



REPUBLIC OF KENYA



FAMILY LAW BENCH BOOK



Key Principles

- Statutory Provisions
- Leading Authorities
- Case Summaries
- Judicial Checklists
- Areas for Reform
- Relevant Human Rights Norms

Vol. 1



REPUBLIC OF KENYA



KENYA JUDICIARY ACADEMY

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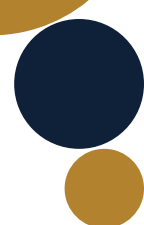
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FAMILY LAW BENCH BOOK

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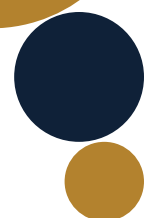
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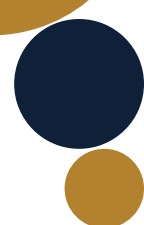


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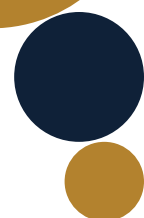
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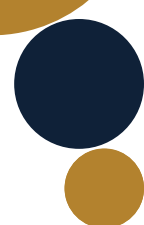
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ACKNOWLEDGEMENTS

The Family Law Bench Book represents a significant collaborative effort aimed at enhancing the administration of justice in family-related issues. It serves as a practical, authoritative and user-friendly reference for judicial officers by touching on vital areas such as children, marriage, inheritance, mental health, protection against domestic violence, matrimonial property and burial disputes. This Bench Book has also been crafted to ensure consistency, quality and efficiency in judicial decision-making, all while promoting access to justice and upholding the constitutional values that form the foundation of family law in Kenya. All these unique features of the Bench Book will assist judges, magistrates, Kadhis, legal researchers, law clerks and other professionals in the justice sector who are involved in resolving family disputes.

On behalf of the Family Division of the High Court, I want to extend my heartfelt thanks to the UN-Women for their generous financial support and steadfast dedication to enhancing access to justice in family matters. Right from the early ideation of this project under the leadership of Ms. Joan Onyango-Obunga and Ms. Christine Okeno, to its conclusion under Ms. Mary Wanjiru, it is their backing that has made it possible to conduct the necessary research, consultations, validation processes and technical discussions that led to this publication.

I also want to recognize the active involvement, intellectual contributions and commitment of all the Judges of the Family Division: Justice Stephen Riechi, Justice Eric Ogolla, Justice Patricia Nyaundi, Justice Carolyn Kendagor, and Justice Hellen Namisi. Their practical experience and insights were invaluable in shaping the content and direction of this Bench Book. Their unwavering dedication to advancing family justice has ensured that this publication remains rooted in judicial practice and responsive to the modern challenges faced in family law adjudication.

I wish to take a moment to express my heartfelt thanks to everyone who participated in the Focus Group Discussions from **24th February, 2026** to **27th February, 2026**, and the Validation Workshop on **9th April, 2026** and **10th April, 2026**. We owe a debt of gratitude to the Judges of the Court of Appeal, the High Court, the Environment and Land Court and the Employment and Labour Relations Court, as well as to Magistrates, Kadhis, Deputy Registrar

Hon. Catherine Ng'ang'a, Legal Researchers, Law Clerks, Court Administrators and the Registry Staff of the Family Division. Their honest insights, professional knowledge and thoughtful suggestions truly enriched the quality and relevance of this Bench Book.

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Lastly, I want to take a moment to express my sincere gratitude to everyone who played a part in this effort, whether you were recognized individually or as part of a group. I hope this Bench Book becomes a useful resource for fostering consistency, fairness, efficiency and access to justice in family matters, while also aiding the ongoing evolution of family law in Kenya.

Hon. Mr. Justice H. K. Chemitei, FCI Arb
Presiding Judge,
Family Division,
High Court of Kenya

FOREWORD

Few areas of the law mirror the social, cultural, and constitutional evolution of a nation as profoundly as family law. The story of family law in Kenya is, in many respects, the story of our collective journey from tradition to transformation, from exclusion to inclusion, and from formal equality to the ongoing pursuit of substantive justice.

My own engagement with family law has spanned more than three decades - as an advocate, a women's rights activist, a law reform advocate, a Judge, and now as Chief Justice and President of the Supreme Court of Kenya. Throughout this journey, I have witnessed firsthand the remarkable transformation of Kenya's family justice system, as well as the enduring challenges that continue to confront families seeking justice.

When I entered legal practice in the 1980s, family law was largely fragmented across statutes, customary norms, religious traditions, and colonial-era legal frameworks. Many aspects of the law reflected social assumptions that no longer aligned with the realities and aspirations of a changing society. Women often encountered significant barriers in asserting their rights within marriage and upon its dissolution. Children's voices were seldom heard in decisions that profoundly affected their lives. Family disputes were frequently viewed as private matters rather than questions of justice deserving careful judicial attention.

Yet even then, it was evident that the family occupies a unique place in society. It is within families that individuals first encounter love, responsibility, dignity, belonging, and care. It is also within families that some of the most painful conflicts arise. The manner in which courts respond to these disputes has consequences that extend far beyond the litigants themselves. Family law is therefore not merely about resolving disputes; it is about shaping the social fabric of our nation.

The movement towards a more just and responsive family justice system was neither automatic nor inevitable. It was built through the sustained efforts of many actors - judges, magistrates, legislators, civil society organisations, academics, development partners, and courageous litigants who challenged long-standing assumptions and sought recognition of their rights.

I recall with particular pride the advocacy efforts undertaken through the Federation of Women Lawyers (FIDA-Kenya) and other reform movements during the 1990s and early 2000s. One of our central aspirations was the establishment of a specialised Family Division of the High Court. We understood that family disputes require more than technical legal expertise. They demand sensitivity, empathy, patience, and a nuanced understanding of human relationships. Therefore, the eventual establishment of the Family Division represented an important institutional recognition that family justice deserved specialised attention and expertise.

The promulgation of the Constitution of Kenya, 2010 marked a defining moment in this journey. For the first time, the family was expressly recognised as the natural and fundamental unit of society and the necessary basis of social order. The Constitution embedded principles of human dignity, equality, non-discrimination, access to justice, and the paramountcy of the best interests of the child. These constitutional values fundamentally altered the landscape of family law and provided courts with a transformative framework for adjudication.

In the years that followed, significant legislative reforms reshaped the legal architecture governing family relations. The Marriage Act, 2014, the Matrimonial Property Act, 2013, and the Children Act, 2022, amongst other legislative reforms, collectively reflected a growing commitment to equality, dignity, protection, and inclusion. Alongside these legislative developments, Kenyan courts have developed an increasingly progressive body of jurisprudence addressing questions of marriage, parental responsibility, succession, matrimonial property, adoption, domestic violence, child protection, and legal capacity.

Yet the work of family justice remains uniquely challenging. Family disputes often continue long after a judgment has been delivered. Unlike many other areas of litigation, family cases involve relationships that frequently endure beyond the courtroom. Judges and Judicial officers must therefore exercise not only legal reasoning but also wisdom, compassion, emotional intelligence, and an appreciation of the broader social consequences of their decisions.

This Bench Book arrives at an important moment in that continuing evolution. It captures the rich body of constitutional, statutory, and jurisprudential developments that have shaped family law in Kenya. More importantly, it translates those developments into practical guidance for judges and judicial officers who are called upon daily to make decisions that profoundly affect the lives of children, spouses, parents, and other vulnerable members of society.



I particularly commend the issue-based approach adopted in this publication. By bringing together constitutional principles, statutory frameworks, judicial precedents, comparative perspectives, practical checklists, and emerging areas of reform, the Bench Book provides a valuable resource for Judges, Magistrates, Kadhis, legal practitioners, and all those involved in the administration of family justice.

As I reflect on the long journey of family law reform in Kenya, most of which is captured in this Bench Book, I am encouraged by how far we have come. We have moved from a legal order that often treated women and children as subjects of protection to one that increasingly recognises them as rights-bearing individuals entitled to dignity, equality, and agency. We have built institutions dedicated to family justice. We have developed jurisprudence that seeks to give meaningful effect to constitutional values. We have strengthened protections for vulnerable persons and expanded access to justice for families across the country.

Yet we must also acknowledge that the journey is unfinished. Many families continue to face delays in resolving disputes. Vulnerable litigants still encounter barriers in accessing justice. The implementation gap between legal rights and lived realities remains significant. The task before us is therefore not only to develop the law but also to ensure that its promise is realised in the everyday lives of the people we serve.

The Judiciary's vision under the 'Social Transformation through Access to Justice' (STAJ) Blueprint calls upon us to build a justice system that is people-centred, accessible, responsive, and humane. Family justice lies at the very heart of that vision. Every child protected, every family dispute resolved fairly, every vulnerable person treated with dignity, and every litigant heard with compassion contributes to the broader project of social transformation envisioned by our Constitution.

I commend the Presiding Judge of the Family Division, the Kenya Judiciary Academy, the National Council for Law Reporting, the consultants, researchers, judges, judicial officers, and all stakeholders who contributed to the preparation of this Bench Book. I also acknowledge with appreciation the support of UN Women and other partners whose collaboration has strengthened efforts to advance equality and access to justice within the family justice system.

It is my hope that this Bench Book will serve as a practical companion and a source of guidance for all judges and judicial officers entrusted with the administration of family justice. May it contribute to the development of a family justice system that remains faithful to our Constitution, responsive to the needs of society, and committed to the dignity of every person who comes before our courts.

Hon. Justice Martha K. Koome, EGH

Chief Justice and President of the Supreme Court of Kenya

PREFACE

The Kenya Judiciary Academy (KJA) is mandated to promote continuing judicial education and research in support of a responsive, effective, and people-centred justice system. In the discharge of this mandate, KJA has coordinated the development of this Family Law Bench Book as a practical resource to strengthen the adjudication of family disputes across the judiciary.

This Bench Book is the product of a collaborative and consultative process that brought together judges, judicial officers, researchers, and partners, notably UN Women, whose support has been instrumental. The initiative is anchored in the Judiciary's strategic vision of Social Transformation through Access to Justice and responds to the growing complexity and evolving nature of family law in Kenya, particularly in the context of constitutional imperatives, legislative reforms, and emerging jurisprudence.

The Bench Book is designed as a user-friendly, issue-based reference that consolidates key constitutional provisions, statutory frameworks, judicial precedents, and applicable international and regional standards. It places particular emphasis on a rights-based, gender-responsive, and child-centred approach, consistent with the Constitution of Kenya, 2010. By providing structured guidance, checklists, and curated authorities, it aims to support consistency, clarity, and efficiency in judicial decision-making.

In addition to serving as a practical tool, the Bench Book identifies gaps and areas requiring reform, thereby contributing to ongoing legal and policy development. It reflects an appreciation of Kenya's plural legal context, incorporating statutory, customary, and religious norms, and underscores the importance of harmonization in the pursuit of substantive justice.

KJA is grateful to the Technical Working Group, the research and drafting consultants, and all stakeholders who participated in the consultative engagements, including the Focus Group Discussions and Validation Workshop, for their invaluable contributions. Their collective expertise and commitment have ensured that this Bench Book is both practically relevant and academically rigorous.

KJA greatly appreciates Ms. Antonia N’Gabala-Sodonon, UN Women Country Representative to Kenya, her Deputy, Mr. Dan Bazira, and its staff Ms. Mary Njeri Wanjiru, Ms. Joan Onyango-Obunga, Ms. Christine Okeno, Dr. Jack Onyisi Abebe, Ms. Fatuma Abdi, Ms. Emily Mwasame for their support throughout the process. I would like to recognize the immense contribution and leadership of the KJA Team of Duncan Okello, Hon. Lillian Arika, Hon. Boru Wako, Dido Saro, Emmanuel Nyongesa, Evans Wanyama, and Agnes Chepkemai in ensuring the successful execution of this project.

As a living document, the Bench Book will be periodically updated to reflect developments in law and practice. It is the reason that it is cited as Volume 1, as we envisage updated series to be produced over time. This Bench Book - and KJA’s Kadhis Bench Book – will complement each other in areas of personal law. It is our expectation that it will serve not only as a reference for judicial officers but also as a resource for legal practitioners, scholars, and policymakers engaged in the advancement of family justice.

The Kenya Judiciary Academy reaffirms its commitment to supporting the Judiciary through innovative, evidence-based, and impactful judicial education and knowledge products that enhance access to justice for all.

HON. JUSTICE (DR.) SMOKIN C. WANJALA, PhD, FCIArb, CBS
JUDGE OF THE SUPREME COURT OF KENYA AND DIRECTOR GENERAL
KENYA JUDICIARY ACADEMY

INTRODUCTION

WHY FAMILY LAW?

The family has been described as the first school of justice.¹ It is within this intimate sphere that most people first learn the meaning of right and wrong, fairness and unfairness, justice and injustice. Families shape citizens and influence the character of civil society. Without just families, there can be no just society. The manner in which family disputes are handled therefore has significance beyond the immediate parties. It communicates the depth of a society's commitment to justice and reflects its broader social vision.

While improving access to justice across all areas of law is important, access to justice in family matters occupies a place of particular importance because family is the foundational unit of society. Article 45 of the Constitution of Kenya recognizes the family as “the natural and fundamental unit of society and the necessary basis of social order”. From “before the cradle” to “beyond the grave”, family law spans the full arc of human life, dignity, care, responsibility and belonging.

PURPOSE OF THE BENCH BOOK

This Bench Book is intended primarily as an informative and accessible reference tool for judges and judicial officers determining family matters. It does not replace primary legal sources, namely statutes, constitutional provisions and judicial precedents. Rather, it provides a guide to assist users to navigate those sources.

The Bench Book is designed as a practical tool that a judge or judicial officer may consult quickly to verify an authority cited in the course of proceedings. It is also offered as credible and authoritative research that may support judgment writing. At the same time, it is intended to provide sufficient depth to serve as an induction resource for judges and judicial officers who are relatively new to family matters.

¹ Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989), 17-18.

The Bench Book is envisioned as a dynamic resource that may be updated regularly and revised collaboratively by the Bench, reflective practitioners and the research community. Each substantive chapter could, in future, be developed into a stand-alone bench book, possibly accompanied by an up-to-date case digest.

HOW THIS BENCH BOOK IS ORGANIZED

This Bench Book consists of eight (8) substantive chapters, in addition to this introduction. Each chapter opens with an introduction that provides the historical context of the relevant area of law, situates the chapter within the applicable constitutional framework, and outlines the relevant international and regional human rights framework. It then identifies the key concerns addressed in the chapter.

The list of key concerns was generated by judges and judicial officers handling family matters. The chapters do not attempt to provide a comprehensive overview of each area of law, which would be the function of a textbook. Instead, they adopt an issue-based approach, highlighting relevant statutory provisions and judicial precedents.

Although a bench book is not intended to generate policy prescriptions, each chapter includes a section on “Areas for Reform”. This section collates issues identified in the discussion as requiring reform. It is included in the hope that judicial actors may give these issues visibility in their engagement with justice sector stakeholders and contribute to evidence-informed reform efforts.

The first chapter sets out the constitutional principles that underpin justice in the family law sphere. The next five chapters are structured around the five statutory areas that form the core of the Family Division’s work, namely children (Chapter 2), the law of succession (Chapter 3), marriage (Chapter 4), matrimonial property (Chapter 5), and mental health (Chapter 6). The remaining two chapters address two issues that judges and judicial officers handling family matters identified as key concerns: burial disputes (Chapter 7) and legal responses to domestic violence (Chapter 8).

The chapters are not of equal length. Their scope and depth are determined by the subject matter. A reader will notice, for instance, that the chapter on the law of succession is significantly longer than the others. There are two principal reasons for this.



First, succession matters occupy a substantial portion of the Family Division's caseload. In

- Succession: 1,043
- Appeals: 217
- Adoptions: 353
- Miscellaneous applications: 429
- Matrimonial property: 119
- Divorce, filed before the Chief Magistrate: 1,916

Secondly, unlike other areas of family law, the law of succession has not undergone comprehensive review to align it with the Constitution of Kenya, 2010. It is characterized by ambiguities, gaps and inconsistencies with other areas of law. It is therefore important to have a resource that promotes consistent interpretation and application of the law of succession in a manner that is aligned with the Constitution.

HOW TO USE THIS BENCH BOOK

It is unlikely that many users will read this Bench Book consecutively from the first page to the last. It is more likely that a user will consult it with a specific issue, case, statute or theme in mind.

Where a reader's interest is defined by subject matter, the Table of Contents will direct the reader to the relevant chapter, the relevant issue or theme within that chapter, and thereafter to the applicable statutory provisions and judicial precedents. A reader interested in the relevance of a particular international or regional human rights instrument to a specific aspect of family law may go directly to the treatment of that instrument within the relevant chapter.

Similarly, a reader interested in the general trajectory of judicial precedent on a particular issue may identify the relevant chapter and then consult the section discussing judicial precedent under that issue. For this reason, the Table of Contents has been organized to give visibility to judicial precedent on each issue within each chapter. Reported cases have been hyperlinked to new.kenyalaw.org for ease of access.

Where a reader is interested in a specific case, the quickest route will be through the Index of Cases at the end of each chapter. The Index will contain hyperlinks to the case on new.kenyalaw.org, in the case of reported decisions, and to the page of the Bench Book on which that case appears.

Where a reader is interested in issues requiring reform, the “Areas for Reform” section of each chapter can be accessed through the Table of Contents.

CHAPTER 1: CONSTITUTIONAL PRINCIPLES UNDERPINNING ADMINISTRATION OF JUSTICE IN FAMILY MATTERS

"The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State." ([Article 45\(1\), Constitution of Kenya, 2010](#))

1.0 INTRODUCTION

1. The declaration in [Article 45\(1\)](#) of the Constitution that the family is the natural and fundamental unit of society traces its ancestry to international and regional human rights instruments. In similar terms, [Article 23](#) of the International Covenant on Civil and Political Rights provides that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This position is echoed in Article 10 of the International Covenant on Economic, Social and Cultural Rights, which adds the dimension of the family's central role in the care and education of dependent children.
2. The Constitution of Kenya, 2010 marked the first time that Kenya's constitutional framework dedicated a specific article to the family. It made explicit the constitutional principles that should guide the State's engagement with family relations. Courts are required to be guided by these principles when administering justice in family matters. The adjudication of family matters should contribute to the realization of the constitutional principles contained in [Article 45](#). However, Article 45 is not the only constitutional source from which principles relating to justice in the family sphere may be discerned.
3. This chapter discusses the following constitutional principles:
 - human dignity and privacy;
 - free consent;
 - non-discrimination and equal rights of parties to a marriage;
 - legal pluralism and respect for diversity;
 - the best interests of the child;

- expeditious administration of justice;
- administration of justice without undue regard to procedural technicalities; and
- promotion of alternative dispute resolution.

2.0 HUMAN DIGNITY AND PRIVACY

4. The Bill of Rights is relevant to every form of adjudication. In family disputes, however, its essence may be captured through two closely related concepts: human dignity under [Article 28](#) and privacy under [Article 31](#). Persons involved in family disputes should experience the justice process in a manner that respects their inherent dignity. The right to privacy supports the realization of that dignity. In particular, [Article 31\(c\)](#) requires that information relating to a person's family or private affairs should not be unnecessarily required or revealed, and that the privacy of communications should not be infringed.
5. This is the rationale for anonymizing judgments in family matters. As currently implemented, however, this practice could be strengthened. In several instances, although the names of parties are anonymized in the case title, the full names of parties or children, or details of property that may compromise the identity, privacy or safety of the parties or persons connected to them, still appear in the body of the judgment. The National Council for Law Reporting could work with the relevant court registries to conduct an audit and ensure that anonymization of family judgments effectively safeguards the privacy, dignity and safety of parties, children and other affected persons.

3.0 FREE CONSENT

6. [Article 45\(2\)](#) provides that "every adult has the right to marry a person of the opposite sex, based on the free consent of the parties". [Article 260](#) of the Constitution defines an adult as a person who has attained the age of eighteen (18) years, thereby establishing eighteen (18) as the minimum constitutional age for marriage.
7. Embedded in Article 45(2) is the recognition that marriage is one important basis for the formation of family. However, it does not follow that marriage is the only basis for family relations. Parent-child relationships that do not arise within marriage are also family relationships. Some adult relationships that have not been formalized as marriages may also give rise to legal presumptions that implicate family relations. In [MNK-v-POM](#)

[Initiative for Strategic Litigation in Africa \(ISLA\) \(Amicus Curiae\) \[2023\] KESC 2 \(KLR\)](#), the Supreme Court observed the need for the legal framework to provide clearer guidance on the regulation of such relationships.

8. [Article 45\(2\)](#) affirms that marriage must be founded on free consent.² Free consent has been defined as non-coercive agreement to marriage, given with full understanding of the consequences of that consent. This explains why the right to marry is specified as the right of “every adult”, since a child is legally incapable of giving valid consent to marriage.
9. Consent and the minimum age for marriage are closely connected and are reflected in several international and regional human rights instruments, including:
 - Article 6(a) and (b) of the [Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa \(Maputo Protocol\)](#);
 - Article 21(2) of the [African Charter on Rights and Welfare of the Child \(African Children’s Charter\)](#);
 - Article 16(2) of the [UN Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\)](#);
 - Article 23(2) and (3) of the [International Covenant on Civil and Political Rights](#).
10. The African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child have jointly issued an elaborate General Comment that unpacks the issues of consent and minimum age, with a view to ending child marriage and child unions.³ The inclusion of “unions” is important because it extends protection to informal unions that may not be formally recognized as marriages. The Joint General Comment emphasizes that consent must be given by the parties themselves. The consent of a legal guardian or public official, even where the law requires such involvement, cannot substitute the personal consent of the parties.
11. The African Court on Human and Peoples’ Rights has also affirmed that the minimum age for marriage cannot be formulated in a discriminatory manner. It must be the same for males and females.⁴

² See [Joint General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage](#), paragraph 6.

³ See note 1.

⁴ [Association Pour le Progrès et la Défense des Droits des Femmes Maliennes \(APDF\) & The Institute for Human Rights and Development in Africa \(IHRDA\) -v- Republic of Mali \(2018\), Vol.2 African Court Law Report \(2017-2018\)](#), 380 (abbreviated as *APDF & IHRDA-v-Mali*).

4.0 NON-DISCRIMINATION AND EQUALITY OF PARTIES TO A MARRIAGE

12. [Article 27](#) of the Constitution guarantees the equality of all persons before the law and the right of every person to equal protection and equal benefit of the law. [Article 27\(3\)](#) specifically guarantees that women and men have the right to equal treatment in the political, economic, cultural and social spheres. The prohibition of discrimination is addressed both to the State and to every person, thereby giving horizontal application to the Bill of Rights under [Article 27\(5\)](#).
13. Applying the principle of equality to marital relations, [Article 45\(3\)](#) provides that “parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”. Parties to a marriage are therefore accorded equal legal and moral worth. Marriage is not to be a site of discrimination. Like other spheres of interaction, whether public or private, marriage falls within the scrutiny of the anti-discrimination clause in [Article 27](#). The adjudication of family disputes must therefore advance the constitutional principle of equality and the related right to dignity under [Article 28](#).
14. Debates on how the principle of equality in marriage should be translated into specific legal outcomes have arisen most prominently in the context of division of matrimonial property. It is significant that the Constitution, in the chapter on land and environment, requires Parliament to enact legislation “to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage” under [Article 68\(c\)\(iii\)](#). The Constitution therefore identifies marital property holding as an area of family relations historically vulnerable to inequality. Judicial precedent has addressed whether [Article 45\(3\)](#) should be translated into a literal 50:50 division of matrimonial assets. These cases are discussed in detail in Chapter 5 on matrimonial property.
15. A study that examined ninety-four (94) matrimonial property disputes in the High Court and Court of Appeal concluded that, in the majority of cases, courts ordered a 50:50 division of matrimonial property after a careful assessment of each party’s contribution. This finding, however, must be read alongside another finding from the same study: that sixty-three per cent (63%) of the properties in dispute were registered in the sole name of

the former husband. This suggests that, although judicial decision-making increasingly reflects the principle of equality, equality is not yet the established social norm in family property ownership.

16. [Article 159\(2\)\(a\)](#), which requires courts to dispense justice “to all, irrespective of status”, is also relevant to the advancement of equality in marriage. This principle applies to all contexts of adjudication, including family disputes.

5.0 LEGAL PLURALISM AND CONSTITUTIONAL RESPECT FOR DIVERSITY

17. [Article 45\(4\)](#) gives Parliament the power and mandate to legislate on family matters in a manner that recognizes the diverse traditions and religions that make up the nation of Kenya, provided that such laws are consistent with the Constitution. The Constitution recognizes that the norms regulating family life are closely connected to religious and cultural values. However, it permits those norms to operate only within a constitutional framework and subject to the supremacy of the Constitution under [Article 2](#).

18. Also relevant to legal pluralism and constitutional respect for diversity is [Article 24\(4\)](#) of the Constitution, which provides:

“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.”

19. The Judiciary has, on numerous occasions, been called upon to determine the constitutional boundaries within which plural norms on marriage and family operate. One such occasion was the Council of Imams case before the High Court’s Constitutional and Human Rights Division.⁵ The Malindi branch of the Council of Imams and Preachers of Kenya brought a constitutional challenge seeking to block the criminal prosecution of persons alleged to have participated in child marriage, citing freedom of religion under [Article 32](#) of the Constitution and the accommodation of Muslim personal law under [Article 24\(4\)](#).

⁵ [Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others \[2015\] KEHC 1762 \(KLR\)](#)

20. The Court held:

“The bottom-line is that the Kenyan Law does not permit marriages of people below the age of 18 years. The 2nd respondent was a child under the provisions of article 260 of the Constitution. The right to marry under article 45(2) of the Constitution is only available to adults. Article 260 defines an adult as someone who has attained the age of 18 years. The Constitution grants the freedom to exercise one’s religion. However, that freedom has to be carried out in line with the other Constitutional provisions.”

21. On another occasion, the Kadhis’ Court in [SSA v MNA \[2019\] KEKC 26 \(KLR\)](#) had to determine how to interpret and apply Islamic principles on parental priority and a discerning child’s preference in custody disputes. The Kadhis’ Court considered these principles in relation to the child’s developmental stages and the possible displacement of a mother’s custody rights upon remarriage, in light of the constitutional principle of the best interests of the child. The Court held that a mother’s remarriage does not automatically strip her of custody rights. Equally, a mother is not automatically entitled to custody of children of tender years regardless of the circumstances, including where there is evidence relevant to the child’s welfare. The Court also concluded that it is not bound by a discerning child’s preference on which parent to live with. These rules, derived from prophetic sayings, do not constitute rigid injunctions, but rebuttable presumptions. The court must take all relevant factors into account and ultimately determine what serves the present and long-term interests of the child. This approach aligns with the constitutional principle of the best interests of the child.

22. There are also examples on the constitutional boundaries of customary law in family matters. [In re Estate of Susan Mwelu Mutia \(Deceased\) \[2025\] KEHC 2202 \(KLR\)](#), a married daughter had been excluded from the distribution of her mother’s estate by her unmarried sisters, purportedly in accordance with customary law. The court agreed with her that the exclusion amounted to discrimination contrary to Article 27 of the Constitution.

23. Similarly, in [Habiba Sharu Hirbo v Ibrahim Sharu Hirbo & Another, \[2020\] KEHC 7560 \(KLR\)](#), the High Court invoked [Article 27](#) of the Constitution to invalidate a Burji custom under which a Muslim Burji man had purported to distribute all his land to his sons during his lifetime, to the exclusion of his widow and daughters. Having established that no formal transfer, and therefore no valid hiba or gift, had taken place despite demarcation on the ground, the Court reaffirmed the application of Islamic inheritance law to the distribution of the estate. It reinstated the widow’s one-eighth share, taken to be represented by the matrimonial home, and the daughters’ respective shares.

6.0 BEST INTERESTS OF THE CHILD

24. Long before the Constitution of Kenya, 2010, the Kenyan Judiciary had developed a strong tradition of affirming the best interests of the child as the paramount consideration in all matters involving children, beginning with **Wambwa v Okumu**⁶ in 1970. This principle has been reinforced in several recent decisions, including [FAAF v RFM & 2 others \[2025\] KESC 45 \(KLR\)](#); [LAC & another -v- MJC \[2022\] KECA 68 \(KLR\)](#); [In re DNK \(a minor\) \[2022\] KEHC 3034 \(KLR\)](#); [SMM v ANK \[2022\] KEHC 1043 \(KLR\)](#).
25. [Article 53\(2\)](#), after enumerating specific rights of the child, provides that “a child’s best interests are of paramount importance in every matter concerning the child”. The best interests principle has been incorporated into statutory law through the [Children Act, 2022](#). The entire statute is framed around this constitutional principle, which is highlighted specifically in Part II, titled ‘[Safeguards for the Rights and Best Interests of the Child](#).’ Part II substantially incorporates the rights guaranteed under [African Charter on the Rights and Welfare of the Child \(the African Children’s Charter\)](#) into Kenya’s principal statute on children.
26. To ensure that the paramountcy of this principle is not lost in statutory interpretation, [section 4](#) of the Children Act contains a conflict of laws clause, which provides:
- “(1) This Act shall prevail in the case of any inconsistency between this Act and any other legislation on children matters.
- (2) Despite subsection (1), a provision in another legislation on children matters may prevail if it offers a greater benefit in law to a child.
- (3) A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child.”
27. Judicial precedents upholding this principle in diverse contexts of adjudication are discussed in Chapter 2, which focuses on the Children Act. The principle also features in some judicial precedents dealing with matrimonial property disputes in Chapter 5 of this Bench Book.⁷

⁶ *Wambwa -v-Okumu* [1970] E.A. 578.

⁷ See, for example, discussion of the case of [DEN -v-PNN 2015 KECA 819 \(KLR\)](#) under Chapter Five (Matrimonial Property).

7.0 EXPEDITIOUS ADMINISTRATION OF JUSTICE

28. [Article 159\(2\)\(b\)](#) provides that “justice shall not be delayed”. This constitutional principle applies to all contexts in which judicial authority is exercised, including family matters. Family disputes often carry distinct urgency. Delay in resolving a succession matter may result in children dropping out of school, opportunities being lost and life chances being diminished. Delays in adoption matters may expose children, prospective adoptive parents and other parties to uncertainty and heightened anxiety. Similarly, delay may deepen tensions in protracted divorce proceedings.
29. A study of one hundred (100) divorce cases filed between 2014, when the Marriage Act came into force, and 2023 found that, on average, a divorce case took three years from the filing of the petition to the issuance of the decree absolute.⁸ The same sample of cases was also studied in relation to matrimonial property disputes, and the duration of proceedings was found to be similar.⁹
30. Succession causes account for a large proportion of pending cases. Records for the 2024/25 financial year indicate that, out of the High Court’s 52,534 pending civil cases, 15,666 were succession causes. The magistrates’ courts reported 243,007 pending cases, of which 39,758 were succession matters and 15,437 were children’s matters. The Kadhis’ courts had 3,482 pending cases, of which 1,788 were succession matters.¹⁰ This is partly explained by the fact that succession disputes have no limitation period; they may be instituted or reopened years after a person’s death. This issue is flagged for reform in Chapter 3 on the law of succession.

8.0 ADMINISTRATION OF JUSTICE WITHOUT UNDUE REGARD TO PROCEDURAL TECHNICALITIES

31. This principle is articulated in Article [159\(2\)\(d\)](#) and is also implied in Article 48, which requires that access to justice should not be impeded. Procedure is important because it

⁸ Sussie Mutahi & Elvira Akech, ‘Insights From A Decade of Divorce Cases in Kenya: An Invitation Toward Multidisciplinary Collaboration for Marriage Enhancement’ *Family Transitions*, 66(3), 137-164 (2025).

⁹ Sussie Mutahi, ‘The Matrimonial Property Act 2013 in Action: Empirical Analysis of a Decade of Decided Court Cases’, *East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya]* (2025) 115 [115-134] (available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3028>).

¹⁰ Chief Justice’s Internal Memo on National Mediation Service Week Focused on Family Disputes, 9th-13th March, 2026.

ensures an orderly, transparent and predictable judicial process, and safeguards fairness to all parties. However, courts have applied this constitutional principle to caution against elevating form over substance. The High Court decision in [Khisa & another v Nalika & another \[2025\] KEHC 5797 \(KLR\)](#) illustrates this point in relation to an application that had been struck out for citing an incorrect legal provision alongside other correct provisions.

9.0 PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION

32. As observed in the discussion on legal pluralism, family relations are often regulated through social norms and informal processes, alongside formal law. A study on the justice sector in Kenya¹¹ found that only eight per cent (8%) of respondents would approach the courts, from a choice of institutional neutral third parties, to resolve a family problem. The figure rises slightly, by three per cent (3%), if Kadhis' courts are included. This may be compared with thirty per cent (30%) of respondents who indicated that they would approach the chief. When asked which options they considered most helpful in addressing family problems, twenty per cent (20%) cited family networks, while seventeen per cent (17%) cited the chief, with courts registering only six per cent (6%).
33. Article [159\(2\)\(c\)](#) of the Constitution identifies the promotion of alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, as one of the principles that should guide courts and tribunals in exercising judicial authority. Constitutional recognition of alternative dispute resolution rests on Article 1, which provides that all sovereign power belongs to the people of Kenya. This recognition is made specific to judicial authority under [Article 159\(1\)](#) which declares that judicial authority is derived from the people. The people of Kenya may therefore exercise that authority directly through a wide range of ADR mechanisms, or delegate it to courts and tribunals. Further, the Judiciary has committed itself to a multi-door approach to justice as part of broadening access to justice under [Article 48 of the Constitution](#).
34. Parliament has not enacted a comprehensive law to give effect to the aspiration contained in [Article 159\(2\)\(c\)](#). However, the absence of an implementing statute has not prevented the Judiciary from taking deliberate steps to promote ADR. The Judiciary has established

¹¹ Hague Institute of Innovation in Law (HIIL), Judiciary of Kenya & World Bank, 'Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life' (2017), p.138, 139.

two steering committees and mandated them to lead efforts to broaden access to justice through ADR: The Steering Committee on Mediation and the National Steering Committee on Alternative Justice Systems. The former has focused on streamlining the use of mediation, especially court-annexed mediation, while the latter is largely associated with traditional dispute resolution mechanisms and other community-based forums for conciliation. Both steering committees work to create awareness of ADR and to structure the Judiciary's interface with ADR mechanisms.

9.1 Mediation

35. The Family Division and the Commercial Division of the High Court were the first courts in which court-annexed mediation was introduced on a pilot basis in 2016. The [Civil Procedure \(Court Annexed Mediation\) Rules, 2022](#) now provide a framework under which civil cases pending before any court may be referred to mediation, either at the request of the parties, at the initiative of the court, or following screening for suitability for mediation under [Rules 5 to 7](#). Mediation registries have been established to streamline the screening and referral of cases.

36. Screening excludes cases considered unsuitable for mediation. Although the Rules do not expressly stipulate all categories of unsuitable matters, three types of cases are typically excluded:

- cases involving only points of law;
- public interest litigation; and
- cases involving sexual and gender-based violence.

37. The Rules also establish the Mediation Accreditation Committee, which is responsible for accrediting certified mediators and enforcing the code of conduct for mediators undertaking court-annexed mediation. As of March 2026, the Committee had accredited 2,742 mediators.

38. Once a matter pending in court is referred to mediation, the court, through the mediation registry, is responsible for appointing a mediator. The parties may also request a specific mediator. Once a mediator is assigned, the process is to be completed within sixty (60) days. During the mediation period, the court's timeline is paused, except for mentions under [Rule 14](#). The first mediation session must be held within seven (7) days under [Rule 15](#). At the first session, the mediator and the parties must sign the agreement to mediate,

as well as a binding confidentiality agreement under [Rules 24](#) and [25](#). The mediation period may be extended in special circumstances.

39. Court-accredited mediators are remunerated from the Judiciary's budget. The current rate of remuneration, set during the pilot phase in 2016, is KSh 20,000 per completed mediation. Mediators are assigned to cases that match their areas of expertise and interest, while also taking into account their availability and past performance under [Rule 13\(10\)](#). The remuneration structure may raise ethical concerns if it creates an incentive to rush the process in order to maximize financial gain. Such concerns may be raised with the Mediation Accreditation Committee.
40. Following submission of the mediator's report, where the settlement is signed and subsequently adopted by the court, it becomes a final and enforceable court order. Rule 39 allows parties to apply to challenge a mediated agreement.
41. In [Kibosia & 11 others v Chebelieni & another \[2024\] KECA 1269 \(KLR\)](#), the issue before the Court of Appeal was whether a mediation settlement agreement signed by only some of the parties, who were beneficiaries in a succession dispute, could be validly adopted as a consent judgment. The appellants challenged the High Court's adoption of the agreement as a consent judgment. The Court of Appeal held that a mediation settlement agreement must reflect the consent of all parties, demonstrated through their signatures. Since not all the beneficiaries had signed the agreement, there was no proper mediation settlement agreement capable of being adopted as a consent judgment. The Court emphasized that mediation is founded on consensus and cannot bind parties who have not assented. Consequently, the Court held that the agreement was invalid, set aside the consent judgment and allowed the appeal.
42. In [John Juma & 2 others v Patrick Lihanda & another; Zedekiah Orera & 4 others \(Interested Parties\) \[2019\] KEHC 1273 \(KLR\)](#), the High Court considered the circumstances under which a mediation settlement agreement adopted as a judgment of the court could be set aside. The applicants challenged the agreement on the ground that it had been entered into improperly and did not reflect their true consent. The court found that, once a signed mediation settlement agreement is adopted as a judgment, it assumes the status of a

consent judgment and is binding on the parties. It may therefore be set aside only on limited grounds similar to those applicable to setting aside a contract or consent judgment, including fraud, mistake, misrepresentation or lack of capacity. The court emphasized that mediation is a voluntary process and that parties are bound by agreements freely entered into. It therefore declined to set aside the agreement in the absence of sufficient proof of vitiating factors.

43. In addition to cases referred to mediation by the courts, the [Civil Procedure \(Court-Annexed Mediation\) Rules, 2022](#) also establish a framework for the registration, adoption and enforcement of private mediation agreements entered into without the filing of a court case.
44. Statistics indicate that greater use could be made of court-annexed mediation. At the end of the 2024/25 financial year, the High Court had 52,534 pending civil cases. The magistrates' courts had 243,007 pending cases, while the Kadhis' courts reported 3,482. During the same period, only 9,843 cases were referred to court-annexed mediation. Of these, 8,828 were settled and concluded, demonstrating the high, but still underused, potential of court-annexed mediation.¹²

9.2 Alternative Justice Systems

45. To provide a framework for mainstreaming alternative justice systems, the Judiciary adopted the Alternative Justice Systems Policy in 2020,¹³ This was followed by the establishment of the National Steering Committee on Alternative Justice Systems. The Steering Committee provides ongoing guidance on implementation of the policy as part of the Judiciary's strategy for enhancing access to justice. The policy recognizes a wide range of AJS forums, which vary in the degree of their interface with State or formal authority structures. Some, such as family-based mediation forums, tend to operate with a high degree of autonomy from formal authority structures. Nevertheless, the Judiciary remains ultimately responsible for safeguarding the rights enshrined in the Constitution.
46. It is for this reason that [Article 159\(3\)](#) was included: to provide guardrails for the operation of AJS, particularly traditional dispute resolution mechanisms. The provision states that these mechanisms must not be used in a manner that contravenes the Bill of Rights, is

¹² Chief Justice's Internal Memo on National Mediation Service Week Focused on Family Disputes, 9th-13th March, 2026.

¹³ [Alternative Justice Systems Framework Policy](#) (Judiciary of Kenya 2020).



repugnant to justice and morality, results in outcomes that are repugnant to justice or morality, or is inconsistent with the Constitution or any written law. To give effect to this constitutional filter, the National Steering Committee has proposed a two-sided agency test. The first, described as the “positive test”, asks whether the disputing parties voluntarily and objectively selected the dispute resolution mechanism for settlement of their dispute. The second, described as the “negative test”, asks whether there is a constitutional or legislative text, or compelling public policy, that ousts AJS.¹⁴ If the answer to the first question is affirmative, the matter is properly before an AJS forum. If the answer to the second question is affirmative, the matter is improperly before an AJS forum and should be transferred to a court.

47. As with court-annexed mediation, signing an agreement reached after AJS proceedings signifies consent, and the agreement becomes binding on the parties. In [LWG-v-CBG \[2023\] KEHC 26305 \(KLR\)](#), the court considered the circumstances under which an AJS agreement may be set aside. The matter involved a matrimonial property dispute between a man and his four wives. One party sought to amend originating summons filed eight years earlier, stating that efforts to resolve the matter through AJS had failed. An AJS forum had facilitated a process that led to the signing of an agreement by all parties, but the agreement was not formally recorded before the court. The application was brought one year after the AJS proceedings. The court observed that the applicant had not made a specific prayer to set aside the outcome of the AJS proceedings. It pointed out that mere dissatisfaction with the outcome is not a sufficient ground for setting aside AJS recommendations. Further, the applicant had not raised any issue of procedural impropriety or proved that she did not consent to the AJS process. She had not alleged disproportionality or violation of any of her rights, including the right to be heard, and the court noted that she was represented by an advocate during the process. She had therefore exercised her agency by participating in the AJS process and signing the agreement and should not be permitted to reopen litigation by amending pleadings filed eight years earlier. The agreement reached was binding on the parties, whether or not it had been formally adopted as an order of the court.

¹⁴ Remarks by Chairman of National Steering Committee on Implementation of the Alternative Justice Policy at Law Society of Kenya Continuous Professional Development webinar held on 21st September 2023 (Joel Ngugi, JA); Presentation by Janet Anyango, Member, National Steering Committee on Implementation of the Alternative Justice Policy, at the 2nd Annual Family Conference held at Strathmore University on 24th November 2024.

48. The High Court in [Alice Kimori Ogeto v Peter Oripu Butu & 2 others \[2024\] KEHC 9226 \(KLR\)](#) restated the good-faith principles applicable to AJS. The case concerned intestate succession in a polygamous family. Some parties who were dissatisfied with the outcome of an AJS process convened a separate process from which they excluded some family members. The court restated the good-faith principle in AJS: where parties willingly submit themselves to the process, they must, in good faith, respect the outcome. A party may seek review of an AJS outcome only on grounds such as disproportionality or procedural impropriety.

49. A court handling a family dispute may therefore interface with AJS forums in one of four ways:¹⁵

- **deference:** deferring to the forum's decision and adopting it as the court's decision, while reviewing it only for procedural propriety and proportionality;
- **recognition and enforcement:** recognizing and enforcing the forum's decision, subject to a party's right to seek that it be set aside for justifiable reasons;
- **facilitation:** using the AJS forum's decision and process as evidence in ongoing court proceedings; and
- **appellate review:** sitting in an appellate capacity and reviewing both the procedure and the basis of the ADR forum's decision.

9.3 Integration of ADR Mechanisms in Family Law

50. The extent to which ADR has been incorporated from constitutional principle into the statutory framework for family law varies. [The Marriage Act](#) recognizes the role of ADR forums in matrimonial disputes in two specific instances. The first relates to dissolution of Christian marriages. [Section 64](#) provides that parties to a Christian marriage may seek the services of reconciliation bodies established for that purpose, where such bodies exist in the public place of worship where the marriage was celebrated. The second relates to mediation of disputes in customary marriages. [Section 68](#) provides that parties to a customary marriage may undergo conciliation or customary dispute resolution before a court hears a petition for dissolution of the marriage. [Section 68\(2\)](#) requires that the process conform to the principles of the Constitution, a requirement that is not expressly placed on Christian conciliation bodies under [section 64](#). In addition, the person overseeing

¹⁵ These four options follow what is outlined in the [Alternative Justice Systems Framework Policy](#) (Judiciary of Kenya 2020), 9

conciliation in customary marriage disputes is required to document the process and submit a report for the court's record, a requirement not imposed on Christian conciliation bodies.

51. ADR is further addressed in [Rule 23](#) of [the Marriage \(Matrimonial Proceedings\) Rules, 2020](#). The rule provides that, except in proceedings for dissolution of marriage, the court may, on its own initiative or at the request of the parties, refer a matter to court-mandated mediation. The agreement reached forms part of the record of proceedings and is adopted as an order of the court.
52. It is worth noting that the limited statutory recognition of ADR in the Marriage Act is a faint echo of a more comprehensive proposal made in the 1968 report of the [Presidential Commission on the Law of Marriage and Divorce](#). The commission recommended a network of marriage tribunals operating nationwide at village level, in addition to recognition of existing conciliatory bodies and customary arbitrators. These bodies would have served as forums of first instance for matrimonial proceedings, with their decisions subject to review by the courts.¹⁶
53. [Section 14](#) of the [Protection against Domestic Violence Act \(PADVA\)](#) gives courts power to screen cases to determine which ones may be amenable to counselling and conciliation programmes or any other programme acceptable to the court. The Protection against Domestic Violence Act is discussed in detail in Chapter 8.
54. In conclusion, regular monitoring of the Judiciary's progress in giving effect to [Article 159\(2\)\(c\)](#) of the Constitution would be valuable. This is central to broadening access to justice, particularly in family matters, where timely, rights-compliant and context-sensitive dispute resolution can reduce conflict, protect dignity and promote substantive justice.

9.4 Upholding International Legal Principles

55. Each substantive chapter of this Bench Book identifies and discusses the international and regional normative framework relevant to that subject matter. The application of international legal principles in Kenya is anchored in Articles 2(5) and 2(6) of the Constitution. Article 2(5) provides that the general rules of international law form part

¹⁶ Government of the Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce (Government Printer, 1968), Recommendation No.100 Para 254; Draft Law of Matrimony Act, 1968, s 10. The report is available at <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968-eng@1968-08-01>

of the law of Kenya, while Article 2(6) provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. These provisions marked a significant shift from Kenya's earlier dualist tradition towards more direct incorporation of international law into the domestic legal order. Scholars¹⁷ have described this approach as quasi-monist or coordinative, rather than purely monist, because many treaty provisions still require legislative, administrative or judicial elaboration before they attain full practical effect within the domestic legal system.

10.0 INDEX OF RELEVANT CASES ON CONSTITUTIONAL PRINCIPLES UNDERPINNING ADMINISTRATION OF JUSTICE IN FAMILY MATTERS

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¹⁷ Herman Omiti, "The Monist Dualist Dilemma and the Place of International Law in the Hierarchy of Valid Norms under the Constitution of Kenya 2010" (2012) SSRN Paper No. 2099043.

Government of the Republic of Kenya, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer 1968).

[Hague Institute for Innovation of Law \(HiIL\), Judiciary of Kenya and World Bank, Justice Needs and Satisfaction in Kenya 2017: Legal Problems in Daily Life \(2017\).](#)

Mutahi S and Akech E, 'Insights from a Decade of Divorce Cases in Kenya: An Invitation toward Multidisciplinary Collaboration for Marriage Enhancement' (2025) 66(3) *Family Transitions* 137.

CHAPTER 2: LAW ON CHILDREN

1.0 INTRODUCTION

1. The enactment of the [Children Act, 2022](#) ("the Act") marked a significant step towards the protection and promotion of children's rights in Kenya. The Act repealed the [Children Act of 2001](#) which had been in force for approximately twenty-one (21) years and had demonstrated substantive shortcomings that required legislative remedy.
2. Practitioners, children's rights advocates and courts had noted that the repealed law was outdated¹⁸, particularly because it was not fully aligned with the Constitution of Kenya, 2010, especially in relation to the best interests of the child, equal parental responsibility and child justice processes.¹⁹ This led to several constitutional challenges against provisions of the repealed Act. Two illustrative cases are discussed below.
3. In [NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another \[2019\] KEHC 9196 \(KLR\)](#), the court declared several provisions of the Children Act, 2001 unconstitutional on the basis that they made paternal responsibility for children born outside marriage conditional, discretionary or dependent on acknowledgment by the father, thereby violating [Articles 27](#) and [53](#) of the Constitution. Specifically, [Section 2\(b\)](#), which defined "relative," was invalidated for making a child's relationship with the father's family dependent on acknowledgment and maintenance. [Section 27\(2\)](#) was struck down for requiring a father to have "acquired" parental responsibility before assuming it, particularly upon the death of the mother. [Section 94](#) was invalidated for conditioning maintenance obligations on whether the father had assumed responsibility, while [Section 102\(1\)](#) was declared unconstitutional for requiring acquisition of parental responsibility before recognition as a guardian.
4. In the same decision, [Sections 158\(4\)\(b\)](#) and [158\(4\)\(c\)](#) were invalidated in the context of adoption. Section 158(4)(b) was found to be discriminatory because it required consent

¹⁸ Odongo O. G. 'The post-2010 jurisprudence on children's rights under the Kenyan Constitution', The African Human Rights Journal https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962022000200006 accessed on 29th March, 2026.

¹⁹ ZAK & another v MA & another (Petition 193 of 2011) [2013] KEHC 6007 (KLR).

from the parents of a female minor giving up her child for adoption, but did not impose a corresponding requirement in respect of a male minor who is a father. [Section 158\(4\)\(c\)](#) was declared unconstitutional because it required a biological father to have acquired parental responsibility before his consent to adoption became necessary.

5. Overall, the court held that the impugned provisions were unconstitutional to the extent that they made paternal responsibility optional or conditional. The decision affirmed that parental responsibility is automatic, equal and independent of the marital status of the child's parents.
6. Prior to this, the High Court in [ZAK & another v MA & another \(Petition 193 of 2011\) \[2013\] KEHC 6007 \(KLR\)](#) had declared sections [24\(3\), 25, 90 \(a\)](#) and [90\(e\)](#) of the Children Act, 2001 unconstitutional for violating [Article 53\(1\)\(e\)](#) of the Constitution, which mandates equal parental responsibility for mothers and fathers regardless of marital status. The court found these provisions inconsistent with the constitutional principles of equality and freedom from discrimination under [Articles 27\(1\), \(2\), and 27\(4\)](#). The court further emphasised the need for statutory amendments to align the legal framework on children with the Constitution.
7. [The Children Act, 2022](#) was enacted twelve (12) years after the promulgation of the Constitution of Kenya, 2010. Its principal objective is to give effect to [Article 53](#) of the Constitution on children's rights. The Act addresses several inadequacies in the repealed law and aligns the statutory framework with the Constitution. Among other reforms, the Act provides for equal parental responsibility irrespective of the marital status of the parties,²⁰ recognizes intersex children,²¹ expands the legal parameters on adoption and provides a more elaborate framework on the best interests of the child²² than [Section 4\(2\)](#) and [Section 4\(3\)](#) of the repealed Act.

2.0 CONSTITUTIONAL FRAMEWORK ON THE LAW ON CHILDREN

8. The Children Act, 2022 is anchored in the Constitution of Kenya, 2010, primarily [Article 53](#), which obligates the State and persons with parental responsibility to protect and promote children's rights. [Article 53](#) provides that every child has the right: (a) to a name and

²⁰ Section 32 of the Children's Act, 2022

²¹ Section 26 of the Children's Act, 2022

²² Section 8, Children Act, 2022.

nationality from birth; (b) to free and compulsory basic education; (c) to basic nutrition, shelter and health care; (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; (e) to parental care and protection, which includes the equal responsibility of the mother and father to provide for the child, whether or not they are married to each other; and (f) not to be detained except as a measure of last resort and, when detained, to be held for the shortest appropriate period of time, separately from adults, and in conditions that take account of the child's sex and age. [Article 53\(2\)](#) further provides that a child's best interests are of paramount importance in every matter concerning the child.

9. Kenyan courts have affirmed these rights in several decisions. In [LNW vAG & 3 Others \[2016\] KEHC 7266 \(KLR\)](#), the court affirmed a child's right to a name and nationality, echoing the decision of the African Committee of Experts on the Rights and Welfare of Children (African Children's Committee), [Institute for Human Rights and Development in Africa \(IHRDA\) and Open Society Justice Initiative \(on behalf of Children of Nubian Descent in Kenya\) v the Government of Kenya](#),²³ which remains to be fully implemented. A child's right to free and compulsory basic education was affirmed in [Githunguri Residents Association v Cabinet Secretary Ministry of Education & 5 others \[2015\] KEHC 7323 \(KLR\)](#). The rights to basic nutrition, care and shelter, and protection from abuse, harmful practices and violence were upheld in [LJ & Another v Astarikoh Henry Amkoah & Others \[2015\] KEHC 7320 \(KLR\)](#).

2.1 Nature and Scope of Article 53

10. [Article 53](#) falls within Chapter Four of the Constitution, the Bill of Rights, and specifically under [Part 3](#) on the "Specific Application of Rights". Its placement in this part means that it both supplements and reinforces the general rights guaranteed to all persons under [Part 2](#) of the Bill of Rights. [Article 53](#) is therefore the constitutional reference point for children's rights and the standard against which all laws, policies and decisions relating to children are to be measured.²⁴
11. Importantly, [Article 53](#) does not operate in isolation. [Article 52\(1\)](#) clarifies that the rights in [Part 3](#) do not exclude the rights available to children under [Part 2](#). This means that

²³ The African Committee of Experts on the Rights and Welfare of the Child Decision on the Communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) against the Government of Kenya, 22 March 2011, Communication Com/002/2009, <https://www.refworld.org/cases/ACERWC.4f5f04492.html> (accessed 29 March, 2026).

²⁴ GO Odongo 'The post-2010 jurisprudence on children's rights under the Kenyan Constitution' (2022) 22 *African Human Rights Law Journal* 426–450. DOI: <http://dx.doi.org/10.17159/1996-2096/2022/v22n2a5>

every general right - including dignity, privacy, freedom from discrimination, fair hearing, and economic and social rights - applies to children as it does to adults, unless expressly excluded or incapable of application by its nature. [Article 53](#) provides enhanced and specialized protection in addition to this general constitutional foundation.

12. The Supreme Court confirmed this position in [CMM & 6 others v Standard Group & 4 others \[2023\] KESC 68 KLR](#), holding that, beyond [Article 53](#), all other rights in the Constitution apply to children as human beings, unless such rights are excluded because they apply only to adults, such as the right to vote or the right to marry.

2.2 Article 53 (2): The Best Interests Principle

2.2.1 The Paramountcy Rule

13. [Article 53\(2\)](#) provides that a child's best interests are of paramount importance in every matter concerning the child. This is one of the most consequential provisions in Kenya's constitutional framework on children's rights. The best interests of the child are not merely one factor to be weighed alongside others; they constitute the primary and overriding consideration that must guide every court, administrative body and legislative actor whenever a decision affects a child. [Section 8\(1\)](#) of the Children Act gives direct statutory expression to this principle by providing that, in all actions concerning children, whether undertaken by public or private institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration, including, but not limited to, the considerations set out in the [First Schedule](#) to the Act.²⁵
14. [Section 8\(2\)](#) further provides that all judicial and administrative institutions must treat the child's interests as the first and paramount consideration, to the extent consistent with adopting a course of action that safeguards and promotes the rights and welfare of the child, conserves and promotes the welfare of the child, and secures for the child such guidance and correction as may be necessary for the child's welfare and the public interest. Read together, [Article 53\(2\)](#) and [Section 8](#) create a constitutional and statutory obligation of the highest order: the child's best interests are both the starting point and the ultimate test in every matter concerning a child.

²⁵ Godfrey O. Odongo, "The Role of International Law in the Judicial Interpretation of New African Children's Laws: The Kenyan Example" in Ton Liefwaard & Jaap E. Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* Springer, Dordrecht, 2015 ISBN: 978-94-017-9444-2.

2.2.2 Meaning and Content of “Best Interests”

15. The term “best interests of the child” is deliberately not exhaustively defined, either in the Constitution or in the principal international instruments. This allows courts and other decision-makers to apply the principle contextually, having regard to the particular circumstances of each child.
16. Since a child’s best interests will vary depending on the circumstances of each case, their determination must be informed by the child’s individual situation, needs and context. This was explained by the Supreme Court in [MAK v RMAA & 4 others](#), **SC Petition No. 2 (E003) of 2022; [2023] KESC 21 (KLR)**, where the Court held:

“The concept of the child’s best interest is flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation and needs.”
17. This position was reaffirmed by the Supreme Court in [CMM \(Suing as the Next of Friend of and on Behalf of CWM\) & 6 others v Standard Group & 4 others \(Petition 13 \(E015\) of 2022\) \[2023\] KESC 68 \(KLR\)](#), where the Court held that a child’s best interests are flexible and must be assessed afresh on the particular facts before the court.
18. The [First Schedule](#) to the Children Act, 2022 provides a non-exhaustive list of eighteen (18) “best interest considerations” that courts must take into account. These include the child’s age, maturity, developmental stage, background and gender; any special needs of the child; the nature of the relationship between the child and each parent or guardian; the viability, adequacy and duration of the child’s living arrangements; the likely effect on the child of any change in circumstances; the child’s own views, having regard to age and maturity; the child’s emotional, educational, social and cultural needs; the impact of any disability; any history of family violence or abuse; the ability of each parent or guardian to provide for the child; and the importance of maintaining continuity in the child’s relationships with siblings and extended family.
19. Judicial officers should treat the First Schedule as a mandatory analytical framework at the commencement of all proceedings involving children. They should identify, on the record, the considerations that are engaged and explain how those considerations have been weighed. A decision that fails to properly apply [Article 53\(2\)](#) is constitutionally vulnerable.

2.2.3 Best Interests: Universal Application

20. A defining feature of the paramountcy rule is its universal application. [Article 53\(2\)](#) applies in every matter concerning a child, without qualification. The Supreme Court confirmed in [CMM \(Suing as the Next of Friend of and on Behalf of CWM\) & 6 others v Standard Group & 4 others \(Petition 13 \(E015\) of 2022\) \[2023\] KESC 68 \(KLR\)](#) that the principle extends to criminal justice proceedings, media publication decisions, administrative determinations, stay of execution applications, custody proceedings, immigration decisions and policymaking. In custody and access disputes, the child's best interests determine who should care for the child and the terms of access, and parental claims must yield where they conflict with the child's welfare. In maintenance proceedings, [Article 53\(1\)\(e\)](#) and Section 114 establish a constitutional and statutory framework for financial provision. In stay applications, the substantial loss that must be accorded greatest weight is the potential loss or prejudice to the child, rather than that of the applicant parent. In criminal proceedings, children in conflict with the law must be treated with child-sensitive safeguards at every stage, from arrest, investigation and trial to sentencing. The publication of children's identities in such proceedings is unconstitutional. Where the deportation of a parent is in issue, courts must assess whether removal would violate a child's right to parental care under [Article 53\(1\)\(e\)](#), although bare allegations without substantiation will not suffice. In inheritance and succession matters, disinheriting children on account of the circumstances of their birth violates [Articles 53\(1\)\(e\)](#) and [53\(2\)](#), including in Muslim personal law proceedings. This position was confirmed by the Supreme Court in [FAAF v RFM & 2 others \(Petition E035 of 2023\) \[2025\] KESC 45 \(KLR\) \(30 June 2025\) \(Judgment\)](#) where the Court held that the exclusion of children born outside marriage from inheriting under Islamic law violates the right to equality and the best interests of the child. Administrative decisions affecting children, whether by schools, police or welfare institutions, must comply with [Article 47](#) on fair administrative action and must be interpreted through the lens of [Article 53\(2\)](#).

2.2.4 Children as Subjects, Not Objects

21. A fundamental constitutional principle affirmed by Kenyan courts is that children are subjects of the law and not objects of it. This means that children have agency and that their voices must be heard in proceedings that concern them, in a manner consistent with their age, maturity and evolving capacities. The High Court gave clear expression to this principle in [SM v DK & another \(Civil Appeal 120 of 2023\) \[2024\] KEHC 162 \(KLR\)](#). The

case concerned a father who challenged interim access orders granted to the maternal grandparents after the death of the children's mother. The children were aged twelve (12) and ten (10) years. The trial court had made the interim orders without first interviewing the children, despite a request to do so. The High Court held that the trial court had erred in principle: the failure to interview the children before granting interim access orders was inconsistent with the best interests principle and the children's right to be heard. The Court confirmed that one important way of determining a child's interests is to hear the child's views and then weigh those views against all the circumstances of the case.

2.2.5 Best Interests and the Limitation of Rights

22. Where children's rights come into tension with other constitutionally protected rights, such as freedom of expression, freedom of the media or a parent's right of access to justice, the limitation clause under [Article 24](#) must be applied. Courts must apply heightened scrutiny where the right at risk of limitation is a child's right, and any limitation must satisfy the proportionality test, having regard to the child's vulnerability and best interests. This was affirmed in [CMM \(Suing as the Next of Friend of and on Behalf of CWM\) & 6 others v Standard Group & 4 others \(Petition 13 \(E015\) of 2022\) \[2023\] KESC 68 \(KLR\)](#). In that case, several media houses had published the names, images and videos of children facing criminal charges in a high-profile case, contending that public interest justified the disclosure. The Supreme Court declared the publication unconstitutional. It held that the courts below had erred by elevating public interest in the publication of the images and identities of children in a criminal trial above the children's best interests, without properly subjecting the limitation to the provisions of [Article 24](#). The Court held that publishing the names and images of children facing criminal charges violated their right to privacy under [Article 31\(c\)](#) and their right to have their best interests treated as paramount under [Article 53\(2\)](#). The Court also declared permanent criminal records for children unconstitutional for violating [Article 53\(2\)](#), and issued comprehensive guidelines for courts, counsel, prosecutors and the media on the protection of children in all criminal and civil proceedings.
23. [Section 93](#) of the Children Act restricts those who may be present in children's court proceedings and prohibits the media from disclosing the identity of children who are parties to such proceedings. [Section 95\(5\)](#) preserves the substance of what was [Section 76\(5\)](#) of the Children Act, 2001. The Supreme Court confirmed that these statutory provisions are constitutional expressions of [Article 53\(2\)](#) and must be applied strictly. Courts have

authority to hold media houses accountable for violations and must exercise that authority where necessary to give full effect to the constitutional guarantee.

3.0 INTERNATIONAL AND REGIONAL FRAMEWORK RELEVANT TO CHILDREN

24. By virtue of [Article 2\(6\)](#) of the Constitution, key international children's rights instruments to which Kenya is a State Party, including [the United Nations Convention on the Rights of the Child \(CRC\)](#) and [the African Charter on the Rights and Welfare of the Child](#), form part of Kenyan law. Their principles have been incorporated into the Children Act, 2022, making them directly applicable before domestic courts.²⁶
25. For judicial officers, this creates both an interpretive obligation and a substantive mandate, grounded not only in [Article 2\(6\)](#), but also in Articles 20(3), 21(1), 53(2) and 259(1) of the Constitution.²⁷ Courts are required, as a matter of constitutional imperative and not mere discretion, to interpret all law and conduct relating to children through the prism of [Article 53](#) and the international norms incorporated into Kenyan law. They must give paramount importance to the best interests of the child in every matter concerning a child. Where domestic law is silent, ambiguous or requires harmonization with international standards, courts are obliged to develop the law in a manner that gives the fullest possible effect to the rights guaranteed under [Article 53](#), drawing on the [CRC](#), [the African Children's Charter](#), and [the Children Act 2022](#) as complementary sources of legal content and interpretive guidance.²⁸

3.1 [Universal Declaration of Human Rights \(the "UDHR"\) \(1948\)](#)

26. [Article 25\(2\)](#) of the UDHR provides that all children are entitled to special care and assistance, regardless of whether they are born within or outside marriage.²⁹
27. In 1959, the [United Nations Declaration of the Rights of the Child](#) was adopted. The Declaration was the first international instrument to codify the principle of the best interests of the child.

²⁶ Nicholas W Orago, "The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective" (2013) 13(2) *African Human Rights Law Journal* 415–440.

²⁷ [Mitu-Bell Welfare Society v Kenya Airports Authority & 3 others \(Petition 3 of 2018\) \[2021\] KESC 34 \(KLR\)](#)

²⁸ [MWK & Another v Attorney General & 4 Others; Independent Medical Legal Unit \(IMLU\) \(Interested Party\); The Redress Trust \(Amicus Curiae\) Constitutional Petition No. 347 of 2015 \[2017\] KEHC 1496 \(KLR\)](#)

²⁹ United Nations General Assembly, Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948.

3.2 United Nations Convention on the Rights of the Child (CRC)

28. The [United Nations Convention on the Rights of the Child \(CRC\)](#), 1989, which Kenya has ratified and which Kenyan courts have consistently relied upon in judicial decision-making, is the foundational international instrument on children's rights. It sets out a comprehensive scheme of civil, political, economic, social and cultural rights. Its four guiding principles are non-discrimination under [Article 2](#); the best interests of the child under [Article 3](#); the right to life, survival and development under [Article 6](#); and the right of the child to be heard under [Article 12](#). These principles are reflected in [Article 53](#) of the Constitution and in the statutory framework governing children. Kenyan courts have treated them as binding norms and have used them to guide judicial reasoning in areas such as child protection, child justice, custody and child participation in proceedings. The CRC therefore operates as a constitutional companion, reinforcing and elaborating the scope of children's rights in Kenya.

3.3 United Nations Convention Against Torture (CAT), 1984

29. The broader international human rights framework also contributes to the protection of children in Kenya, notably through the [United Nations Convention Against Torture \(CAT\)](#). This instrument is directly relevant to Article 53(1)(d) of the Constitution, which guarantees protection from torture and cruel, inhuman or degrading treatment or punishment. Its application extends to the prohibition of corporal punishment, as reflected in [Section 25](#) of the Children Act, 2022. Judicial officers are required to interpret children's rights consistently with CAT obligations, ensuring that all forms of violence against children are prohibited, addressed and effectively remedied.

3.4 African Charter on the Rights and Welfare of the Child (ACRWC), 1990

30. Complementing the CRC at the regional level is the [African Charter on the Rights and Welfare of the Child](#) (ACRWC), 1990, which Kenya has also ratified. The Charter reflects an African normative perspective by incorporating contextual realities such as shared community responsibility for children, extended family systems and socio-economic challenges affecting children. It affirms the best interests principle as the primary consideration in all actions concerning the child under [Article 4](#); guarantees the right to a name and nationality under [Article 6](#); and provides for the rights to education under [Article 11](#), parental care and protection under Article 19, and the administration of child justice

under [Article 17](#). Kenyan courts have recognized that the ACRWC operates alongside the CRC,³⁰ often providing more context-specific guidance.³¹ This relationship was extensively explored in the African Committee of Experts on the Rights and Welfare of the Child decision in **Communication Concerning Children of Nubian Descent in Kenya (2011) - ACERWC/004/COM/001/2009**.³²

3.5 Application of International and Regional Instruments in Children Matters by Kenyan Courts

31. The Court of Appeal in [Child Welfare Society of Kenya v Republic \[2017\] KECA 175](#) authoritatively affirmed that the CRC, the African Children's Charter and related international instruments ratified by Kenya form part of Kenyan law by virtue of [Article 2\(6\)](#), of the Constitution, and must guide all actions concerning children. The decision underscores the constitutional imperative that children's matters be determined within a framework that is both domestically grounded and informed by international and regional human rights standards.
32. In [POO \(a Minor\) v Director of Public Prosecutions & another \[2017\] KEHC 8341 \(KLR\)](#), the petitioner was arrested on 14 February 2016 and charged with defilement and committing an indecent act with a child. He consistently stated that he was a child, aged sixteen (16) years at the time, but no age assessment was conducted despite a court order. He was detained in an adult facility for nine (9) months, missed school and was provided with witness statements only late in the trial. The court found multiple constitutional violations, including discrimination under [Article 27](#), violation of fair trial rights under [Article 50](#), and breach of the prohibition against detaining children with adults under [Article 53](#). The court also relied on international law, particularly [Article 37\(d\)](#) of the [United Nations Convention on the Rights of the Child](#), which guarantees that every child deprived of liberty has the right to prompt access to legal and other appropriate assistance. The court held that the petitioner, as a child with limited knowledge of his rights, suffered substantial injustice because he was not provided with legal aid or adult assistance.

³⁰ Benyam D Mezmur "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?" (2008) 23(1) *South African Public Law* 1–29

³¹ Julia Sloth-Nielsen & Benyam D Mezmur "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context" (2007) 7(2) *African Human Rights Law Journal* 330–353

³² Godfrey Odongo "Caught Between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms" (2012) 12(1) *African Human Rights Law Journal* 112–141.

33. [*Nyabola v Attorney General & another; Kenya Private School Association Nakuru Branch \(Interested Party\)* \[2014\] KEHC 2599 \(KLR\)](#), the petitioner challenged Kenya's policy of funding only public secondary schools, arguing that it discriminated against learners in private institutions and violated [Article 53\(1\)\(b\)](#) of the Constitution, the Children Act and international treaties. The court dismissed the petition, holding that the policy did not violate the principle of non-discrimination because the right to education is progressively realized, with priority given to public schools serving the majority of learners. The Court relied on [Article 28](#) of the [United Nations Convention on the Rights of the Child](#), , as incorporated into the Children Act, which recognizes the child's right to education and requires States to progressively achieve this right, ensuring equal opportunity and free primary education for all.
34. It is clear from the foregoing that the international and regional normative framework on children's rights is integrated into Kenya's constitutional order. Judicial officers are required to apply these norms proactively to ensure that all decisions affecting children meet or exceed minimum international and regional standards, while safeguarding the best interests of the child as the paramount consideration in all proceedings.

4.0 JURISDICTION IN CHILDREN MATTERS

35. The Act establishes a specialized children's court system intended to be child-friendly and protective of the rights, welfare and best interests of the child.³³ The Chief Justice, by notice in the Gazette, designates children's courts and appoints magistrates to preside over children's cases in any area of the country. The children's court has jurisdiction to conduct civil proceedings on matters set out under the Act, hear criminal charges against a child, except murder, determine offences under the Act committed by any person, hear cases where a child is a complainant or victim, and determine any other child-related matters provided for under the Act.³⁴
36. The purpose of establishing separate children's courts is to ensure that cases involving children are heard in a manner that treats the welfare and best interests of the child as the paramount consideration.³⁵ The courts are obligated to protect the identity of the

³³ Section 90 and 92, Children Act 2022.

³⁴ Section 91, Children Act 2022.

³⁵ C.J. Okech "The Juvenile Justice in Kenya: Growth, System and Structures" *UNAFEI Resource Material Series No. 101* (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 2016) Available at: https://www.unafei.or.jp/publications/pdf/RS_No101/No101_5_VE_Okech_1.pdf

child and are empowered to clear the court during children's proceedings,³⁶ where this is necessary to protect the child.

37. Appeals from the children's court lie, in the first instance, to the High Court on points of law and fact, and, in the second instance, to the Court of Appeal on points of law only.³⁷

38. Sections [224](#), [226](#) and [227](#) of the Act provide for diversion in children's cases. Diversion is the process through which children in conflict with the law are dealt with outside the formal criminal justice system and away from the formal court process.³⁸ This promotes rehabilitation and reintegration of children into society and minimizes stigma.³⁹

4.1 Jurisdiction of the Kadhis' Courts in Children's Matters

39. [Article 170\(5\)](#) of the Constitution establishes and regulates Kadhis' courts. It provides for the office of the Chief Kadhi and at least three other Kadhis to preside over matters of Islamic law. The Constitution limits the jurisdiction of Kadhis' courts to questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.

40. [Section 5](#) of the [Kadhis' Courts Act](#) similarly provides that Kadhis' courts have jurisdiction in matters of Muslim personal law relating to marriage, divorce, inheritance and personal status in proceedings where all the parties profess the Muslim religion and submit to the court's jurisdiction.

41. It is important to note that, when hearing appeals from the Kadhis' courts, the High Court is required to sit with the Chief Kadhi or two (2) Kadhis as assessors to advise the Judge on Muslim law.⁴⁰ In [Haji & 4 others v Ali & 3 others \(Civil Appeal 340 of 2018\) \[2023\] KECA 1120 \(KLR\)](#), the Court of Appeal highlighted that Section 65 of the [Civil Procedure Act](#) requires the Chief Kadhi or two other Kadhis to sit as assessors in appeals from a Kadhi's court, and that failure to do so invalidates the proceedings.

42. Two schools of thought have emerged on whether Kadhis' courts have jurisdiction over children's matters.

³⁶ Section 95, Children Act 2022.

³⁷ Section 99, Children Act, 2022.

³⁸ Florence Mueni Muema and others "Therapeutic and non-therapeutic practices in the child justice system in Kenya: A therapeutic jurisprudence perspective June 2024 [International Journal of Law and Psychiatry](#) 95(7):101993 DOI:10.1016/j.ijlp.2024.101993

³⁹ Section 226, Children Act, 2022.

⁴⁰ Section 65 of the Civil Procedure Act (Cap 21).

43. The first school of thought holds that there is no constitutional or statutory provision vesting jurisdiction in Kadhis' courts to hear and determine children's matters. Proponents of this view emphasize strict constitutional and statutory interpretation, asserting that subordinate courts cannot expand their jurisdiction beyond the limits conferred by law. Accordingly, matters concerning children, such as custody, maintenance and welfare, fall exclusively within the purview of the children's court, and consent by the parties cannot confer jurisdiction on the Kadhi's court where none exists in law.

4.1.1 Judicial Precedent to the Effect that Kadhis' Courts do not Have Jurisdiction over Children's Matters

44. In [AAI v HAD \[2018\] eKLR](#), the High Court held that, under [Article 170\(5\)](#) of the Constitution and [Section 5](#) of the [Kadhis' Courts Act](#), Kadhis' courts are limited to matters of Muslim personal law relating to marriage, divorce, inheritance and personal status, and do not have authority over child custody or maintenance. The court further held that jurisdiction cannot be inferred or expanded beyond what is legally conferred, and that issues relating to children were governed specifically by the Children Act, 2001, now repealed.
45. In [ABMM v SMY & another \[2019\] eKLR](#), the High Court held that the Kadhi's court lacked jurisdiction to determine issues of child custody and maintenance. Consequently, the court referred the issues of custody and maintenance to the children's court, while leaving undisturbed the Kadhi's court's orders on divorce and dowry.
46. A similar position was taken in [MNO v SJM \[2021\] eKLR](#), where the Court emphasized that jurisdiction flows from both the Constitution and enabling statutes. Relying on the principle established in [Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others \[2012\] eKLR](#), the Court reiterated that a court cannot arrogate to itself powers not conferred by law.
47. The second school of thought, which supports jurisdiction, is founded on two arguments. First, that the Children Act does not oust the jurisdiction of Kadhis' courts or confer exclusive jurisdiction on children's courts. Secondly, that children's matters may be incidental to marriage and divorce proceedings and, therefore, where Kadhis' courts are properly seized of those matters, they may address aspects affecting children, provided that they apply the best interests of the child as the paramount consideration.

4.1.2 Judicial Precedent in Favour of Jurisdiction for Kadhis' Courts in Children's Matters

48. In [Najma Ali Ahmed v Swaleh Rubea \[2010\] eKLR](#), the High Court held that, for Muslim families, child maintenance may be incidental to marriage and divorce, which are matters within the jurisdiction of the Kadhi's court under Islamic personal law. The court further held that a father's obligation to maintain his child is unconditional and recognized in the Quran. It held that, although the Children Act establishes children's courts for general child welfare matters, it does not oust the jurisdiction of Kadhis' courts to address maintenance obligations arising from Muslim marriages. The court therefore upheld the Kadhi's order on child maintenance, while modifying other aspects of the judgment, including property distribution.
49. Similarly, in [ZUDG v SJKUR \[2020\] KEHC 5069 \(KLR\)](#), the High Court upheld the jurisdiction of Kadhis' courts to determine matters relating to child custody and maintenance where such issues arise incidentally from divorce proceedings between Muslim parties. The court found that the Children Act did not expressly oust the jurisdiction of the Kadhi's court and that child maintenance, being incidental to marriage and divorce, fell within its mandate, provided that the court applied the principles of the Children Act, particularly the best interests of the child. Accordingly, the court held that the Kadhi had acted within jurisdiction in making orders concerning the child.
50. In [GJG v HG \[2025\] KEHC 2664 \(KLR\)](#), the High Court, relying on the decisions in [MAA v SIE \(Civil Appeal E009 of 2024\) \[2024\] KEHC 4894 \(KLR\)](#) and [ZUDG v SJKUR \[2020\] eKLR](#), ruled in favour of jurisdiction on the two grounds identified above.
51. Courts have also been clear that where the parties have already divorced and children's matters are filed as stand-alone suits, with no live matrimonial proceedings to anchor them, the Kadhi's court has no jurisdiction. In **Abdirahim Yussuf Hassan v Zeitun Alio Mohammed [2025] Civil Appeal No. E003 of 2024 (Unreported)**, the High Court set aside the Kadhi's orders on this basis, holding that the suit was incompetent before the Kadhi's court because [Section 91](#) of the Children Act does not confer jurisdiction in children's matters on Kadhis' courts. The matter was a stand-alone claim on care, custody and maintenance, and is therefore distinguishable from the authorities where children's matters arose incidentally to matrimonial proceedings.

52. The Court of Appeal pronounced itself on the issue in [TSJ v SHSR \[2019\] KECA 170\(KLR\)](#). It held that [Section 73](#) of the Children Act, 2001, while establishing the jurisdiction of the children's court, did not stipulate that such jurisdiction was exclusive. The Court therefore upheld the decision of H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, a religious arbitration board, on dissolution of marriage and children's matters in accordance with the parties' marital contract. The case has been cited for the proposition that family disputes are arbitrable and that such arbitral awards are binding, thereby underlining that the jurisdiction of the children's court is not necessarily exclusive.
53. Some Muslim jurists have cited this decision to support the jurisdiction of Kadhis' courts in children's matters, on the basis that Kadhis' courts, like the arbitration board in **TSJ v SHSR**, are religious in character. However, there does not appear to be a reported decision that has applied **TSJ v SHSR** as binding authority on this specific question. The divide for and against jurisdiction therefore remains unresolved at the High Court, with courts aligning themselves with either position on the grounds discussed in this section.
54. Further, [Section 91 \(2\)](#) of the Act addresses jurisdiction in children's matters by requiring any court handling a child's case, even if it is not a designated children's court, to adhere to the provisions of the Children Act and act in the best interests of the child. This deeming provision may provide the basis upon which courts other than designated children's courts, including Kadhis' courts, found jurisdiction to handle children's matters, to the extent that the Act anticipates that a non-designated court may, in certain circumstances, handle such matters.
55. These conflicting positions will require definitive resolution by the Court of Appeal or through legislative reform.

4.2 Jurisdiction of the Children's Court over Children Outside Kenya

56. [Sections 91](#) of the Act provides for the jurisdiction of the courts, while section 168 empowers the Cabinet Secretary to enter into inter-country reciprocity agreements for the enforcement of orders made under the Act. No such agreement is in place as at the time of writing this chapter. [Section 15 of the Civil Procedure Act](#) provides for the territorial jurisdiction of courts.
57. A review of decisions on this question shows that courts have moved away from a rigid territorial concept of jurisdiction towards a child-centred and welfare-based approach. The physical presence of the child in Kenya is not, in itself, a prerequisite for jurisdiction.

Courts have sustained jurisdiction where there is a sufficient legal nexus, such as citizenship, parental connection or prior court involvement.

58. At the heart of this approach is the best interests of the child principle under [Article 53\(2\)](#) of the Constitution and the Children Act, which treats jurisdiction not as an end in itself, but as a tool for protecting the child's rights and welfare. Consequently, procedural doctrines such as *res judicata* and *functus officio* have been treated as inapplicable, or as applying with necessary flexibility, given the dynamic nature of children's matters. Concerns about enforceability or foreign residence do not automatically defeat jurisdiction. Courts retain continuing and supervisory jurisdiction over children's matters and adopt a pragmatic and protective approach, even where enforcement limitations exist, because declining jurisdiction may leave a child without effective legal protection.

4.2.1 Judicial Precedent on Jurisdiction of Kenyan Courts over Children Outside Kenya

59. In [ALAO v SOO \(Civil Appeal E067 of 2023\) \[2024\] KEHC 13098 \(KLR\)](#), the appellant and the child were resident in the United States of America, while the respondent was resident in Kenya. All the parties were Kenyan citizens. The appellant filed a suit for determination of custody, maintenance and access. The respondent filed a preliminary objection, which was upheld by the trial court on the grounds that the appellant and the child resided in the United States, outside the jurisdiction of the children's court, and that the children's court, under [Section 91](#) of the Children Act, [Section 7](#) of the Magistrates' Courts Act and [Section 15](#) of the [Civil Procedure Act](#), had territorial jurisdiction only over children in the Republic of Kenya.
60. On appeal, the High Court held that the children's court retained jurisdiction notwithstanding that the child and the applicant resided outside Kenya. While [Section 91](#) of the Children Act outlines the jurisdiction of the children's court, and [Section 15](#) of the Civil Procedure Act provides for the institution of suits based on the defendant's residence, jurisdiction in children's matters is not to be construed strictly on the basis of territorial presence. The court emphasized that where the child and both parents were Kenyan citizens, and one parent resided within Kenya, a sufficient jurisdictional nexus existed. Further, [Article 53\(2\)](#) of the Constitution and [Section 4\(2\)](#) and [4\(3\)](#) of the Children Act require that the best interests of the child be treated as the paramount consideration, thereby guiding courts to adopt a broader, welfare-oriented approach to jurisdiction.

61. The court rejected the argument that the orders would be nugatory because the child resided abroad, noting that enforceability concerns do not, of themselves, oust jurisdiction. Reliance on the Foreign Judgments (Reciprocal Enforcement) Act was found to be inapplicable, as that statute does not govern custody or guardianship matters. [Republic v Senior Resident Magistrate Mombasa ex parte HL & another \[2016\] eKLR](#), the court affirmed that Kenyan courts have a duty to uphold and protect the rights of children irrespective of their location. Accordingly, jurisdiction was upheld on the basis of citizenship, the respondent's residence in Kenya and the overarching constitutional imperative to safeguard the best interests of the child.
62. In [MTKO v JMR \(Civil Appeal E064 of 2023\) \[2025\] KEHC 3681 \(KLR\)](#), the appeal arose from a custody dispute between the child's biological father, who was the respondent, and the maternal grandmother, who was the appellant, following the death of the child's mother. The trial court granted custody, care and control to the father and permitted him to relocate with the child to Grenada. On appeal, a preliminary objection was raised challenging the High Court's jurisdiction on the basis that the child was no longer within Kenya, having left immediately after judgment, and that both the child and the appellant resided outside the country.
63. The court dismissed the objection and affirmed that jurisdiction is not ousted merely because a child is outside Kenya. Relying on [Article 165\(3\)](#) of the Constitution, the court emphasized its unlimited jurisdiction in civil matters, including children's rights, and reiterated that jurisdiction in children's matters is welfare-driven rather than strictly territorial. Citing **Owners of the Motor Vessel "Lillian S" v Caltex Oil (K) Ltd** on the centrality of jurisdiction, and [Republic v SRM Mombasa ex parte HL & another \[2016\] eKLR](#), the court held that Kenyan courts retain authority to safeguard children's rights irrespective of location. Accordingly, the court assumed jurisdiction, proceeded to determine the appeal and ultimately upheld the trial court's decision granting custody to the surviving parent, in line with the best interests of the child principle under [Article 53\(2\)](#) of the Constitution and [Section 8](#) of the Children Act.
64. In [ZN \(Suing as mother and next friend of the Minors\) v FB \(Children's Case 266 of 2019\) \[2024\] KEMC 79 \(KLR\)](#), the Magistrate's Court considered a preliminary objection challenging its jurisdiction on the ground that the children were no longer within Kenya. The objection was raised alongside arguments that the application was res judicata and that the court was functus officio, having previously issued judgment in the matter. The

court rejected these objections, holding that the doctrine of res judicata does not strictly apply in children's matters because issues concerning children are dynamic and subject to change in line with their welfare, as affirmed in [E M v A M \[2020\] KEHC 8406 \(KLR\)](#). Consequently, the court was not functus officio and retained continuing jurisdiction to make further orders where necessary to safeguard the best interests of the child.

65. On territorial jurisdiction, the court acknowledged the general principle in [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) that jurisdiction is fundamental, but held that, in children's matters, jurisdiction is welfare-driven rather than strictly territorial. Although the children were resident in the United States, the court retained authority to issue and supervise orders concerning their welfare, guided primarily by [Article 53\(2\)](#) of the Constitution and [Section 8](#) of the Children Act, 2022, which establish the paramountcy of the best interests of the child. While noting limitations in enforcing custody orders abroad and the absence of reciprocal arrangements under the [Foreign Judgments \(Reciprocal Enforcement\) Act](#), including the absence of the inter-country reciprocity agreement anticipated under [Section 168](#) of the Act, the court emphasized that such constraints do not oust jurisdiction. Instead, courts must adopt practical and protective measures, including structured access, supervision and ancillary mechanisms, to ensure that the child's welfare remains safeguarded.

5.0 KEY CONCERNS UNDER THE CHILDREN ACT

66. Since this chapter is not intended to provide a topic-by-topic discussion of the law relating to children in Kenya,⁴¹ this section highlights key concerns that judicial officers and other stakeholders have identified as requiring clarity. These concerns include:

1. Parental care and responsibility;
2. Disputed parentage: use of DNA testing as a tool for establishing paternity before imposing parental responsibility;
3. Cases where a birth certificate is produced but paternity is contested: the effect of a negative paternity test on information contained in a birth certificate;

⁴¹ There is need for such a resource, particularly one that engages with the state of the law since the enactment of the Children Act 2022. Many existing resources reflect the position under the repealed Children Act 2001. For a resource that is based on the pre-2022 legal position but is still useful in its engagement with the relevant principles and concepts see Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, Nairobi: Law Africa (2016).

4. Parental care and responsibility by persons acting in loco parentis, grandparents and other relatives;
5. Parental responsibility agreements;
6. Alternative care systems, including:
 - 6(a) adoption;
 - 6(b) eligibility of foreign nationals married to Kenyan citizens to adopt;
 - 6(c) eligibility of foreign nationals to adopt under the Act;
 - 6(d) gaps and ambiguities in surrogacy-related adoptions;
 - 6(e) safeguards in kinship adoptions;
 - 6(f) kafaalah; and
 - 6(g) guardianship.

5.1 Parental Care and Responsibility

67. [Article 53\(1\)\(e\)](#) establishes one of the most significant constitutional developments in Kenyan children's law: both parents bear equal responsibility to provide for the child, whether or not they are married to each other. This provision directly abrogated the pre-2010 legal position under which only fathers who were married to a child's mother, or who had voluntarily assumed responsibility for the child, were legally compelled to maintain the child.
68. [Section 31 \(1\)](#) of the Children Act, 2022 defines parental responsibility as all the duties, rights, powers, responsibilities and authority that a parent of a child has, by law, in relation to the child and the child's property, in a manner consistent with the evolving capacities of the child. [Section 31\(2\)](#) outlines the duties of a parent, including the duty to maintain the child and, in particular, to provide the child with basic nutrition, shelter, water and sanitation facilities, clothing, medical care, basic education, and guidance on general and social conduct and moral values. Parents also have a duty to protect the child from neglect, abuse, discrimination or other differential treatment, and to ensure that, during the temporary absence of the parent or guardian, the child is committed to the care of a fit person.
69. In addition, parents have a duty to provide parental guidance in religious, moral, social, cultural and other values that are not harmful to the child; determine the name of the child; procure registration of the child's birth; appoint a legal guardian for the child; receive, recover and otherwise deal with the property of the child for the benefit and in the best

interests of the child; facilitate or restrict the migration of the child from or within Kenya; and, upon the death of the child, arrange for the burial, cremation or any other acceptable method of interment.

70. Under the Act, a parent means the mother or father of a child, or any person on whom parental rights are conferred by law.⁴²
71. [Section 32](#) of the Children Act aligns the statutory framework with [Article 53](#) of the Constitution by providing for children's right to parental care regardless of the marital status of the parents or guardians. It thereby removes the inconsistency that existed under the Children Act, 2001. [Section 114\(1\)](#) sets out the framework for financial provision, including the parents' income and earning capacity, their financial resources and the needs of the child.

5.1.1 Judicial Precedent on Equal Parental Responsibility

72. The High Court applied Article 53(1)(e) in [ZAK & another v MA & another \(Petition 193 of 2011\) \[2013\] KEHC 6007 \(KLR\)](#), holding that provisions of the Children Act, 2001 and the Law of Succession Act that gave a father discretion to determine whether to recognize a child as his relative for purposes of inheritance contravened Article 53(1)(e). Courts are bound to uphold the constitutional standard of equal parental responsibility and cannot permit that standard to be diminished by the individual preference of a parent.
73. The Supreme Court significantly extended the reach of this provision in [FAAF v RFM & 2 others \[2024\] KESC 61 \(KLR\)](#), holding that children born outside marriage, where paternity was acknowledged during the deceased's lifetime, have an equal right to inherit from a Muslim father's estate. The Court held that [Article 53\(1\)\(e\)](#) and [Article 53\(2\)](#), read together with [Articles 27](#) and [28](#), preclude any rule, whether religious or otherwise, that penalizes children on account of the circumstances of their birth. Constitutional supremacy therefore prevails over religious personal law where the two conflict on matters concerning children's rights.
74. The Supreme Court also confirmed in [MAK v RMAA & 4 others \(Petition 2 \(E003\) of 2022\) \[2023\] KESC 21 \(KLR\)](#) that parental responsibility cannot be extinguished. It is a continuing constitutional duty. Parental responsibility agreements have the force of law and may only be vacated by a court order or on application by the child with leave of the court.

⁴² Section 2, Children Act, 2022.

Courts must approach applications seeking to extinguish parental rights with extreme caution and must always test any proposed order against the constitutional standard of the best interests of the child.

5.2 Disputed Parentage: Use of DNA Testing as a Tool for Establishing Paternity Before Imposing Parental Responsibility

75. One of the key shifts introduced by the [Children Act, 2022](#), as noted above, is equal protection and parental responsibility for all children, irrespective of whether they were born within or outside marriage.⁴³ This represents a significant legal shift from the repealed [Children Act, 2001](#), which differentiated between children on the basis of their parents' marital status.⁴⁴
76. The law requires both parents to care for, protect and provide for their children, regardless of the parents' marital status. This assumes that the identity of the child's father is known and is not contested. However, where paternity is disputed, it may be necessary to establish paternity before imposing parental responsibility.
77. Changes in family relations and contested parentage have led to increased reliance on deoxyribonucleic acid (DNA) testing to establish paternity. There is currently no legislation that specifically regulates the ordering of DNA tests for this purpose. Courts have therefore invoked the constitutional principle of the best interests of the child⁴⁵ and the court's inherent powers⁴⁶ when making orders for DNA testing.⁴⁷
78. In determining whether to order DNA testing, Kenyan courts are called upon to balance the best interests of the child against the adult party's constitutional rights to privacy, dignity and bodily integrity, including under [Article 31](#) for the adult involved. Decisions in this area underscore that, while privacy and bodily integrity are protected, they may yield where it is necessary and proportionate to vindicate the superior and constitutionally protected best interests of the child.
79. These cases should be distinguished from cases in which adults seek DNA testing against a putative father, where the courts have generally declined to order testing because the

⁴³ Section 31 of the Children Act, 2022

⁴⁴ Sections 24 (3) and 25 of the Children Act, 2001 (Repealed)

⁴⁵ Article 53 of the Constitution,

⁴⁶ Section 8 (2) of the Children's Act, 2022

⁴⁷ Hon. Gerhard Gitonga, Principal Magistrate (as he was then): "To Make or not to Make an Order for DNA Test: A Judicial Officer's Dilemma", (paper presented at the Annual Hon. Magistrates and Kadhis Colloquium/Inaugural Magisterial Oration, March/April, 2025).

ultimate purpose is not to safeguard the best interests of a child. See for example, [DB v JK \[2024\] KEHC 12796 \(KLR\)](#), [R.K v H.J.K & another \[2013\] KEHC 6501 \(KLR\)](#) and [SWM v. GMK \[2012\] KEHC 5512\(KLR\)](#).

5.2.1 Guiding Principles Based on Judicial Decisions on DNA Testing in Contested Paternity Cases

80. There does not appear to be a uniform judicial approach on the legal basis for ordering DNA testing or on the precise threshold to be met. However, the case law discussed below provides the following general guiding principles:

- a. Courts have inherent jurisdiction to order DNA testing in paternity disputes as part of their constitutional duty to establish the truth.
- b. Truth is a central value in the administration of justice, and DNA testing may be ordered where it provides the most reliable means of resolving paternity, subject to proportionality.
- c. DNA testing is not automatic. It must be justified through a proportionality analysis that considers necessity, available evidence, the genuineness of the dispute, the impact on the child and any limitation of rights under [Article 24\(1\)](#).
- d. Where paternity can be scientifically determined, justice will generally require that it be established, because certainty serves the child's welfare regardless of the outcome.
- e. The mother's evidence may be significant in determining whether testing is necessary, particularly where there is denial of paternity or inconsistent testimony.
- f. The absence of specific legislation does not displace judicial responsibility. Courts must determine the issue guided by constitutional values, the interests of justice and the best interests of the child.
- g. The best interests of the child are paramount and may independently justify compelled DNA testing to secure certainty of identity and parentage.

5.2.2 Judicial Precedent on DNA Testing in Contested Paternity Cases

81. In [N E O v H W K \[2017\] KEHC 78 \(KLR\)](#), the High Court acknowledged that the legal landscape on compelled DNA testing was unsettled on two fronts: there was no statutory framework regulating it, and judicial pronouncements had not been unanimous. Despite this, the court held that it had jurisdiction to order DNA testing where establishing the truth was central to the dispute before it.

82. The court grounded this jurisdiction on two pillars. First, it relied on the constitutional and inherent mandate of courts to pursue truth as a central value in the administration of justice. The court drew from the South African case of [Botha – vs – Dreyer \(now Moller\) \(4421/08\) \[2008\] ZAGPHC 395](#), which held that the discovery of truth should, as a general rule, prevail over privacy and bodily integrity considerations. Secondly, the court relied on the best interests of the child principle under Section 4(3) of the Children Act of South Africa), which required the court to take additional steps where the welfare of a child demanded it.
83. The High Court, however, qualified this position by holding that DNA testing should not be ordered as a matter of course or as a routine response to every request. The court must weigh the competing considerations, consider whether the truth can be established without DNA testing, and strike a balance between the need to establish the truth and the affected party's rights to dignity and privacy under [Articles 28](#) and [31](#) of the Constitution. That balance must be assessed through the limitation clause under [Article 24\(1\)](#).
84. On the facts, the court was persuaded that DNA testing was not merely desirable but necessary, given that paternity was genuinely disputed, the respondent had given contradictory sworn evidence and the uncertainty would have lasting consequences for the child's life, identity and welfare.
85. The court further referred to **Re G (Parentage: Blood Sample) [1997] 1 F.L.R. 360**, as cited in the High Court of Delhi decision in [Rohit Shekhar v Narayan Ditt Tiwari & Another \(27 April 2012\)](#). The court considered the justice of DNA testing from all angles: if the man is the biological father, testing places his position beyond doubt; if he is not, no injustice is occasioned by acknowledging him as a devoted stepfather where that is supported by the facts. The court underscored that justice to a child demands that the truth be established where it can be, and that contact between a putative father and a child is best grounded in established fact rather than uncertainty.
86. The court found this reasoning directly applicable to the case before it, particularly because the mother, who would ordinarily be best placed to speak to the child's paternity, denied that the appellant was the father.
87. In the case of [PKM v. Senior Principal Magistrate Children's Court at Nairobi & Another](#), the court adopted the test developed by the Supreme Court of India in [Bhabani Prasad Jena v Convener Secretary, Orissa State Commission for Women & another](#).

88. According to the court, the question was whether the DNA test was “eminently needed” to establish the truth and reach a just conclusion, in the absence of other evidence. The court also held that a prima facie case warranting the order ought first to be established.
89. In [MW v KC \[2005\] KEHC 3172 \(KLR\)](#), MW, the mother of JN, sought to compel KC to undergo a DNA test to determine paternity. The court granted the order, emphasizing the child’s right to know the father and the need to protect the child’s welfare under [sections 4–19](#) of the Children Act, 2001. The court outlined the circumstances for ordering a DNA test as follows:
- a. the applicant must demonstrate sufficient cause and a likelihood that the respondent may be the father;
 - b. the respondent’s refusal must infringe the child’s right to know the parent;
 - c. the refusal must unreasonably deprive the child of rights and benefits under the Act; and
 - d. the court must have jurisdiction under the Act to compel testing.
90. The decision underscores that DNA testing orders are justified where they are necessary to uphold the child’s rights and welfare.
91. [BGG & another v EWK & another \[2024\] KECA 484 \(KLR\)](#) was an appeal in a succession cause where the applicants sought a stay of execution of a High Court ruling that had ordered them to submit to DNA testing to determine the paternity of the objector’s child. They contended that the order violated their constitutional right to privacy under [Article 31](#). The Court of Appeal acknowledged that DNA testing is intrusive and implicates bodily integrity and private life. However, it held that the right to privacy is not absolute and must be weighed against the need to achieve substantive justice. On the facts before it, the Court found that failure to conduct the test would occasion injustice to a person who was potentially entitled to benefit from the deceased’s estate. It therefore concluded that, although intrusive, the DNA test was justified and that justice would be better served by allowing it to proceed.
92. In [PKM v Senior Principal Magistrate Children’s Court at Nairobi; JW \(Interested Party\) \[2014\] KEHC 7488 \(KLR\)](#), the petitioner challenged an order requiring him to undergo DNA testing to determine the paternity of Baby JM, arguing that the order violated his constitutional rights to privacy and dignity.

93. The court emphasized that an order for DNA testing should be made only where it is in the best interests of the child and where a prima facie case justifies it. It balanced the petitioner's right to dignity under [Article 28](#) of the Constitution against the child's right to parental care under [Article 53\(1\)\(e\)](#). The court held that the child's interest in knowing the parent and receiving care must prevail over the petitioner's inconvenience in undergoing DNA testing, because the child's constitutional rights take precedence.
94. Following the dismissal by the High Court of the appeal challenging the DNA testing order, the appellant moved to the Court of Appeal in [PKM v Senior Principal Magistrate Children's Court at Nairobi \[2022\] KECA 467 \(KLR\)](#), seeking a stay of execution of the High Court order requiring him to undergo DNA testing to determine the paternity of JM. The Court dismissed the application, holding that the child's right to know their biological father under [Article 53\(2\)](#) of the Constitution took precedence over the applicant's privacy concerns. The Court emphasized that proceeding with the DNA test would not prejudice the applicant or render his appeal nugatory, and that the child's best interests are paramount in all matters concerning a child. The compulsion of DNA testing was therefore justified to protect and enforce those rights.
95. In [MKK v LGI \[2021\] KEHC 13126 \(KLR\)](#), the applicant sought a DNA test to establish whether the respondent was the biological father of the child, citing abandonment and the need to determine financial responsibility. The respondent opposed the test on the ground that it would violate his constitutional rights. The court found that there was a prima facie case and that the test was in the child's best interests. It ordered that the DNA test be conducted at Kenyatta National Hospital, with the costs shared equally between the parties. The court weighed the child's constitutional right to parental care against the respondent's rights to privacy and dignity, concluding that the child's interests took precedence under [Article 53\(2\)](#) of the Constitution.
96. In [MKK v LGI \[2021\] KEHC 13126 \(KLR\)](#), AWN appealed against the lower court's refusal to order DNA testing for the children, IW and LW, while he continued to pay maintenance. The lower court had found the test unnecessary because AWN had already assumed parental responsibility. The High Court overturned the decision, holding that a child's right to maintenance is independent of disputes between parents and cannot be made contingent on the conduct of either parent. The court emphasized that the law protects children's interests by ensuring that they receive support to which they are entitled. Consequently, it ordered that the children undergo DNA testing, with the cost to be borne by the appellant.

5.3 Where Birth Certificate Evidence is Produced but Paternity is Disputed

97. In Kenya, a birth certificate is prima facie evidence of paternity, but it is not conclusive proof. Where paternity is disputed, the court may order DNA testing where this is necessary to determine the child's parentage and to safeguard the child's best interests.
98. Courts have also been confronted with cases where DNA test results have excluded the person named as the father in the child's birth certificate as the biological father. Kenyan courts have held that maintaining incorrect information on a child's paternity in official records is inconsistent with the best interests of the child.

5.3.1 Judicial Precedent on Birth Certificates as Prima Facie but not Conclusive Evidence of Paternity, and the Need for Correction in Appropriate Cases

99. In [NEO v HWK \[2017\] KEHC 78 \(KLR\)](#), the court held that, while a birth certificate is proof of paternity, it is not the only or final proof, and parental responsibility begins after paternity has been determined.
100. The court went on to quote with approval the decision in [Wilfred Koinange Gathiomi V. Joyce Wambui Mutura & Another, \[2016\] eKLR](#) where paternity was central to the dispute. The court held that DNA testing was the only way to resolve the paternity issue that the appellant had raised but was reluctant to pursue to its logical conclusion.
101. In *re Baby LWW (Child)* [2021] KEHC 6973 (KLR), the High Court was asked to determine whether the name of the second applicant, initially recorded as the child's father in the birth notification and birth certificate, should be removed following DNA evidence proving that he was not the biological father. The application was grounded on the constitutional principle that the best interests of the child are paramount under [Article 53\(2\)](#) of the Constitution, and was reinforced by [Section 4\(2\)](#) of the Children Act, 2001, which required that, in all actions concerning children, their best interests be a primary consideration. The court also considered the child's rights under [Article 53\(1\)\(a\)](#), including the right to a name and identity, as well as international instruments emphasizing the importance of accurate parentage information.
102. In its analysis, the Court held that the child's best interests include the right to a correct identity and to knowledge of biological parentage, and that maintaining inaccurate information in official records would be prejudicial. While the respondents argued that removing the second applicant's name would deprive the child of parental support, the Court found that imposing paternity on a person who was neither the biological father

nor willing to assume that role would not serve the child's welfare. Relying on precedent including [F K K & another v. Attorney General & 2 others \[2014\] KEHC 520 \(KLR\)](#), the Court concluded that the right to identity includes accurate information and that rectification of the register was justified despite initial compliance with the Births and Deaths Registration Act. Consequently, the Court ordered the deletion of the second applicant's name from both the birth notification and the birth certificate, holding that the correction best served the child's welfare and long-term interests.

103. Similarly, in [MMK & another v Registrar of Births & Deaths & 2 others \(Miscellaneous Application E027 of 2024\) \[2025\] KEHC 1904 \(KLR\)](#), the court ordered deletion of the first applicant's name from the child's birth certificate after DNA results showed that he was not the biological father.

5.4 Parental Responsibility of Persons Acting In Loco Parentis

104. Every child is entitled to parental care and protection, which includes the equal responsibility of the mother and father to provide for the child, whether or not they are married to each other.⁴⁸ In some cases, the biological parents are no longer together and another non-biological parent, such as a stepparent, provides care and maintenance for the child.

105. The Act defines a stepparent as a parent married to a child's biological mother or father.⁴⁹ Accordingly, [Section 34 \(6\)](#) of the Act imposes parental responsibility on a stepparent regardless of whether the stepparent has adopted the spouse's child. The case law discussed below shows that parental responsibility may arise in relation to non-biological children through marriage, cohabitation or conduct, thereby creating duties and rights for stepparents and other persons acting in loco parentis that may be equivalent to those of biological parents. In all cases, the best interests of the child, as enshrined in [Article 53\(2\)](#) of the Constitution, take precedence over personal disputes or competing claims between adults.

106. Once a parental role is assumed, the person may be obligated to fulfil both financial and caregiving responsibilities, including education, maintenance and general care. Comparative jurisprudence, particularly from South Africa, reinforces the principle that adults who assume parental duties cannot later renounce them where doing so would undermine the child's welfare and rights.

⁴⁸ Article 53(1)(e), Constitution of Kenya, 2010.

⁴⁹ Section 2, Children Act, 2022.

5.4.1 Judicial Precedent on Acquisition of Parental Responsibility by Persons Acting In Loco Parentis

107. In [ZAK & another v MA & another \[2013\] KEHC 6007 \(KLR\)](#), the High Court applied the purposive approach to constitutional interpretation, emphasizing that the best interests of the child article 53(2) must take precedence in determining parental responsibility. This approach led to the conclusion that non-biological parents who cohabit with or maintain children may acquire legal parental responsibility, thereby aligning statutory law with constitutional standards.
108. The court assessed the constitutionality of [Sections 24\(3\)](#) and [Sections 25](#) of the Children Act, 2001, now repealed, and found them inconsistent with [article 53\(1\)\(e\)](#) on equal parental responsibility and [article 27](#) on equality and non-discrimination.
109. The sections were declared void for violating constitutional principles, thereby necessitating legislative amendments to align the Act with the Constitution.
110. The court relied on comparative jurisprudence from South Africa, including [MB v NB \[2010\] 3 SA 220 \(GSJ\)](#), where a man who had performed parental duties during marriage was held responsible for contributing to the child's schooling after the couple's divorce, reflecting both constitutional protections and the responsibilities arising from an assumed parental role.
111. Similarly, [EKTU v ECC \[2021\] KEHC 12817 \(KLR\)](#) involved a dispute between former spouses over parental responsibility, custody and maintenance of three children, only one of whom was biologically related to the applicant. The children's court found that the applicant had assumed parental responsibility for one non-biological child through cohabitation and conduct, and ordered him to contribute to education, medical expenses, upkeep and housing. The applicant appealed and sought a stay of execution of the maintenance order, claiming financial inability and arguing that execution would render the appeal nugatory.
112. Although those orders were issued before the enactment of the Children Act, 2022, their substance is now reflected in [section 114](#), which provides for financial provision by step parents.
113. In [DNU v RMW \[2024\] KEHC 12501 \(KLR\)](#), the court applied these principles to uphold a lower court ruling requiring the appellant to pay school fees, provide medical cover

and meet related expenses for the children of his former spouse, even though he was not their biological father and had contested his inclusion on their birth certificates. The decision reinforced the principle that parental responsibility may be assumed through conduct and recognition by the child, and that obligations arising from such a role cannot be avoided where avoidance would undermine the best interests of the child.

114. The Court held that stay of execution of maintenance orders is rarely granted, because doing so risks depriving children of support during the pendency of an appeal. Balancing the parties' rights while prioritizing the welfare of the children, the Court dismissed the stay application and emphasized that statutory duties towards children cannot be suspended in the absence of sufficient justification.

115. In [MB v NB \(2008/25274\) \[2009\] ZAGPJHC 76; 2010 \(3\) SA 220 \(GSJ\) \(25 August 2009\)](#), a South African High Court decision, the court emphasized that a man who had acted in loco parentis during a marriage owed ongoing parental obligations to the child, even after the breakdown of the marriage. The defendant had performed the duties of a father, including agreeing to the child's enrolment in an expensive private boarding school. The court held that the child's right to family and parental care under [Section 28\(1\)\(b\) of the Constitution](#) of South Africa includes the expectation that the child will receive appropriate care and support. It concluded that the defendant was constitutionally and legally obliged to contribute to the child's school tuition, recognizing both the child's rights and the responsibilities inherent in an assumed parental role.

5.5 Custody and Maintenance Disputes Between a Surviving Biological Parent, Grandparents and Other Relatives

116. [Section 34](#) of the Act addresses parental responsibility upon the death of either biological parent. Where one parent dies, the surviving parent automatically assumes parental responsibility for the child, either alone or together with any guardian appointed by the deceased parent through a will. In either case, the law vests parental responsibility in the surviving biological parent as the default position. A testamentary guardian plays a secondary and complementary role where one has been formally appointed, subject to any objection by the surviving parent. The issue of testamentary guardianship is addressed later in this chapter.

117. A comparison with the corresponding provision in the repealed Children Act, 2001 illustrates the significance of [section 34](#). The most visible change is the shift in terminology



from “guardianship” to “parental responsibility”. This is not merely a semantic change. Parental responsibility is a broader and more contemporary concept that encompasses the full range of parental duties, rights and obligations. It reflects a rights-based approach to parenthood, rather than the narrower custodial framing under the repealed Act.

118. The most substantive reform is the elimination of the gender asymmetry in the repealed Act, under which the guardianship of a surviving mother was expressly made “subject to the provisions of this Act”, while that of a surviving father was framed in more absolute terms. [Section 34](#) treats both parents equally, using uniform language irrespective of which parent survives. This brings the law into direct alignment with [Article 53\(1\)\(e\)](#) of the Constitution, which guarantees equal parental responsibility to both parents irrespective of marital status, and with [Article 27](#) of the Constitution on equality and non-discrimination.
119. Finally, whereas the repealed Act expressly preserved the court’s power to appoint a joint guardian where the deceased parent’s appointee had died or refused to act, [section 34](#) limits joint guardianship to a testamentary guardian. This simplifies the provision while leaving intact, by implication, the court’s broader supervisory jurisdiction in children’s matters. Overall, [section 34](#) modernizes, equalizes and simplifies the law, reflecting a deliberate legislative shift towards a child-centred and constitutionally consistent framework.
120. Against this background, the section below analyses judicial precedents in which courts have generally upheld the parental responsibility of a surviving biological parent over claims by other applicants, including relatives of the deceased parent, unless exceptional circumstances are demonstrated.

5.5.1 Judicial Precedent on Custody and Maintenance Disputes Between a Surviving Biological Parent, Grandparents and Other Relatives

121. [LAC & Another v MJC \[2022\] KECA 68](#) was a second appeal arising from a custody dispute concerning a child whose mother had died in 2017. The dispute was between the maternal grandparents, who were the appellants, and the surviving biological father. The grandparents had been caring for the child following the mother’s return to Kenya after separating from the respondent father, who was based in the United Kingdom.
122. Although the deceased mother had left a will appointing the grandparents as guardians, the will was never proved in court. The children’s court had awarded custody to the

grandparents until the child attained the age of ten (10) years. On first appeal, the High Court reversed that decision and awarded custody to the surviving biological father, prompting the grandparents to appeal to the Court of Appeal.

123. The Court of Appeal dismissed the appeal, affirming that parental responsibility vests primarily in the surviving biological parent and that the child's best interests under [Article 53\(2\)](#) of the Constitution and [Section 83](#) of the Children Act are ordinarily best served by awarding custody to that parent. Relying on the English decision in [Re G \(Children\) \(FC\) \[2006\] UKHL 43](#), the Court held that a child should not be removed from the care of a biological parent without compelling and expressly stated reasons. The respondent had demonstrated stable employment, a supportive extended family in the United Kingdom, access to free education and consistent involvement in the child's life. No exceptional circumstances had been established to displace his claim.
124. The Court further reinforced that grandparents, however capable and well-intentioned, cannot assume parental responsibility in substitution for a surviving biological parent. The grandparents' years of caregiving and the unproved testamentary appointment were insufficient to override the father's parental responsibility. The decision is binding authority for the proposition that a surviving parent's parental responsibility prevails over grandparental custody claims in the absence of exceptional and demonstrable circumstances.
125. The decision in [MTKO v JMR \(Civil Appeal E064 of 2023\) \[2025\] KEHC 3681 \(KLR\)](#) further affirms the primacy of a surviving biological parent's parental responsibility over claims by grandparents, subject only to the best interests of the child and the existence of exceptional circumstances. The Court grounded its reasoning in [Section 34\(1\)](#) of the Children Act, which provides that, upon the death of one parent, the surviving parent assumes parental responsibility, and [Section 11\(2\)](#), which recognizes the child's right to be cared for by his or her parents. This position is reinforced by [Article 53\(1\)\(e\)](#) of the Constitution and by international instruments such as the [UN Convention on the Rights of the Child](#) and [the African Charter on the Rights and Welfare of the Child](#), both of which priorities parental care.
126. The Court ultimately held that custody should ordinarily vest in a biological parent, and that a non-parent, including a grandparent, cannot assume parental responsibility in the absence of legal guardianship or compelling justification. While grandparents may play an important supportive role, they do not acquire legal parental status merely by providing



care. The Court emphasized that the best interests principle does not displace parental primacy but operates within it. A parent should therefore be denied custody only where there is cogent evidence of unfitness, incapacity or other exceptional circumstances.

127. On the facts, the grandmother's concerns, including allegations about the father's lifestyle and the contention that the child would have better opportunities abroad, did not meet this threshold. The father demonstrated willingness and capacity to care for the child, and there was no proof of unfitness. Accordingly, the Court held that the child was not an orphan, and that it would be contrary to both law and principle to elevate the grandmother to the status of a parent. The decision reinforces that parental responsibility is a legal right and duty that prevails over third-party claims unless clearly displaced by evidence, and that the best interests of the child will, in ordinary circumstances, align with care by the surviving parent.
128. In *Re DNK (Minor)* [2022] KEHC 3034, the High Court overturned a joint custody order between a father and maternal grandparents, holding that, as the sole surviving biological parent, the father bore full parental responsibility for the child because the mother had not appointed a testamentary guardian. The Court reinforced this position by citing [Article 7](#) of the [United Nations Convention on the Rights of the Child](#) and [Article 19 of the African Charter on the Rights and Welfare of the Child](#), both of which affirm a child's right to be cared for by their parents.
129. The Court found no exceptional circumstances to justify displacing the father's parental responsibility. The allegations of neglect were found to be factually unsupported. The Court also rejected the grandparents' financial superiority as a basis for custody, stating clearly that material wealth is not the determining factor in a child's well-being.
130. The trial magistrate had relied on a gender stereotype by taking "judicial notice" that fathers are limited in confronting difficult situations touching on a child's welfare, as partial justification for awarding joint custody to the grandparents. The appellate court rejected this reasoning. Relying on **Sylvia Mueni Musyoka v Alex Njuguna Kagwe, Nakuru Children Appeal No. E011 of 2021 (unreported)**, the Court held that the tender years doctrine can no longer operate as an inflexible rule. It must be subordinated to the best interests of the child principle, and both parents begin from a position of equal right to custody. The stereotype that fathers are inherently less capable caregivers for young children was found to have no place in a modern constitutional and child-rights framework.

131. The Court concluded that the trial magistrate had erred in invoking this stereotype without identifying any specific and concrete limitations of the father in the case. The stereotype therefore provided no legitimate basis for diluting the father's custody rights by bringing the grandparents in as joint legal custodians.

132. [Re EK and MW \(Minors\) \(Civil Appeal 036 of 2020\) \[2022\] KEHC 12528 \(KLR\)](#) involved an appeal by the maternal grandparents of two children against a lower court judgment awarding custody to the biological father. The children's mother had died in 2014, after which the grandparents cared for the children for several years. The key issues before the Court were whether the grandparents' long-term caregiving entitled them to custody over the biological father, who had not been formally married to the children's deceased mother; whether unproven allegations of his involvement in the mother's death disqualified him; whether the trial court's failure to interview the children was a reversible error; and whether joint custody would serve the best interests of the children.

133. The Court dismissed the appeal and upheld the award of custody to the biological father, anchoring its decision on the paramountcy principle under [Article 53\(2\)](#) of the Constitution and the Children Act. It held that a child's best interests are ordinarily served by placement with a surviving biological parent, and that grandparents cannot assume parental responsibility where a parent is alive, willing and able to care for the child. The allegations against the father were found to be unsubstantiated, as he had never been criminally charged and the Children Officer's report found nothing to disqualify him. The failure to interview the children was excused on account of their young age. Joint custody was declined due to the evident hostility between the parties, and marital status was held to be irrelevant to parental responsibility under [Article 53\(1\)](#) of the Constitution.

5.6 Custody Disputes Involving Relocation

134. The Court of Appeal issued a judgment on 24 April 2026 that usefully reviews the approach Kenyan courts have taken in custody disputes involving one parent's wish to relocate outside Kenya: **Jasreen Kaur Pandher v Kabir Singh Chal (Civil Appeal No. E223 of 2024)**. Drawing from existing jurisprudence, the Court developed a nine-point framework to guide courts in determining such disputes. The Court noted that relocation disputes require courts to undertake the constitutional task of placing the best interests of the child at the centre of the inquiry, while also recognizing the parental rights that may be implicated, including dignity, autonomy, equality, freedom of movement and family life. The nine-point framework is set out in the checklist below.

i. No presumption for or against relocation.

ii. Evidential burden on the relocating parent.

iii. Bona fides of the relocation.

iv. Likely benefits of relocation for the child.

The court must evaluate the likely benefits of relocation for the child. This assessment must take into account the full range of welfare considerations, including emotional security, educational continuity and quality, healthcare, safety, cultural exposure and access to supportive family environments.

v. Likely detriments of relocation.

The court must assess the likely detriments of relocation, including disruption of established routines, loss of a familiar environment, separation from established family and social networks, and the impact on the child's relationship with the non-relocating parent.

vi. Preservation of a meaningful relationship with the non-relocating parent.

The court must specifically assess the feasibility of preserving a meaningful relationship

between the child and the non-relocating parent. The proposed contact arrangements must be practical, affordable, realistic and sustainable over time.

vii. Caregiving realities.

The court must consider caregiving realities. It should assess how granting or refusing relocation would affect the primary caregiver's well-being, autonomy and practical capacity to parent, and how that impact would in turn affect the child's day-to-day care.

viii. Structured constitutional balancing.

The court must undertake a structured balancing exercise consistent with constitutional proportionality, weighing the best interests of the child alongside relevant parental rights, including those protected under Articles 27, 39 and 45 of the Constitution.

ix. Flexibility and revisability of relocation orders.

Given the dynamic circumstances that often give rise to relocation disputes, the court should consider orders tailored to the facts of the particular case, rather than issuing permanent permission or permanent prohibition as a matter of course. Orders may be conditional, subject to review timelines, or framed to give parties liberty to apply for variation upon a material change in circumstances.

5.7 Parental Responsibility Agreements

135. Parental responsibility agreements ("PRAs") are grounded in [section 31](#) of the Children Act, 2022, which defines parental responsibility broadly as:

"all the duties, rights, powers, responsibilities and authority which by law a parent has in relation to the child..."

This includes obligations relating to food, shelter, education, healthcare, guidance and protection from harm. The Act further establishes the principle of equality of parental responsibility. [Section 32](#) provides that both parents bear parental responsibility on an equal basis, regardless of marital status, with neither parent enjoying a superior claim. This principle is central to PRAs, which do not create parental responsibility, but regulate its exercise.

136. The facilitative framework for PRAs is set out in [section 33](#) of the Children Act, 2022. It allows parents who are not married to each other to enter into a parental responsibility



agreement in the prescribed form. Such an agreement operates as a structured parenting plan through which the parties define their respective roles in accordance with the best interests of the child. The statute contemplates that these agreements may address a wide range of issues, including residence and time-sharing arrangements, decision-making processes, including matters of religion, visitation schedules and holidays, education and healthcare decisions, travel and relocation arrangements, and financial responsibilities, including extracurricular expenses. This statutory codification reflects a transition from informal parenting arrangements to formalized co-parenting frameworks.

137. Historically, the repealed Children Act, 2001 recognized PRAs under [section 26](#), requiring that they be in the prescribed form and terminable only by court order.
138. A parental responsibility agreement has a dual legal character, combining contractual and statutory elements. On the one hand, courts treat PRAs as binding agreements between parties. Courts do not rewrite contracts, and parties are therefore bound by their agreements in the absence of vitiating factors such as fraud, coercion, mistake, undue influence or illegality.
139. On the other hand, PRAs derive their enforceability from statute and may be elevated into court orders once adopted as orders of the court. In that event, they acquire enhanced legal force and become binding and enforceable within the Kenyan legal system.
140. For validity, a PRA must comply with formal statutory requirements. It must be executed in the prescribed form, ordinarily signed before a magistrate or commissioner for oaths, executed by both parents, supported by proof of identity and parentage, and filed in court for certification.
141. Although the statutory framework primarily contemplates parents who are not married to each other, the underlying principle of shared parental responsibility applies more broadly.
142. Crucially, every PRA must be grounded in the best interests of the child, which remains the overarching constitutional and statutory principle in all matters concerning children. This is reflected in [section 33](#) of the Act.
143. [Section 33\(2\)](#) provides a non-exhaustive framework for the content of PRAs. In practice, such agreements typically address custody and residence arrangements, access and visitation rights, financial obligations and maintenance, decision-making authority, communication obligations and relocation arrangements.

5.7.1 Enforcement of Parental Responsibility Agreements

144. The Children Act, 2022 strengthens the enforcement of PRAs by introducing consequences for non-compliance. [Section 33](#) provides that interference with access or parental rights, as well as failure to notify a change of residence, constitutes an offence. This marks a significant development by reinforcing compliance through statutory sanctions.
145. In addition to statutory enforcement, courts may enforce PRAs either as agreements recognized under statute or as court orders, where the agreements have been adopted by the court.
146. A PRA cannot be unilaterally revoked. [Section 33\(3\)](#) provides that variation or termination may only occur by court order, upon application by a person with parental responsibility or, with leave of the court, by the child. This position mirrors the earlier framework under [section 26](#) of the Children Act, 2001 and has been consistently affirmed in case law. Where a child seeks leave, courts require evidence that the child has sufficient understanding, reflecting recognition of the child's evolving capacities.
147. Courts generally adopt a deferential approach to PRAs, respecting the autonomy of parties and upholding agreements unless judicial intervention is necessary. However, the binding nature of PRAs is always subject to the paramountcy of the child's best interests. Courts may depart from the terms of an agreement where circumstances have changed, where the agreement no longer serves the child's welfare, or where the child's views, where appropriate, justify such departure.
148. Parental responsibility agreements occupy a central role within Kenya's child law framework as structured mechanisms for co-parenting. Although contractual in nature, their enforceability is rooted in statute and subject to judicial oversight, with the best interests of the child remaining the paramount consideration. The jurisprudence below reflects a consistent approach: courts will uphold PRAs where they are valid and beneficial to the child, but will intervene where necessary to protect the child's welfare.

5.7.2 Judicial Precedent on Parental Responsibility Agreements

149. In [MAK v RMAA & 4 others \(Petition 2 \(E003\) of 2022\) \[2023\] KESC 21 \(KLR\)](#), the Supreme Court affirmed that a parental responsibility agreement is a binding legal instrument that regulates the exercise of parental responsibility between parents. Once voluntarily executed and adopted as an order of the High Court, a PRA acquires the force of a court



order and remains valid and enforceable unless varied or terminated in accordance with the law. Under [section 26](#) of the repealed Children Act, 2001, a PRA could only be set aside through a formal court process. It could not be unilaterally disregarded by either party or casually dismissed.

150. The Court criticized the High Court and the Court of Appeal for failing to recognize and interrogate the binding nature of the PRA, and for relying on findings of the English Family Court that had effectively disregarded the agreement without reference to Kenyan law. It held that a foreign court has no authority to nullify or override a PRA adopted by a Kenyan court, particularly where such action ignores Kenya's statutory and constitutional framework governing parental responsibility.
151. The Court reiterated that parental responsibility entails equal and continuing obligations of both parents, and that a PRA serves as a structured mechanism for regulating those obligations. It emphasized that such agreements cannot be violated without legal consequences and remain operative until lawfully set aside or until the child attains majority. Accordingly, courts must give due weight to PRAs and ensure that they are varied or terminated only in strict compliance with the governing legal framework.
152. In re [EN & JK \(Minors\) \(Civil Case E045 of 2021\) \[2022\] KEHC 354 \(KLR\)](#), the court considered whether a PRA entered into by the parties should be upheld and enforced in determining interim custody, access and maintenance arrangements. The appellant argued that the PRA remained valid and entitled him to equal shared parental involvement, while the respondent contended that the agreement had lapsed and was no longer binding.
153. The court held that the validity, enforceability or alleged lapse of the PRA could not be conclusively determined at the interim stage. It emphasized that such determination required a full hearing with evidence from both parties and properly fell within the mandate of the trial court handling the main suit. As the issue was still pending before the lower court, the High Court declined to make a definitive pronouncement on the PRA.
154. The court further clarified that interim orders on custody, access and maintenance should not pre-empt the final determination of rights under the PRA. It therefore maintained the status quo, reiterating that any challenge to, or enforcement of, the PRA must be resolved during the substantive hearing, where the trial court would assess its legal effect alongside all other evidence and in light of the best interests of the children.

155. In [RNG v EG \[2016\] KEHC 8422 \(KLR\)](#), the court declined to review maintenance terms captured in a PRA. The court's finding reinforces the principle that a parental responsibility agreement may serve as the primary legal framework for maintenance obligations, provided that it was entered into voluntarily and remains valid. The court held that such agreements are not merely static contracts, but enforceable arrangements that courts must respect, especially where the parties have established a history of compliance.
156. While the court acknowledged its inherent jurisdiction to review maintenance, it found that the existing PRA, which had already been reviewed once to account for the child's growth, adequately balanced the child's best interests with the parents' financial circumstances. Crucially, the court determined that the existence of a valid and functioning agreement creates a high threshold for judicial interference at an interlocutory stage. It effectively held that the respondent's consistent adherence to the PRA outweighed the appellant's claims of inadequacy based on inflation or evolving needs.
157. In [RA v JNO \(Suing as the Next Friend and Mother to the Minors IO and MM\) \(Children's Appeal Case E001 of 2024\) \[2024\] KEHC 2557 \(KLR\)](#), the appeal turned on the trial court's failure to consider a valid PRA executed by the parties. The agreement allocated actual custody of the son to the father and actual custody of the daughter to the mother, with shared access and responsibilities. The High Court held that a PRA, freely entered into, carries significant legal weight and must be expressly considered in custody determinations. While the best interests of the child under Article 53(2) remain paramount, they do not automatically override such an agreement. Rather, the court must evaluate the PRA within the broader welfare analysis, including whether circumstances justify its variation. The trial court's omission to address the PRA amounted to a misdirection in law.
158. The court further emphasized that a PRA is evidence of prior parental consensus, promotes stability and should not be lightly disregarded in the absence of compelling reasons. It found that the mother's unilateral actions, particularly interference with custody arrangements and the irregular change of the child's name and birth records, undermined joint parental responsibility and were relevant to her suitability as a custodial parent. Ultimately, the High Court set aside the trial court's orders and varied the PRA, granting the father actual custody of both children while retaining aspects of shared parental responsibility. The decision affirms that courts may modify, but should not ignore, PRAs without proper justification.

5.8 Alternative Care Systems

159. [Article 43](#) of the Constitution establishes the right to social security, including care for persons who are unable to support themselves and their dependants. This forms the constitutional foundation of the alternative care system for children. Within the child protection framework, this right is operationalized through [section 12](#) of the Children Act, 2022, which expressly recognizes alternative care as a component of social security for children whose parents or guardians are unable to provide adequate care. The Act conceptualizes alternative care broadly to include arrangements such as kinship care, foster care, guardianship, adoption, kafaalah, institutional care, temporary shelter, supported independent living, child-headed households, emergency care and aftercare. These mechanisms are intended to ensure that children deprived of parental care continue to receive protection, maintenance and developmental support in line with their constitutional rights.
160. [Section 12](#) further sets out the objectives and governing principles of alternative care, emphasizing that placement must be guided by the best interests of the child, priorities family-based care,⁵⁰ and be used only as a measure of last resort. It requires that placements be made as close as possible to the child's usual environment, preserve sibling relationships where appropriate, and aim to provide a stable, caring and permanent home, while safeguarding the child from abuse, neglect and exploitation. Institutional care is expressly limited and subject to strict standards. In particular, the Act prohibits the placement of children under three years of age in institutions except in exceptional circumstances. The Act also provides for both formal placements, whether court-ordered or administrative, and informal placements, and establishes a Child Welfare Fund⁵¹ to support the financing of alternative care services as part of the realization of [Article 43](#) rights.
161. To operationalize these provisions, Kenya has developed the [Children \(Foster Care\) Practice and Procedure Rules, 2024](#) and [the Children \(Guardianship\) Practice and Procedure Rules, 2024](#). The Adoption Regulations, 2005 and the Charitable Children Institutions Regulations, 2005, formulated under the Children Act, 2001, remain in force until new regulations are formulated. Kenya has also developed policy instruments,

⁵⁰ Section 67 of the Children Act, 2022.

⁵¹ Section 12 (7) of the Children Act, 2022.

including the **National Framework for the Implementation of Kafaalah Care for Children in Kenya (2025) and the Guidelines for the Alternative Family Care of Children in Kenya.**⁵²

162. These instruments promote a shift from institutional care to family-based and community-based care models. They introduce gatekeeping mechanisms to prevent unnecessary separation of children from their families and provide standards for placement, monitoring, reintegration and aftercare services. Together, the constitutional provision, statutory framework and implementing guidelines establish a comprehensive alternative care system aimed at ensuring that children deprived of parental care are protected within a structured, rights-based and welfare-oriented regime.

163. The alternative care systems addressed in this chapter include adoption, kafaalah and guardianship.

5.8.1 Adoption

164. The Children Act, 2022 defines adoption as a permanent legal process through which a child is placed with a new legal parent or parents, resulting in a complete transfer of parental rights and responsibilities. [Section 2](#) provides that “adoption” means the process through which a child is permanently placed with a legal parent or parents in accordance with [Part XIV](#) of the Act, while an “adoption order” is defined as an order made under [section 183](#), vesting all parental rights and responsibilities in the adopter. The effect of an adoption order is therefore to create a new and permanent legal parent-child relationship, extinguishing prior parental rights, subject to limited exceptions such as stepparent adoption. This distinguishes adoption from other forms of alternative care.

165. The Act provides for different types of adoption under [Part XIV](#). These include local or domestic adoption, governed generally by the provisions on eligibility and procedure, including sections [184–195](#), which address who may adopt, consent requirements and the making of adoption orders. The Act also provides for inter-country adoption under sections [196–199](#), which permit adoption by non-residents subject to strict safeguards and the principle that inter-country adoption is a measure of last resort. The Act further recognizes kinship or relative adoption and stepparent adoption, which fall within the general adoption framework but are treated distinctly in practice, particularly in relation to

⁵² <https://adoptionisbeautiful.or.ke/guidelines-for-the-alternative-family-care-of-children-in-kenya/> accessed on 24th April, 2026.



consent and the preservation of existing family ties. This is reflected in [sections 186 and 187](#) on consent and the persons whose consent is required. These statutory provisions are operationalized through subsidiary legislation made under the Act, including the Adoption Regulations issued pursuant to the Cabinet Secretary's regulation-making powers under [section 247](#). The Regulations provide detailed procedures on the accreditation of adoption societies, declaration of a child free for adoption, pre-adoption foster placement and post-adoption supervision. Together, these provisions establish a structured legal regime ensuring that all forms of adoption are subject to judicial oversight and the paramountcy of the best interests of the child.

5.8.1.1 Eligibility to Adopt: Does Section 186(6) Bar Foreign Nationals Married to Kenyan Citizens?

166. In 2014, the Government of Kenya issued a moratorium suspending the adoption of Kenyan children by foreign nationals because of concerns about gaps in inter-country adoption laws. The principal concern was the need to protect children from trafficking and other exploitative or abusive practices. The moratorium was intended to remain in place pending review of the Children Act, 2001, then in force, and related laws addressing human trafficking. The Children Act, 2022 was subsequently enacted with several safeguards, but the moratorium on foreign adoptions was not lifted. [Paragraph 17](#) of the [Seventh Schedule](#) to the Act therefore retained the terms of the moratorium.
167. [Section 186 \(6\)](#) of the Children Act sets out categories of persons who are ineligible to adopt children in Kenya. These include a person of unsound mind, a person incapable of exercising proper care and guardianship over a child, a person convicted of specified offences outlined in the [Third schedule](#) to the Act, unmarried couples applying jointly, a sole male applicant and foreign nationals, unless they are biological relatives of the child.
168. Kenyan courts have developed key principles for determining the involvement of foreign nationals in adoption proceedings, emphasizing that the best interests of the child remain paramount. Courts have also generally treated joint applications involving a Kenyan citizen married to a foreign national as local adoptions, rather than inter-country adoptions, particularly where the applicants reside in Kenya or where there are established family or kinship ties. This approach enables courts to ensure that children in need of adoption are placed in stable, caring and legally secure homes.

5.8.1.2 Judicial Precedent on Adoptions Involving a Kenyan Citizen Married to a Foreign National

169. The central guiding principle that courts have applied in determining such cases, notwithstanding the 2014 moratorium, is the best interests of the child.
170. [In re LMG \(Child\) \[2023\] KEHC 18227 \(KLR\)](#), a Kenyan national, RMW, and a Spanish national, BGC, sought to adopt an abandoned child in Nairobi. The court held that the 2014 moratorium on inter-country adoptions was unconstitutional, finding it unreasonable and unjustifiable because it failed to provide alternatives for children in need of adoption and did not meet the requirements of [Article 24\(1\)](#) of the Constitution. Since the couple resided in Kenya, the adoption was treated as a local adoption, allowing the placement to proceed. The decision affirms that adoption restrictions cannot override the best interests of the child under [Article 53](#), and that moratoria or statutory limitations must be demonstrably justified to be constitutionally valid.
171. In [In re LAO \(Child\) \[2023\] KEHC 17585 \(KLR\)](#), a Dutch national and a Kenyan citizen sought to jointly adopt LAO. The court held that the adoption was in the best interests of the child, noting that the child was available for adoption. Relying on **Re CC (Child)**, the court distinguished the matter from inter-country adoption and treated it as a kinship adoption because the Kenyan petitioner was the biological mother. Consequently, the adoption was recognized as a local placement aimed at securing the child's welfare rather than as an international adoption.
172. In [re TKM \(Minor\) \[2023\] KEHC 27280 \(KLR\)](#), SMO, a Kenyan citizen, and DTO, a United Kingdom national, sought to adopt TKM, SMO's biological son. The court approved the adoption under the Children Act, 2022, waiving the moratorium on foreign adoptions because of the applicants' kinship ties, stable family union and long-term residency in Kenya. Both applicants were assessed as suitable by the guardian ad litem and the Directorate of Children Services. The court evaluated the application on the basis of the child's best interests under [Article 53\(2\)](#) of the Constitution and [Section 4\(3\)](#) of the Children's Act, concluding that the adoption would protect and promote the child's rights to survival, protection, development, and participation in accordance with [Section 8](#) of the Act.

5.8.1.3 Adoption by Foreign Nationals

173. While there do not appear to be many recent reported decisions on adoption by foreign nationals, the High Court in [Re LMG \(Child\) \[2023\] KEHC 18227 \(KLR\)](#), declared the

2014 moratorium and [paragraph 17](#) of the [Seventh Schedule](#) to the Children Act, 2022 unconstitutional to the extent that they barred foreign nationals from adopting Kenyan children. The court found that these provisions unjustifiably limited the child's rights and welfare.

174. However, not all courts have adopted this approach. [In re FAO \(Minor\) \[2025\] KEHC 11868 \(KLR\)](#), the court held that foreign nationals could not be appointed as guardians, let alone adopt a child, and dismissed the matter.

5.8.1.4 Surrogacy-related Adoptions

175. The Children Act, 2022 does not directly regulate surrogacy. However, it governs the adoption of a child born through a surrogacy arrangement. On 12 November 2025, the National Assembly passed the [Assisted Reproductive Technology \(ART\) Bill 2022](#), which is now pending before the Senate. The Bill is designed to regulate surrogacy and related fertility treatments. It establishes a requirement for a formal agreement between the intended parents and the surrogate, identifying the intended legal parents upon birth. Until the [ART Bill](#) is enacted and aligned with the Children Act, 2022, surrogacy in Kenya remains unregulated.⁵³

176. In [AMN & 2 others v Attorney General & 5 others \[2015\] KEHC 6960 \(KLR\)](#), the High Court held that a surrogate mother is to be registered as the legal mother of a child until legal parenthood is formally transferred to the commissioning parents through adoption. Given the absence of a legislative framework for surrogacy in Kenya, the court adopted the approach used in the United Kingdom, relying on **Re D (A Child) EWHC 2121**, where the United Kingdom Human Fertilization and Embryology Act, 2008 provides that the woman who carries a child through surrogacy is deemed the legal mother. The principle established is that the surrogate initially retains legal motherhood, and commissioning parents acquire parental rights only once adoption or appropriate court orders are completed, thereby ensuring clarity and continuity in the child's legal status.

177. Unlike the law of the United Kingdom, which provides for the transfer of parental rights through a parental order, Kenyan law presently provides adoption as the available route. Commissioning parents must therefore make a formal adoption application in

⁵³ For clear analysis of the state of the law on surrogacy in Kenya, in comparison to India, South Africa and the United Kingdom see Ludia Luther, "On an Ethical Foundation? The case for Regulation of Surrogacy in Kenya", in East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya], available at <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3027>

respect of the child. In determining such an application, the court would be guided by two principal considerations: the need to ensure that the family unit intended in the surrogacy agreement is not frustrated by undue technicality, and the requirement that the best interests of the child remain paramount at all times.

178. The absence of a dedicated legal framework on surrogacy makes it difficult to resolve conflicts that may arise. For example, where a surrogacy arrangement was intended to result in the birth of one child but results in the birth of twins, neither the Children Act nor the Assisted Reproductive Technology Bill provides clear guidance on how the additional child should be treated. This may lead to disputes over custody, financial responsibility and parental rights, particularly where the commissioning parents seek to rely strictly on the agreement and adopt only one child. Although the [ART Bill](#) appears to lean towards respecting the contractual arrangement, the unresolved question remains how the best interests of the additional child would be secured.
179. Another scenario demonstrating the need for a clear legal framework concerns medical errors. For instance, where gametes are mixed up and the resulting child is not genetically related to the commissioning parents, the law does not provide clear guidance on the recourse available to the parties or on the determination of parentage. There are also no reported Kenyan cases resolving parentage disputes specifically arising from gamete mix-ups. Beyond the broad principle of the best interests of the child, courts have limited statutory guidance.
180. This contrasts with South Africa, where surrogacy agreements are regulated under the [Children's Act of 2005](#), which sets out explicit rules on the content of such agreements and requires court confirmation before a surrogacy agreement can be treated as legally binding.

5.8.1.5 Judicial Precedent on Surrogacy-related Adoptions

181. In [AMN & 2 others v Attorney General & 5 others \[2015\] KEHC 6960 \(KLR\)](#), the case concerned a surrogacy arrangement in which X and Y, the petitioners, entered into an arrangement with Z, the surrogate mother, resulting in the birth of twins. Y, the father, had a genetic link to the children. Following erroneous advice from the Attorney-General's office, the birth certificates initially listed X as the mother. The United Kingdom Passport Office rejected the birth certificates, citing the absence of a surrogacy law in Kenya and, consequently, the absence of a legal basis for such an entry on the birth certificates. The

court held that the surrogate mother, Z, remained the legal mother until legal parenthood was transferred through adoption or another legally recognized process. It further held that the birth certificates and Kenyan passports had been issued in error and had to be amended to reflect Z as the mother. In the absence of a surrogacy law, the applicable Kenyan legal framework recognized the woman who gave birth to the children as the legal mother. The court contrasted Kenya's lack of a legal framework on surrogacy with the United Kingdom's [Human Fertilization and Embryology Act 2008](#).

182. In [In re STKS \(Minor\) \[2025\] KEHC 8768 \(KLR\)](#), the applicants, a German citizen and a Tanzanian citizen, who did not have biological children, entered into a surrogacy agreement with LAA, the gestational surrogate. Baby STKS was safely delivered and subsequently placed in the applicants' legal custody after the surrogate mother signed the requisite consent. The court emphasized that, in the absence of specific surrogacy legislation in Kenya, judicial decisions in surrogacy-related matters are guided by the best interests of the child, with the child's welfare and well-being remaining the paramount consideration. This legislative gap is addressed under the section on areas for reform at the end of this chapter.

5.8.1.6 Kinship Adoption

183. [Section 193](#) of the Children Act, 2022 provides for kinship adoption, which refers to the adoption of a child by a relative. The procedure and requirements for adoption are set out under [Sections 186](#) to [188](#) of the Act. Kinship adoptions are the only international adoptions expressly permitted under the current statutory framework.

184. A key concern in this area is adoption by Kenyan citizens who are not ordinarily resident in Kenya, which is addressed under [Section 192](#) of the Act. [Section 192](#) provides that the requirements under [Section 191](#) apply to adoption by Kenyan citizens who are not ordinarily resident in Kenya, Kenyan citizens who have dual citizenship but are not ordinarily resident in Kenya, and persons who were Kenyan citizens by birth but lost that status by operation of law.

185. The requirements under section 191 for inter-country adoptions are that a court may make an adoption order in respect of a child on the joint application of two spouses who are not citizens or residents of Kenya if the applicants satisfy the court that:

- a. all efforts to trace the child's parents and relatives, and to reunify the child with them, have failed despite State support;

- b. all local arrangements for placing the child in family-based alternative care have been exhausted and have failed;
- c. the proposed adoptive parents have obtained the consents specified in [section 186 \(8\)](#);
- d. the country where the proposed adoptive parents ordinarily reside, and where they intend to reside with the child immediately after the making of the adoption order, will respect and recognize the adoption order and grant resident status to the child; and
- e. the proposed adoptive parents have been authorized and recommended as fit and financially capable to adopt a foreign child by a competent government authority or court of competent jurisdiction in the country where they intend to reside with the child immediately after the adoption order.

186. In addition to the statutory requirements governing adoption by Kenyan citizens who are not ordinarily resident in Kenya, Kenyan courts have pronounced themselves on kinship adoption by Kenyans residing outside the jurisdiction in the terms discussed below.

5.8.1.7 Judicial Precedent on Kinship Adoptions

187. Case law suggests that kinship adoptions by Kenyan citizens who are not ordinarily resident in Kenya are generally treated as local adoptions. Courts have also emphasized the need to guard against the misuse of immigration pathways, including residence or migration benefits in foreign jurisdictions, by ensuring that adoptive parents have been authorized and recommended by a competent government authority or court of competent jurisdiction in the country where they reside or intend to reside after the adoption order.

188. In [re J N A \[2018\] KEHC 2306 \(KLR\)](#), the court noted that the applicants, who held dual Kenyan-Irish citizenship, were not affected by the 2014 moratorium on foreign adoptions, which targeted inter-country and resident adoptions by non-Kenyans.

189. The court further noted that, under the Guidelines for the Alternative Family Care of Children in Kenya, kinship adoption by relatives within a child's extended family is treated as domestic adoption. Accordingly, Kenyans living abroad who adopt a Kenyan child do so as Kenyan citizens, and the adoption is classified as a local adoption rather than a foreign or inter-country adoption.

190. [In re Adoption of LLA \(Minor\) \[2024\] KEHC 15210 \(KLR\)](#), the court considered a kinship adoption by a Kenyan citizen living and working in Oslo, Norway, who sought to adopt her grandchild born to her daughter. Relying on *re JNA* [2018], the court held that, because the matter was a kinship adoption, the existing indefinite moratorium on foreign adoptions did not apply, even though the applicant resided abroad. The adoption was treated as a local or domestic adoption under Kenyan law.
191. [In re BEM \[2025\] KEHC 9426 \(KLR\)](#) the court considered an adoption application by relatives of the child who had not had prior physical interaction with the child but had established a relationship through virtual communication. The report before the court indicated that the child accepted the applicants as part of the family and that the applicants had been providing for the child's needs and those of the child's siblings. Considering this evidence alongside the applicants' financial capacity and stable marriage, the court granted the adoption order, emphasizing that a meaningful relationship and the ability to provide care satisfy key requirements for adoption.
192. [In re Kinship Adoption of BAA \(A Minor\) \[2025\] KEHC 7137 \(KLR\)](#), a Kenyan couple sought to adopt a child who was the biological child of the first applicant and his deceased partner. The court considered whether the applicants met the statutory requirements under the Children Act, 2022, whether all necessary consents and reports had been obtained, and whether the adoption served the child's best interests. Reports from the adoption society, the guardian ad litem and the Directorate of Children Services confirmed that the applicants were financially, socially and emotionally capable of raising the child. Applying [Sections 183, 186, 193 and 194](#) of the Children Act, 2022 together with [Article 53](#) of the Constitution, the court held that the adoption was in the child's best interests and that the applicants met the requirements for kinship adoption. It granted the adoption order, appointed legal guardians, directed registration in the Adoption Register and authorized the issuance of a Kenyan passport for the child.

5.8.2 Kafaalah⁵⁴

193. [Section 12](#) of the Children Act incorporates kafaalah, also known as kafalah or kafala in other jurisdictions, as a recognized form of alternative care and as a basis for social security for children whose parents or guardians are unable to maintain them, as

⁵⁴ This section is based on a research paper prepared by Hon. Ishaq Abduljabar Hussein, Deputy Registrar/Senior Principal Kadhi, Office of the Registrar, Magistrates' Court, April 2026.

guaranteed under [Article 43 \(3\)](#) of the Constitution. This incorporation reflects Kenya's obligations under [Article 20](#) of the [United Nations Convention on the Rights of the Child](#), which recognizes kafaalah, alongside foster placement and adoption, as an arrangement for children deprived of a family environment.⁵⁵

194. The [National Framework for Implementation of the Kafaalah care \(2025\)](#) and the [Draft Children \(Kafallah\) Regulations, 2024](#), which are in the final stages of public participation and regulatory impact assessment, are intended to operationalize the Children Act, 2022 and provide standardized procedures for kafaalah care.
195. The 2024 draft Regulations seek to regulate applications for registration as a **kafil**, meaning a caregiver, placement processes, supervision and reporting requirements. The Regulations, together with those governing adoption and foster care, form part of the Government's broader strategy to move from institutional care to family-based care, with a target of phasing out children's homes by 2032.
196. Kafaalah is the Islamic institution closest to foster care. It entails the voluntary undertaking of responsibility for a non-biological child without creating legal parentage or changing the child's lineage, known as nasab. Unlike adoption, kafaalah preserves the child's identity while ensuring care within a family environment. It finds Quranic legitimacy in Surah Al-Ahzab 33:4-5, which prohibits the pre-Islamic practice of establishing false lineage through adoption, while simultaneously affirming the duty to care for orphaned and abandoned children.

5.8.2.1 Judicial Precedent on Kafaalah

197. In [Re Application by H A B A \[2016\] KEKC 27 \(KLR\)](#), the Kadhis' Court in Nairobi considered the case of a Somali refugee who had lost her parents during the civil war and sought to join her informal caregiver in Canada. The application had been rejected because adoption is not recognized under Islamic law. The Kadhis' Court issued an advisory opinion holding that, while Islam prohibits adoption that erases a child's lineage, it strongly obligates the care of children who have been orphaned or deprived of parental care. Analyzing the

⁵⁵ Usang Maria Assim & Julia Sloth-Nielsen "Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment" (2014) 14(2) *African Human Rights Law Journal* 322–349 Available at: <https://www.researchgate.net/publication/317450172>; Nicole F. Bromfield & Karen Rotabi "The Care of Orphaned and Vulnerable Children in Islam: Exploring Kafala with Muslim Social Work Practice with Unaccompanied Refugee Minors in the United States" (2017) *Journal of Human Rights and Social Work*, Springer DOI: 10.1007/s41134-017-0027-2 Available at: <https://link.springer.com/article/10.1007/s41134-017-0027-2> accessed on 24.04.2026.

question through the six objectives of Shari'a, known as **maqasid al-shariah** - namely the protection of life, mind, family, wealth, dignity and religion - the court concluded that a reformed model of adoption is permissible, provided that the child's lineage is preserved. This means that the child retains the biological surname, inherits from the biological parents, and is not treated as a blood relative of the adoptive family.

198. Apart from the unreported Kadhis' Court decision in [Re Application by H A B A \[2016\] KEKC 27 \(KLR\)](#), there does not appear to be another Kenyan decision directly addressing this subject. However, courts across European jurisdictions have increasingly been required to address the legal implications of kafaalah. A consistent judicial approach appears to have emerged: while kafaalah is not equated with adoption, particularly where the child's country of origin prohibits such status, it is nevertheless accorded functional recognition to safeguard the child's welfare and family life. This has led courts in Europe to adopt flexible and context-sensitive interpretations of domestic and regional legal frameworks, especially in matters relating to immigration, parental responsibility and cross-border family arrangements. Central to this approach is the principle that the best interests of the child must prevail over strict legal formalism, while also balancing respect for foreign legal systems with the need to ensure effective protection of children within European legal orders. The relevant decisions are discussed below.
199. In [CJEU - Case C-129/18, SM v UK \(2019\)](#)⁵⁶ the Court of Justice of the European Union held that an Algerian child placed under kafaalah guardianship could fall within the category of "other family members" for purposes of European Union free movement law. This enabled consideration of the child's residence with the legal guardians in the United Kingdom, even though kafaalah was not recognized as legal adoption under United Kingdom law.
200. Similarly, in [Hind Harroudj v France \(2012\)](#), the French courts found that kafaalah provided legal authority in the child's best interests and was consistent with international children's rights standards. However, the courts confirmed that kafaalah does not amount to adoption under French law where the child's country of origin prohibits adoption.
201. In [A v B & Anor \[2024\] EWHC 3198 \(Fam\)](#), a United Kingdom court granted an adoption order to a British woman in respect of a Moroccan child who had previously been under

⁵⁶ <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c%E2%80%999112918-sm-enfant-plac%C3%A9-sous-kafala-alg%C3%A9rienne-26-march-2019> (accessed on 28 April, 2026).

kafaalah guardianship. The court did so despite a technical breach of inter-country adoption procedures under [Section 83](#) of the [Adoption and Children Act 2002](#), prioritizing the child's welfare.

202. Significantly, the decision clarified the approach of the United Kingdom courts to integrating Moroccan kafaalah arrangements into British adoption law. It emphasized the child's best interests over technical procedural errors and demonstrates how legal systems may adapt to address the needs and rights of children across borders.

203. In [CJEU - Case C 129/18, SM \(Enfant placé sous kafala algérienne\), 26 March 2019](#), the Court of Justice of the European Union considered the recognition of an Algerian kafaalah arrangement within the European Union legal framework. The Court held that the Algerian kafaalah system does not create a parent-child relationship within the meaning of "direct descendant" under Directive 2004/38. However, it may fall within the category of "other family members" under Article 3(2)(a) of the same Directive. This remains a developing area of law that Kenyan courts may continue to watch, particularly as kafaalah becomes more clearly operationalized under the Children Act, 2022.

5.8.3 Guardianship

204. Guardianship is one of the forms of alternative care expressly contemplated by the Children Act, 2022.⁵⁷ [Section 122](#) is the foundational provision. It defines who may be a guardian and the modes through which guardianship may be constituted. A guardian may be appointed either by will or deed, commonly referred to as testamentary guardianship, or by order of the court.⁵⁸ The Act further requires a guardian to be a Kenyan citizen, reflecting the legislature's intention to anchor the guardianship regime within national jurisdiction. A guardian may be appointed in respect of the person of the child, the estate of the child, or both, depending on the nature of the appointment and the circumstances of the case.

205. This section addresses testamentary guardianship and the eligibility of foreign nationals to act as guardians.

⁵⁷ Section 12 of the Children Act, 2022.

⁵⁸ Section 125 of the Children Act, 2022.

5.8.3.1 Testamentary Guardianship

206. [Section 124](#) of the Children Act provides for testamentary guardianship. This provision governs the appointment and role of guardians for a child, particularly after the death of a parent. It allows either parent to appoint a guardian by will or deed, and also allows an existing guardian to appoint a successor, provided that the appointment meets the applicable legal formalities, including proper witnessing or compliance with the law on wills.

207. An appointed guardian will generally act jointly with the surviving parent during that parent's lifetime, unless the surviving parent objects or the guardian believes that the surviving parent is unfit, in which case either party may apply to the court. The court has broad powers to determine the most suitable arrangement in the child's best interests. These powers include confirming or rejecting the appointment, ordering joint guardianship, appointing another suitable person, preferably a relative, or making the appointed guardian the sole guardian while also addressing custody, access and financial support. The provision also ensures continuity by stating that guardians appointed by both parents will act jointly after the death of both parents, and that a guardian acting jointly with a parent continues after that parent's death, sometimes alongside another appointed guardian. Additionally, persons who already have lawful custody or care of the child must act jointly with the surviving parent or guardian, although the court may alter such arrangements where necessary to protect the child's welfare.

208. Case law emphasizes that testamentary appointments, while valid, are subject to the paramount principle of the best interests of the child. Courts may override testamentary appointments where the surviving parent objects or where the proposed guardian is found to be unfit. [The Children \(Guardianship\) Practice and Procedure\) Rules, 2024](#) provide that appointment⁵⁹ must be in writing, either through a will or a formal deed, and must comply with the formalities under the Law of Succession Act. A testamentary deed must also meet the requirements set out under [Rule 13](#).

209. The Rules further provide for mandatory registration of the testamentary instrument,⁶⁰ whether a will or deed, with the children's court within thirty (30) days of execution, and for any subsequent amendment or revocation to be registered within fourteen (14) days.

⁵⁹ Rule 9 Children (Guardianship) (Practice and Procedure) Rules, 2024.

⁶⁰ Rule 16 of the Children (Guardianship) (Practice and Procedure) Rules, 2024.

Once the testamentary instrument is written and executed by the parent and witnesses, it must be registered in court within thirty (30) days to ensure its validity and enforceability. It may also be registered within thirty (30) days of the death of the appointing parent.

210. Any Kenyan citizen of high moral character, capable of providing care and guardianship, and not convicted of serious crimes or child-related offences, is eligible for appointment as a testamentary guardian.
211. A testamentary guardian assumes guardianship automatically upon the death of the parent where the testamentary instrument was duly registered. Where the instrument was not registered, the guardian may assume responsibility immediately if there is no other person exercising parental responsibility, provided that a certified copy of the instrument is registered within thirty (30) days of assuming parental responsibility.⁶¹
212. The validity or enforcement of the testamentary instrument may be challenged through a notice of motion supported by an affidavit and registered as a miscellaneous application. Where there are existing proceedings before the court relating to the same child, the application must be filed within those proceedings. Ultimately, the court retains the power to revoke or replace a guardian where the child's welfare, estate or best interests are at risk.

5.8.3.2 Foreign Nationals' Eligibility as Guardians

213. By [Legal Notice No 159](#) of 4 October 2024, the Honourable Chief Justice gazetted the [Children \(Guardianship\) \(Practice and Procedure\) Rules, 2024](#) to guide procedures relating to the guardianship of children under the Children Act. [Rule 6](#) outlines the qualifications for appointment as a guardian. The proposed guardian must be a Kenyan citizen and a fit person. The court must be satisfied that the person is of high moral character and integrity, is capable of giving proper care and guardianship to the child, is of sound mind and has not been convicted of any offence. This rule, read together with [Section 122\(3\)](#) of the Act, expressly bars foreign nationals from being appointed as guardians.
214. Decisions on foreign guardianship in Kenya reveal two distinct approaches. Under the first approach, courts apply statutory provisions strictly, including the citizenship requirement in [Section 122\(3\)](#) of the Children Act, 2022, and decline to grant orders even where welfare considerations may favour placement. Under the second approach,

⁶¹ Rule 23 of the Children (Guardianship) (Practice and Procedure) Rules, 2024.

courts priorities the best interests of the child and may, in appropriate cases, interrogate statutory limitations or moratoria to ensure that children in need of care are placed in stable, caring and legally secure homes, consistent with [Article 53\(2\)](#) of the Constitution and international norms on inter-country adoption. It must, however, be noted that in the latter category, the adoptive parents were a mixed-nationality couple, comprising a Kenyan citizen married to a foreign national.

215. By comparison, in the South African case of [Minister for Welfare and Population Development v Fitzpatrick and Others](#),⁶² the Constitutional Court held that section 18 (4) (1) of the of the Child Care Act was unconstitutional because it prohibited the adoption of South African children by foreign nationals. Goldstone J confirmed that the provision violated children's rights as protected under the Constitution of South Africa and [Article 21](#) of the United Nations Convention on the Rights of the Child. Based on this precedent, South African courts have adopted a more flexible approach in matters of child custody, guardianship and adoption involving foreign nationals, while remaining guided by the best interests of the child.

5.8.3.3 Judicial Precedent on Foreign Nationals' Eligibility as Guardians

216. Decisions in this area reflect two distinct approaches. The first is a strict statutory approach that applies the citizenship requirement as enacted. The second is a best-interests approach, under which courts interrogate limitations where necessary to protect the child's welfare. Although one of the cases involved a Kenyan national married to a foreign national, the court went further and declared the moratorium on inter-country adoption unconstitutional for unjustifiably limiting the adoption process.

217. [In re FAO \(Minor\) \[2025\] KEHC 11868 \(KLR\)](#), Turkish nationals residing in Kenya sought to adopt a Kenyan child and the child's sister, having previously been appointed as their guardians by the Nairobi Children's Court. While the court noted that the children were happy and well cared for, it examined the legality of granting guardianship to foreign nationals, given that [section 122\(3\)](#) of the Children Act, 2022, unlike [section 102\(3\)](#) of the Children Act, 2001, requires guardians to be Kenyan citizens. The court held that it was bound to uphold the law. Although the best interests of the child are paramount, the applicants had not demonstrated exceptional circumstances to justify granting the adoption or guardianship orders.

⁶² (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713 (CC); 2000 (3) SA 422 (CC) (31 May 2000).

218. [In re LMG \(Child\) \[2023\] KEHC 18227 \(KLR\)](#), the case involved RMW, a Kenyan national, and BGC, a Spanish national, who sought to adopt Baby L, a child found abandoned in Nairobi in 2021. The court ruled that the 2014 moratorium on inter-country adoptions was unconstitutional, allowing the adoption to proceed as a local adoption because the couple resided in Kenya. The court found the moratorium unreasonable and unjustifiable because it failed to provide alternatives for children in need of adoption and did not comply with [Article 24\(1\)](#) of the Constitution. The moratorium was declared unconstitutional because it was not expressly justified as a limitation of rights under [Article 53\(2\)](#).
219. South African courts have considered comparable circumstances. In [Minister for Welfare and Population Development v Fitzpatrick and Others \(CCT08/00\) \[2000\] ZACC 6; 2000 \(7\) BCLR 713 \(CC\); 2000 \(3\) SA 422 \(CC\) \(31 May 2000\)](#), Mr and Mrs Fitzpatrick were British citizens who had been living permanently in South Africa since March 1997. They sought to adopt a child born to a South African citizen. However, [section 18 \(4\) \(1\) of the Child Care Act](#) absolutely prohibited the adoption of a child born to a South African citizen by a non-citizen, or by a person who had the residential qualifications for South African citizenship but had not applied for a certificate of naturalization.
220. The main issue for determination was whether [section 18 \(4\) \(1\) of the Child Care Act](#) was constitutional in prohibiting the adoption of South African children by non-South Africans. The provision was held to be unconstitutional because it violated the rights of the child. The Court held that the Act not only offended certain fundamental rights under the Constitution of South Africa, but also infringed the standards governing inter-country adoptions under [article 21](#) of the [UN Convention on the Rights of a child](#).

6.0 AREAS FOR REFORM AND LESSONS FROM OTHER JURISDICTIONS

6.1 Safeguards on Adoption by Foreign Nationals

221. Kenya could consider reforms on adoption by foreign nationals, including permitting such adoption where reasonable efforts to secure suitable placement with a Kenyan family have failed. Drawing from jurisdictions such as South Africa, where the principle of subsidiarity applies, adoption by foreign nationals should be subject to strict safeguards. These



may include approval by a designated Central Authority, mandatory court confirmation, enhanced vetting of prospective adoptive parents, criminal background checks, financial capacity assessments, psychological evaluations, verified home studies conducted by accredited agencies in the prospective adoptive parents' countries of residence, and mandatory periodic reports to Kenyan authorities for a defined period after placement to ensure the child's continued welfare. The law could also provide for nullification of adoption orders obtained through misrepresentation, with criminal sanctions where appropriate.

6.2 Regulating Surrogacy

222. The Children Act, 2022 is silent on surrogacy, despite the increasing use of assisted reproductive technologies in Kenya. This silence has required courts to analogise surrogacy-related disputes to adoption or guardianship, an approach that is not fully suited to the legal realities of surrogacy and that may produce uncertainty. It also risks failing to guarantee equal protection and benefit of the law for all parties, particularly children born through surrogacy arrangements. Courts inevitably resort to the best interests of the child principle, which is necessary but insufficient to resolve specific questions relating to contractual intention, liability, legal parenthood and parental responsibility.

223. Kenya should consider enacting dedicated surrogacy legislation. Such legislation could provide for the recognition of the parental rights and responsibilities of intended or commissioning parents upon birth, or within a specified period after birth, subject to safeguards. It should also provide clear rules on multiple births, parentage, consent, the legal status of the surrogate, parental responsibility, medical errors, record-keeping and the protection of the identity, dignity and welfare of the child.

6.3 Additional Safeguards to Prevent Abuse or Misuse of Kinship Adoptions

224. To preserve kinship adoption while preventing abuse or misuse, Kenya could introduce immigration disclosure requirements where prospective adoptive parents reside outside Kenya. It could also mandate post-adoption monitoring, especially for cross-border placements, and criminalize deliberate misrepresentation in kinship adoption proceedings. These safeguards would help preserve the protective purpose of kinship adoption while ensuring that the best interests of the child remain paramount.

6.4 Parental Responsibility of Stepparents

225. The legal requirement that stepparents may continue to provide for children even after dissolution of the marriage between the stepparent and the child's biological parent calls for further reflection.⁶³ The Children Act, 2022 recognizes the best interests of the child as paramount, but questions remain on how to balance this principle against the autonomy and obligations of stepparents. Clarification may be required on the scope and duration of a stepparent's parental responsibility, particularly where the child's biological parent remains alive and capable of providing care. For example, does a biological father retain parental responsibility where the relationship with the child's mother has ended and the mother has married or is cohabiting with another person? Conversely, what is the legal position where a biological mother remains available and the child's father has entered a new marriage or cohabiting relationship? These questions demonstrate the need for clearer guidance on the scope and application of [section 34 \(6\)](#) of the Act.

6.5 Adoption and Guardianship by Foreign Nationals

226. In [In re LMG \(Child\) \[2023\] KEHC 18227 \(KLR\)](#), the court declared the 2014 moratorium on adoption by foreign nationals, and paragraph 17 of the [schedule 7](#) to the Children Act, 2022 which incorporated the moratorium, unconstitutional. However, guardianship by foreign nationals remains barred under the current statutory framework. It has been argued that the best interests of the child may be better served by thorough vetting and robust post-placement monitoring, rather than by a complete ban. The blanket prohibition, although intended to curb trafficking and exploitation, has been criticized as potentially ineffective and as insufficiently attentive to the protective role that adoption or guardianship may play for children deprived of parental care.⁶⁴

⁶³ Ndubi, Marvis and Gaiciumia Beatrice, 'Exploring the Intricacies of Step-parenting, parental responsibility and children rights in Kenya' (March 1, 2024) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745812 >; Margaret M. Mahoney, "Support and Custody Aspects of the Stepparent-Child Relationship" (1984) 70(1) *Cornell Law Review* 38–78 Available at: <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4370&context=clr> accessed on 24.04.2026; Joanna L. Grossman, "De Facto Parentage and the Rights of Former Stepparents" *Verdict — Justia Commentary*, December 2013 Available at: <https://verdict.justia.com/amp/2013/12/10/de-facto-parentage-rights-former-stepparents>

⁶⁴ Shirley Shitawa Wangusi. "Intercountry adoption in Kenya: A critique on the role of government regarding the modern-day human trafficking". LLB Research Paper, Strathmore University Law School Available at: <https://su-plus.strathmore.edu/items/1136c4e7-5302-40b6-824d-fbe32f57c7bc>

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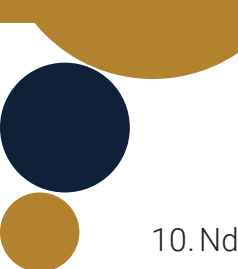
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<i>TSJ v SHSR</i> [2019] KECA 170(KLR)	44
<i>Wilfred Koinange Gathiomi V. Joyce Wambui Mutura & Another</i>, [2016] eKLR	55
<i>ZAK & another v MA & another</i> (Petition 193 of 2011) [2013] KEHC 6007 (KLR)	31,49,57
<i>In ZN (Suing as mother and next friend of the Minors) v FB</i> (Children's Case 266 of 2019) [2024] KEMC 79 (KLR)	46
<i>ZUDG v SJKUR</i> [2020] eKLR	43

8.0 REFERENCES FOR FURTHER READING

1. Alubaba I, 'The Children Bill 2021: A Journey towards Promoting and Protecting Child Rights in Kenya' (Save the Children, 21 January 2022) <https://www.savethechildren.net/news/children-bill-2021-journey-towards-promoting-and-protecting-child-rights-kenya> accessed 8 January 2026.
2. Dausab Y, 'The Best Interests of the Child' in Oliver C Ruppel (ed), *Children's Rights in Namibia* (Macmillan Education Namibia 2009).
3. Gichuki L, 'Legislators Uphold International Adoption Ban, Recommend Phasing Out Children's Homes' (*Mtoto News*) <https://www.mtotonews.com/legislators-upholds-international-adoption-ban-recommends-facing-out-childrens-homes/> accessed 15 January 2026.
4. Kanyoko J, 'How Different Are Children Courts from Normal Courts?' (2020) https://aip-advocates.com/wp-content/uploads/2020/08/How-different-are-children-courts-from-normal-courts_.pdf accessed 15 January 2026.
5. Kariuki J, 'Towards a Child Rights Approach: A Comparative Analysis of the Juvenile Justice Reform Process in Kenya and South Africa' (Central European University 2010).
6. Luther L, 'On an Ethical Foundation? The Case for Regulation of Surrogacy in Kenya' in *East African Law Journal* Special Issue, 'Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya' <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3027> accessed [insert access date].
7. Moraa T and Gor G, 'The Nexus between the Best Interest of the Child and Detention of Children in Conflict with the Law' (2023) 7 *Kabarak Journal of Law and Ethics*.
8. Mbuvi DN, 'Ensuring Equal Parental Responsibility: A Study on the Retrospective Application of Section 2 of the Children Act 2022 in Kenya in Line with the Child's Best Interest Standards' (2024).
9. Ndirangu E and Maimba D, 'The Children Act, 2022: What's Changed? - A Legal Blackline' (MO Advocates, 8 September 2022) <https://moadvocates.co.ke/2022/09/08/the-children-act-2022-whats-changed-a-legal-blackline/> accessed 8 January 2026.

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10. Ndubi M and Gaiciumia B, 'Exploring the Intricacies of Step-parenting, Parental Responsibility and Children Rights in Kenya' (1 March 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745812 accessed 13 January 2026.
 11. Nyabuti M, 'Appraising Kenya's Children Act from Sexual and Reproductive Healthcare Rights Perspectives' (2024) 1(1) *Kenyatta University Journal on Children's Rights*.
 12. Odongo GO, 'The Post-2010 Jurisprudence on Children's Rights under the Kenyan Constitution' (2022) 22 *African Human Rights Law Journal*.
 13. Zaman M and Chatterjee S, 'Child Rights in Kenya - 30 Years On' (UNICEF Kenya, 22 November 2019) <https://www.unicef.org/kenya/stories/Child-rights-in-kenya-30-years-on> accessed 8 January 2026.

CHAPTER 3: LAW OF SUCCESSION

1.0 INTRODUCTION

1. The principal statute governing succession in Kenya is the [Law of Succession Act](#), which was enacted in 1972 and came into force in 1981. However, a significant proportion of succession matters continue to be conducted outside the statutory framework, as a Judiciary study established.⁶⁵ The continued influence of customary and religious norms in this area of law partly explains why the Act took nine (9) years to come into force. The proposal to establish a single statute applicable to succession across the country was controversial from the outset. The law was drafted by the [Presidential Commission on the Law of Succession](#), which submitted its report in 1968.
2. Among the general policy considerations that guided the Commission's work was the need for the law to recognize the diversity of Kenya's community norms while also promoting national unity in a rapidly changing socio-economic context.
3. From the outset, the Commission was committed to recommending a law that would be as simple as possible and aimed at minimizing litigation. This was reflected in General Policy Consideration No. 10. The Commission envisioned that forms for applications for probate and letters of administration would be made available at the lowest administrative unit, in English, Kiswahili and, where necessary, the relevant local language.
4. The [Probate and Administration Rules](#) were promulgated in 1980 to guide the application of the Law of Succession Act. The Rules draw extensively from the Civil Procedure Rules because the Law of Succession Act contains limited procedural detail. This reflects the Commission's original intention that the succession process should not be overly contentious.

⁶⁵ Judiciary of Kenya, *Alternative Justice Systems Baseline Policy (2020)*; Judiciary of Kenya, *Alternative Justice Systems Framework Policy (2020)*, all available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>.

2.0 CONSTITUTIONAL FRAMEWORK FOR THE LAW OF SUCCESSION

5. Unlike other areas of family law, the law of succession has not undergone comprehensive review to align it with the [2010 Constitution](#). As a result, it is characterized by several ambiguities, gaps and inconsistencies with other areas of law. This is despite [Article 68\(c\)\(vi\)](#) of the Constitution, which requires Parliament to enact legislation “to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land”.
6. Nonetheless, [Article 259\(1\)\(a\)](#) of the Constitution requires judicial officers to interpret all laws in a manner that promotes the purposes, values and principles of the Constitution. It is therefore imperative that probate courts interpret and apply the law of succession in a manner consistent with the Constitution of Kenya, 2010. Cases that have challenged aspects of the Law of Succession Act are discussed under the key concerns in section 6 below.

3.0 INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK RELEVANT TO SUCCESSION

- Only one treaty directly addresses succession: the [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#), commonly known as the Maputo Protocol. Other international and regional instruments address succession indirectly through provisions on equality, non-discrimination, property rights, family protection and the best interests of the child.

3.1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

8. The Maputo Protocol⁶⁶ addresses succession directly in two provisions: Article 20 on the rights of widows and Article 21 on the right to inheritance. Article 20 protects widows from inhuman and degrading treatment; guarantees them automatic guardianship of their children following the death of a husband, unless this is contrary to the welfare of

⁶⁶ The Maputo Protocol is available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

the children; and guarantees their right to remarry and their freedom to choose whom to marry. On this last point, inheritance laws, customs and practices should not be designed or interpreted in a manner that restricts a widow's choice to remarry or her choice of spouse.

9. Article 21 guarantees a widow an equitable share of her husband's property. It gives specific protection to her right to continue living in the matrimonial home and to retain that right in the event of remarriage "if the house belongs to her or she has inherited it". This protection is reinforced by the [African Commission's Resolution 262 on Women's Rights to Land and Productive Resources \(2013\)](#).
10. Article 21 also provides for the right of women and men to inherit their parents' properties "in equitable shares". The use of the word "equitable", rather than "equal", is significant and is explained by the drafting history of the Protocol. States such as Algeria, Egypt, Libya and Sudan objected to the use of "equal" in this and other clauses relating to the family sphere. The pursuit of consensus in adopting the text therefore required broader and more flexible wording.⁶⁷

3.2 [African Charter on Rights and Welfare of the Child](#)

11. The African Charter on the Rights and Welfare of the Child⁶⁸ does not directly address succession. However, Article 4 articulates the overarching principle of the best interests of the child, which is paramount in all matters affecting children. Indirect protection of children's rights in succession matters may be inferred from the Charter's protection of the family under Article 18, the responsibility of parents or other responsible adults to maintain the child under Article 20, and the protection of the child from harmful social and cultural practices under Article 21. This would include inheritance practices that deprive children and their immediate family of the resources needed for their care, maintenance and development.

⁶⁷ The drafting history of various articles of the Maputo Protocol is discussed in Annika Rudman, Celestine Nyamu Musembi & Tresor Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (PULP, 2023), available at <https://www.pulp.up.ac.za/latest-publications/the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-a-commentary>. The commentary has a chapter each on articles 20 and 21 which deal with the rights of widows and women's equal right to inheritance, respectively.

⁶⁸ The African Children's Charter is available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf

3.3 African Charter on Human and Peoples' Rights

12. Succession is addressed indirectly in the African Charter on Human and Peoples' Rights,⁶⁹ the core regional human rights instrument. Article 14 guarantees the right to property in the following terms:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the interests of appropriate laws."

3.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

13. The Convention on the Elimination of All Forms of Discrimination against Women⁷⁰ addresses succession indirectly through [Article 16](#), which obligates States to take appropriate measures to ensure "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."

14. Other provisions of the Convention that require States to address discriminatory customs and practices, including [Article 2\(f\)](#); [5\(a\)](#) are also relevant to equality in the law of succession.

3.5 General International Legal Provisions on Non-discrimination

15. Core international human rights treaties, including the [International Covenant on Economic, Social and Cultural Rights](#),⁷¹ and the [International Covenant on Civil and Political Rights](#),⁷² often referred to as the "twin covenants," do not directly address succession. However, their non-discrimination provisions are relevant to the law of succession. Both Covenants contain an anti-discrimination clause under Article 2, framed broadly to prohibit discrimination on several grounds, including property status, sex and religion.

⁶⁹ The African Charter is available at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

⁷⁰ CEDAW is available at <https://www.ohchr.org/sites/default/files/cedaw.pdf>

⁷¹ The International Covenant on Economic, Social and Cultural Rights is available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

⁷² International Covenant on Civil and Political Rights is available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

4.0 JURISDICTION OF PROBATE COURTS

16. As a general rule, probate courts have jurisdiction only over the free property of a deceased person. “Free property” is defined under section 3 of the Law of Succession Act as property in respect of which the deceased person was “legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death” ([section 3](#)).
17. [Section 4](#) of the Law of Succession Act provides that the Act applies with respect to:
 - a. immovable property located in Kenya, irrespective of the deceased person’s domicile; and
 - b. movable property, where the deceased person was domiciled in Kenya at the time of death.
18. The court of first instance in succession matters, except in relation to the estates of Muslims, is either the High Court or the Chief Magistrate’s Court, depending on the value of the estate. The Chief Magistrate’s Court has jurisdiction where the value of the estate does not exceed KSh 20 million, pursuant to section 7 of the Magistrates’ Courts Act, 2015. The jurisdiction of magistrates’ courts is also subject to section 49 of the Law of Succession Act on territorial jurisdiction.
19. It is also important to flag the issue of overlap in subject matter among courts. It is not uncommon for a succession-related matter to originate in the Environment and Land Court as a dispute concerning ownership of land or as a claim in trespass. In such situations, courts have applied two tests. The first is the exclusive jurisdiction test: where a statute vests exclusive jurisdiction in a designated court, the proper course is to defer to that court. The second is the predominant issue test: where a dispute raises multiple issues, but one predominant issue is identifiable, the court with jurisdiction over that predominant issue is the appropriate forum. Accordingly, where a matter filed before the Environment and Land Court is, in substance, a succession dispute, the court may refer it to the High Court.
20. Procedural concerns under the Law of Succession Act are discussed in the relevant section below.

5.0 SCOPE OF APPLICATION OF THE LAW OF SUCCESSION ACT

21. [Section 2](#) of the Law of Succession Act provides that the Act applies universally to all cases of intestate and testamentary succession in relation to persons dying after its commencement. However, [section 2\(3\)](#) limits this universal application by exempting the estates of Muslims from the Act. This provision was introduced through a long-contested amendment in 1991. The law applicable to the estate of a Muslim is Islamic inheritance law. [Section 2\(4\)](#) leaves room for the application of [\(Part VII\)](#) of the Law of Succession Act on administration of estates, where those provisions are not inconsistent with Islamic inheritance law. Matters involving the estates of Muslims are heard, in the first instance, in the Kadhis' courts, with appeals lying to the High Court.
22. The scope of application of the Law of Succession Act is further limited by [section 32](#), which exempts land and livestock in selected, largely pastoralist, counties from the intestacy provisions of the Act. [Section 33](#) provides that the applicable law in respect of land and livestock in those counties is the customary law applicable to that area. In [Ripples International-v-AG \[2022\] KEHC 13210 \(KLR\)](#), a petition before the High Court's Constitutional and Human Rights Division challenged [sections 32](#) and [33](#) as unconstitutional, alleging that they had a discriminatory impact against women. This aspect of the petition did not succeed because no evidence of discriminatory impact was presented.
23. In addition to these two statutory exemptions, research commissioned by the Judiciary found that only a small proportion of succession matters are handled through formal legal processes.⁷³ An academic study published in 2024 estimated that only nine per cent (9%) of estates are administered through the formal succession process.⁷⁴ This reflects the reality of legal pluralism. Like other areas of family law, the law of succession is characterised by multiple normative orders that regulate people's lives, including statutory law, customary law, religious norms and informal family processes. This reality underscores the need to give prominence to the integration of alternative justice mechanisms in resolving succession disputes, while ensuring consistency with the Constitution.

⁷³ See note 1.

⁷⁴ Rebecca Simson, 'Is Kenya's Gender Wealth Gap Narrowing? New Insights from Probate Records' *Socio-Economic Review*, 23(2), 513-540 available at <https://academic.oup.com/ser/article/23/2/513/7748572>

6.0 KEY CONCERNS ARISING FROM THE LAW OF SUCCESSION ACT

24. Several key resources address the law of succession broadly, and references to those resources are provided below.⁷⁵ This Bench Book focuses on key issues that judicial officers and other stakeholders have identified as requiring clarity. Following a brief section on jurisdiction, the remainder of this chapter is organised around the following key issues:

- provision for dependants;
- distribution of intestate estates in polygamous families;
- relevance of customary law in proceedings under the Law of Succession Act;
- succession claims founded on status under customary law;
- property not subject to succession proceedings;
- incongruity between the Law of Succession Act and the law of marriage in defining “spouse”;
- synergy and dissonance between the law of succession and matrimonial property law;
- life interest versus absolute interest for a surviving spouse;
- succession under Islamic inheritance law;
- succession and digital assets; and
- common procedural concerns in succession.

6.1 Provision for Dependants

25. [Sections 26 to 30](#) of the Law of Succession Act deal with provision for dependants. [Section 26](#) creates a mechanism through which a person who was dependent on the deceased may apply to the court for reasonable provision. This applies where such a person has been omitted from a will, or where the will does not make adequate provision for that person’s needs. It also applies in cases of intestacy where a dependant is excluded from the categories of beneficiaries or is inadequately provided for. The same may apply where

⁷⁵ Resources on law of succession: Musyoka, William, *Law of Succession* (2nd Edition, Law Africa, 2022); Kenya Judiciary & IDLO, *Simplified Resource Tool on Inheritance and Related Family Law Practice in Kenya* (available at <https://judiciary.go.ke/download/simplified-resource-tool-on-inheritance-and-related-family-law-practice-in-kenya/>); Ang’awa, Mary, *Procedure in the Law of Succession* (Revised Edition, Law Africa 2016); Fila, Ali Elema, Patrick O. Kiage & Celestine N. Musembi, ‘Partition in Life and in Death: Intestate Succession After the Matrimonial Property Act 2013’, in *East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya]*, 135-155, (available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3015>).



27. [Section 29](#) sets out the eligibility criteria for dependants. The section essentially creates two categories of dependants: those who are automatically eligible for provision, and those whose eligibility depends on proof that they were actually dependent on the deceased immediately before death. The first category is restricted to members of the immediate family, namely “the wife or wives, or former wife or wives, and the children of the deceased”. The second category, whose eligibility is conditional on proof of dependency, includes parents, step-parents, grandparents, grandchildren, step-children, children taken into the family by the deceased and treated as the deceased’s own, siblings and half-siblings.

28. It is necessary to highlight issues arising from the Law of Succession Act's definition of a child for purposes of succession, including dependency. Since children of the deceased are automatically eligible as dependants, the effect of [section 29\(a\)](#) depends significantly on how the Act defines a child. It should also be borne in mind that the reference to "child" under the Law of Succession Act does not carry the meaning assigned to the term under [Article 260](#) is to a relationship by descent, whether biological, adoptive or arising from a history of assumed parental responsibility. [Section 3\(2\)](#) defines "child" or "children" to include:

“a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male

person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

29. The definition of a child born outside marriage in relation to a male person is inconsistent with [Article 53](#) of the Constitution and [section 32\(1\)](#) of the [Children Act](#), 2022, to the extent that it does not automatically impose parental responsibility on the father. The definition differentiates between children based on whether they were born within or outside marriage. [Section 29\(a\)](#) of the Law of Succession Act means that, for a child born to parents who were not married to each other, the father’s parental responsibility is treated as voluntary. Such a child is therefore not automatically eligible as a dependant of the father under [section 29\(a\)](#). The only parent in relation to whom dependency is automatic is the mother. This contravenes [Article 53\(1\)\(e\)](#) of the Constitution, which guarantees every child the right to equal responsibility of the mother and father to provide for the child, whether or not they are married to each other.
30. [Section 3\(2\)](#) of the Law of Succession Act, together with [section 12](#) of the [Registration of Birth’s and Death’s Act](#), was challenged as establishing an unconstitutional “optional paternity scheme” in [NSA & FIDA -v- Cabinet Secretary for Ministry of Interior and Coordination of National Government & the AG \[2019\] KEHC 9196 \(KLR\)](#). The court declared that the impugned provisions contravened [Article 53\(1\)\(e\)](#), which requires both mothers and fathers to provide for their children regardless of whether they are married to each other.
31. This is one of the instances demonstrating that the Law of Succession Act is out of step with the Constitution of Kenya, 2010, and it is highlighted under “Areas for Reform” at the end of this chapter. Judicial officers must therefore interpret the dependency provisions of the Act in a manner that gives effect to the Constitution. [Section 3\(2\)](#) of the Law of Succession Act has become inapplicable to the extent of its inconsistency with Article 53(1)(e). Probate courts should therefore disregard it and treat claimants born outside marriage, upon proof of paternity, as automatic dependants of a deceased father, in line with [Article 53\(1\)\(e\)](#) of the Constitution.

6.1.2 Eligibility of Spouses as Dependants

32. It is also necessary to highlight the Law of Succession Act’s provisions concerning spouses and former spouses as dependants. The Act treats wives and husbands differently. Wives and former wives fall into the category of dependants who are automatically eligible,

while husbands and former husbands must prove that they were actually dependent on the deceased wife immediately before her death under [\(section 29\(c\)\)](#). This has been challenged as discriminatory and inconsistent with developments in the law of marriage and matrimonial property under the post-2010 constitutional dispensation. See [Dennis Kivuti Mungai -v- AG \[2025\] KEHC 8544 \(KLR\)](#), discussed below. The obligation to maintain a spouse is now expressed in gender-neutral and mutual terms. This is evident when the language of section 25 of the repealed [Matrimonial Causes Act \(repealed\)](#) with [section 77](#) of the [Marriage Act, 2014](#) and [section 10](#) of the [Matrimonial Property Act, 2013](#). This calls for reform and is highlighted at the end of the chapter. In the meantime, judicial interpretation of [section 29\(c\)](#) of the Law of Succession Act must take into account the post-2013 marital regime, which implements the Constitution of Kenya, 2010.

33. The definition of “spouse” also highlights another area of incongruity between the law of succession and the law of marriage. A 2021 amendment to section 3 of the Law of Succession Act inserted the phrase: “‘spouse’ means a husband or a wife or wives recognised under the [Marriage Act \(No.4 of 2014\)](#). The incongruity arises because [section 3\(5\)](#) of the Law of Succession Act adopts a broader definition of a wife for purposes of dependency under section 29 and intestate succession under [section 40](#). [Section 3\(5\)](#) posthumously posthumously confers the status of marriage on a union that is otherwise void for bigamy. By contrast, the [Marriage Act, 2014](#) leaves no room for recognition of a bigamous union under ([sections 9 \(a\)](#) and [11\(1\)\(c\)](#)). Several cases have revolved around this issue, and the relevant judicial precedents are discussed below.
34. With respect to former spouses, the statutory provisions do not expressly connect dependency claims under the Law of Succession Act with any division of matrimonial property that may have been made during the deceased’s lifetime. This issue is also flagged under the section on reforms at the end of the chapter. In determining claims for reasonable provision for dependants, settlements or determinations under the Matrimonial Property Act should be considered among the factors informing the court’s discretion under [section 28](#) of the Law of Succession Act.

6.1.3 Judicial Precedent on Dependency

35. Most cases on dependency have revolved around eligibility. In [Dennis Kivuti Mungai -v- AG \[2025\] KEHC 8544 \(KLR\)](#), the Constitutional and Human Rights Division of the High Court declared [section 29\(c\)](#) of the Law of Succession Act unconstitutional on the ground of sex discrimination against husbands and former husbands. The provision

required husbands and former husbands to prove dependency on their deceased spouse immediately before death, a requirement not imposed on wives and former wives. The court cautioned, however, that requiring proof of dependency is not, in itself, unconstitutional. What offends the equality principle in the Constitution is requiring such proof of husbands but not of wives.

36. The Court of Appeal in [Alnashir Abdulkarim Chatur Popat -v- Adil Abdulkarim Chatur Popat & 3 others \[2021 KECA 106 \(KLR\), Civil Appeal E09 of 2020\]](#) affirmed that children of the deceased are automatic dependants and need not prove that they were dependent on the deceased at the time of death. A son excluded from his father's will is eligible to apply for reasonable provision under [section 29](#), regardless of his own financial status.
37. The Court of Appeal has also ruled on the eligibility of grandchildren in [John Gitata Mwangi & others -v- Jonathan Njuguna Mwangi & others \[1999\] KECA 184 \(KLR\)](#). Grandchildren are not automatic dependants. Dependency at the time of the deceased's death must be proved. It is not sufficient to assert that such an obligation exists under customary law. The Court also underlined basic principles concerning dependency. First, an applicant must present sufficient evidence of their means and present and future needs. The court cannot make a determination on insufficient evidence. Secondly, determining dependency is not an exercise in rewriting wills. "Reasonable provision" for dependants is distinct from "fair distribution" of the estate.
38. The High Court has ruled on the eligibility of former spouses, affirming that an application for dependency is the only route open to them. Former spouses are not included in the list of persons eligible to apply for a grant of letters of administration under [section 66](#) of the Law of Succession Act. Since dissolution of the marriage preceded the death of the deceased, a former spouse cannot be said to have survived the deceased as a spouse. See [In the Matter of the Estate of Sylvester Charles Murumba Wafula \(Deceased\) \[2018\] KEHC 6473 \(KLR\)](#).

6.2 Distribution of Intestate Estates in Polygamous Families

39. [Section 40](#) deals with distribution of intestate estates in polygamous families. The section treats each wife and her children as a "house", with each surviving wife and each child being counted as a unit. In the first instance, the net intestate estate and household effects are divided by allocating shares to each unit. This system may advantage the house with the greatest number of children.

40. After this initial distribution, the household effects and net intestate estate allocated to each house are divided within that house in accordance with the intestacy rules set out in sections [35-38](#). This means that the surviving spouse is entitled to the personal and household effects absolutely, as well as a life interest in the whole residue of the net intestate estate allocated to that house. The surviving spouse may then exercise the power of appointment in favour of the children, having regard to [Section 35\(4\)](#). This is important to emphasise because a reading of [section 40 \(1\)](#) in isolation may create the impression that the mathematical reckoning of shares by unit translates into an immediate distribution of each wife's and child's share.

6.2.1 Judicial Precedent on Distribution of Intestate Estates in Polygamous Families

41. A review of court decisions shows that judges have differed on the weight to be accorded to judicial discretion in light of the requirements of [section 40](#).

42. The Court of Appeal has consistently affirmed the place of judicial discretion in applying [section 40](#). In [Muriungi v Mwongera & another \[2024\] KECA 1709 \(KLR\)](#) and in [Gesora v Gesora \[2022\] KECA 109 \(KLR\)](#) the Court affirmed the importance of judicial discretion in interpreting and applying section 40, taking into account the factual circumstances of each case in order to achieve equitable and fair distribution on intestacy in polygamous families. The Court cited [Scolastica Ndululu Suva v Agnes Nthenya Suva \[2019\] KECA 1053 \(KLR\)](#).

43. The Court of Appeal had earlier taken the position that applying section 40 without regard to context could yield discriminatory results because of its uniform treatment of wives and children, without regard to a wife's contribution to the estate. This was the position in [Douglas Njuguna Muigai-v-John Bosco Maina Kariuki \[2014\] KECA 753 \(KLR\)](#). In [Esther Wanjiru Githatu-v-Mary Wanjiru Githatu, \[2019\] KECA 811 \(KLR\)](#), the Court of Appeal upheld judicial discretion to vary the formula set out in [section 40](#) by recognising a resulting trust in favour of the first widow on account of her proven contribution to the property before the marriage became polygamous, and excluding that portion from distribution under [section 40](#).

44. However, the Court of Appeal has also cautioned that courts must have clear reasons for departing from the stipulations of [section 40](#). In [Chepkoech Salat v Josephine Chesang Salat \[2015\] KECA 650 \(KLR\)](#), the Court of Appeal faulted the High Court for adopting

an inconsistent approach in distributing the estate. In some instances, the High Court followed proposals made by the two widows, although those proposals had not been reduced into a consent recorded before the court; in other instances, it disregarded them. It was also unclear whether the number and distribution of children across the houses had informed the lower court's decision. The Court of Appeal emphasized that where "a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision."

45. One reason for departing from a strict application of [section 40](#) is concern that it may result in upheaval where there is evidence that the houses had discernibly separate and distinct property arrangements during the deceased's lifetime. The Court of Appeal reached this conclusion in [Grace Wanjiru Njuru v Loice Njeri Njuru \[2020\] KECA 605 \(KLR\)](#).
46. Courts will also exercise judicial discretion in applying [section 40](#) to avoid an absurd or unjust result. For instance, in [Mary Rono-v-Jane Rono & another \[2005\] KECA 326 \(KLR\)](#), the Court stated that section 40 should not be applied as a rigid mathematical formula that dictates equal shares to all children in all circumstances, treating children who are still in school in the same way as adult children of the deceased. The Court also emphasised that the Law of Succession Act, including [section 40](#), must be interpreted in a manner consistent with Kenya's international treaty obligations, particularly the principle of non-discrimination.
47. The Court of Appeal affirmed in [Nchue-v-Nchue \[2022\] KECA 729 KLR \[2022\] KECA 729 \(KLR\)](#) that [section 40](#) is the default mode of distribution where parties fail to agree. Since the second widow in that case had declined to accede to a proposed mode of distribution out of court, she could not successfully appeal against the High Court's decision to resort to [section 40\(1\)](#) as the default mode of distribution, dividing the estate among nineteen (19) units.
48. One High Court decision is worth underlining: in [GAAM & another-v-MOAO 2016 KEHC 6296 \(KLR\)](#), the Court clarified that children born from a relationship in which their mother or mothers were not married to the deceased, and were therefore not widows of the deceased, cannot on their own be regarded as constituting a house within the meaning of [section 40\(1\)](#).

6.3 Relevance of Customary Law in Proceedings under the Law of Succession Act

49. The Law of Succession Act makes express reference to customary law in only two instances. The first is under [section 2\(2\)](#), which deals with application of the Act. [Section 2\(2\)](#) provides that the estates of persons who died before commencement of the Act are subject to the written laws and customs operating at the time of death. Read together with [section 2\(1\)](#), this has been interpreted to mean that the Act ousted the application of customary law to succession matters, unless such application is permitted by the Act itself. See [Mary Rono-v-Jane Rono & another \[2005\] KECA 326 \(KLR\)](#), alternative interpretation accommodates a residual role for customary law. See [Mwangi-v-Mwangi](#).
50. The second express reference to customary law in the Act is [section 33](#), which designates “the law or custom applicable to the deceased’s community or tribe” as the applicable law with respect to land and livestock in designated counties, most of which are pastoralist counties. These counties are listed under [section 32](#) as areas exempted from the application of the intestacy provisions of the Act. They are West Pokot, Wajir, Turkana, Tana River, Samburu, Narok, Marsabit, Mandera, Lamu, Kajiado, Isiolo and Garissa. The reason for the exemption is set out in the 1968 Report of the Commission on the Law of Succession. The Commission considered, based on hearings held across the country, that the provisions on intestate succession were incongruous with the largely communal character of resource governance in pastoralist communities. Thus, in the absence of a will, the default regime in the exempt counties is customary law.
51. The Court of Appeal has held that the application of customary law to intestate estates outside the counties designated under [section 32](#) is unlawful. This was the position in [Mary Rono-v-Jane Rono & another \[2005\] KECA 326 \(KLR\)](#), where the lower court had applied customary law to property in Uasin Gishu, which is not among the listed counties.
52. However, an attempt to have [sections 32](#) and [33](#) declared unconstitutional on the ground of discriminatory impact arising from the default application of customary law failed in [Ripples International-v-AG \[2022\] KEHC 13210 \(KLR\)](#).

6.3.1 Succession Claims Founded on Status under Customary Law

53. Outside the two express references to customary law in the Law of Succession Act, courts have also dealt with succession claims founded on status under customary law. The most common scenarios involve proof of the existence of a customary marriage,

which is addressed in the chapter on the Marriage Act, including the customary practice of “woman-to-woman” marriage. See, for instance, [Monica Jesang Katam -v-Jackson Chepkwony & another \[2011\] KEHC 4299 \(KLR\)](#).

54. Courts have determined these claims by requiring proof that the relationship relied upon actually meets the criteria for recognition of the relevant customary practice. Courts draw from precedent as well as from published sources. [Rule 64](#) of the [Probate and Administration Rules](#) provides for a wide scope of sources that may be used in proving customary law norms and practices. It provides:

“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.”

55. The most commonly cited source on customary law in succession matters is Eugene Cotran’s Casebook on Kenya Customary Law, published by Professional Books and Nairobi University Press in 1987.⁷⁶ Cotran served as a Judge of the High Court between 1977 and 1982.

56. The book publishes judgments that made authoritative declarations on customary law in diverse contexts, organised by subject matter, including essentials of marriage, pregnancy compensation, matrimonial rights and duties, divorce and return of dowry, child custody and succession. It remains a useful resource, particularly because some of the cases it contains were previously unreported. The resource also includes some subordinate court decisions and, in some instances, traces the path of a dispute from the subordinate court to the superior court, thereby illustrating diverse judicial approaches to customary law.

57. However, Cotran himself acknowledged the fluid and dynamic nature of customary law and the need for the collection of cases to be regularly updated. The book’s use in court must therefore accommodate contemporary practice and change over time, particularly where more recent credible publications are available or where persuasive evidence of living customary law is presented. The book is out of print, but court libraries should have copies.

⁷⁶ Cotran also authored a book on the law of marriage and divorce, which is discussed in Chapter 4 of this bench book: *Kenya: The Law of Marriage and Divorce*, (Restatement of African Law series; Antony Allot, Series Editor), Volume 1, London: Sweet & Maxwell (1968).

6.3.2 Judicial Precedent on Succession Claims Founded on Customary Law

58. This section highlights cases in which courts have referred to customary law principles in deciding succession matters. In [Gesora v Gesora \[2022\] KECA 109 \(KLR\)](#), the Court of Appeal affirmed recognition of the Gusii custom that property falling into the category known as emonga had to be divided equally among all houses in a polygamous family, notwithstanding [section 40](#) of the Law of Succession Act.

59. In [Mwangi-v-Mwangi](#), the Court of Appeal held that although the application of customary law within the Law of Succession Act is expressly provided for only under section 33, customary law may have implicit relevance in other provisions. In that case, the Court took the position that customary law may form part of the “general circumstances of the case” when assessing reasonable provision for dependants under [section 28](#). The customs and traditions of the community from which the testator came may therefore be relevant because reasonable provision may vary from one community context to another.

6.4 Property Not Subject to Succession Proceedings

60. Some categories of property pass from a deceased person to beneficiaries without going through the succession process. These include:

- property held in joint tenancy;
- benefits under retirement schemes;
- pension and social security benefits;
- shares in co-operative societies and savings and credit co-operative societies, but not company shares;
- benefits under insurance policies; and
- family trusts.

61. It should be noted that, under Islamic inheritance law, these exceptions do not apply. All property forming part of a Muslim person's estate is subject to succession.

6.4.1 Joint Tenancy

62. [Section 91](#) of the [Land Registration Act](#) enables joint registration of an interest in land. Persons registered as joint tenants exercise their property rights concurrently, and none may transact without the other under ([section 91\(4\)\(a\)](#)). Of greatest significance for succession law is [section 91\(4\)\(b\)](#), which provides that “on the death of a joint tenant,

that tenant's interest shall vest in the surviving tenant or tenants jointly". This is referred to as the right of survivorship. On the basis of this right, [section 60](#) provides that when a joint tenant dies, the Registrar of Lands need only be furnished with proof of death by way of a death certificate. The name of the deceased joint tenant is then deleted from the register, and the interest in land vests fully in the surviving joint tenant or tenants. No succession proceedings are necessary.

63. [Section 91\(2\)](#) states the general rule that the law will not presume joint tenancy merely from the registration of two or more persons as holders of an interest in property. The law presumes that such persons hold the property as tenants in common, in which case each tenant is capable of transmitting their share to their heirs. However, where the persons so registered are spouses, the law presumes joint tenancy under [section 93](#), which provides:

"Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act."

64. Therefore, where joint ownership is not intended between or among spouses, the instrument of transfer or title document must clearly indicate that the property is held "as tenants in common". In that case, succession will apply to the share of the spouse who is deceased.

6.4.1.1 Judicial Precedent on Joint Tenancy

65. Several cases affirm the exemption of jointly held property from the succession process. [In the Matter of the Estate of Sylvester Charles Murumba Wafula HCSC No.1914 of 2008](#) decided 2018 property that the deceased had registered jointly with his wife was confirmed to have passed automatically to her by survivorship and was therefore not part of the deceased's estate.
66. Similarly, in **the Matter of the Estate of Margaret Mugure Waweru (Deceased) Succession Cause No. 1320 of 2004 (unreported, decided July 2024)**, a daughter had been granted letters of administration in respect of her late mother's estate. Her parents were divorced. Her father successfully objected on the ground that he and the deceased were jointly registered as owners of some of the properties listed as forming part of the estate. No division of matrimonial property had taken place following the divorce. By operation of the right of survivorship, those properties had devolved to him as sole owner and were not part of the free property of the deceased.

6.4.2 Pensions, Terminal and Social Security Benefits

67. [Section 36A](#) of the [Retirement Benefits Act](#) shields retirement benefits from the succession process. It provides that, upon the death of a member of a retirement scheme, benefits payable do not form part of the member's estate but are paid out by the scheme's trustees in accordance with the scheme rules. Schemes usually require members to nominate persons to whom benefits are to be paid in the event of death. Trustees will generally pay according to the nomination. Regulation 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000 provides that, where no nomination has been made, the trustees shall exercise discretion in distributing the benefits to the deceased member's dependants. Regulation 19 also gives trustees discretion to refuse payment to a nominee, provided they give reasons for the refusal. The same rule is reproduced in regulation 23 of the [Retirement Benefits \(Occupational Retirement Benefits Scheme\) Regulations 2000](#).
68. Similarly, [section 37\(5\)](#) of the [National Social Security Fund Act](#) expressly removes social security benefits from succession by providing that, notwithstanding any written law, benefits under the Act do not become part of a member's estate. Members of the Fund are required to nominate dependent relatives who are eligible to receive benefits upon the death of the member under [section 35](#). Notwithstanding the nomination, the Fund's Board may refuse to make payment to a nominee, or may vary the nomination, provided it gives written reasons for doing so under [section 35\(4\)](#).
69. The [Pensions Act](#), Cap. 189, deals with pensions, gratuities and other allowances for officers who have served in the Government. [Section 17](#) deals with payment of pensions to dependants of a government officer who dies in retirement after serving for at least ten (10) years. The section specifies that only the widow or widows and children of the deceased officer are qualified to receive the payments, which are payable for a period of five (5) years from the date of death. Such payments therefore do not fall into the deceased officer's estate.
70. The same applies to pension payments in relation to an officer who dies in the line of duty under [section 19](#), except that, under this section, the number of children eligible to receive such pension is capped at six under [section 19\(1\)\(v\)\(i\)](#). In the case of an unmarried officer who dies from injuries sustained in the line of duty, the pension payments that would have gone to a widow are payable to the officer's mother "if his mother was wholly or mainly dependent on him for her support ... while of good character and without adequate means

of support". If the mother was widowed when the pension payments commenced, the payments terminate upon her remarriage under [section 19\(1\)\(v\)\(ii\)](#).

71. Pension payments to a widow or to a female child terminate upon remarriage under sections [17\(2\)\(a\)](#), [17\(b\)\(ii\)](#), [19\(c\)\(1\)](#), [19\(1\)\(v\)\(iii\)](#). Children cease to be eligible to receive pension payments upon attaining the age of twenty-one (21) years, unless they are engaged in full-time education in an approved institution under [section 17\(2\)\(b\)\(i\)](#).
72. Under the same Act, gratuities are treated differently from pensions. Gratuity payments apply to officers who die while serving in a non-pensionable position, having previously held a pensionable position in which they had been confirmed. [Section 18\(1\)](#) provides that such gratuity payments are to be made to the deceased's personal representative, thereby making them subject to succession proceedings. Where the gratuity amount does not exceed KSh 10,000, the President, or an official acting on the President's behalf, has discretion to name a recipient. The discretion is framed in broad terms.

6.4.2.1 Judicial Precedent on Pensions, Terminal and Social Security Benefits

73. [In the Matter of the Estate of Shadrack Kamanga Ngaruiya 2017 KEHC 7071\(KLR\) \(HCSC No.1355 of 2003\)](#), no information had been provided concerning the deceased's nomination in relation to pension schemes and shares held in co-operatives. The court stated that, even in the absence of such information, nomination takes precedence, and intestacy applies only where it is established that no valid nomination was made.
74. [In the Matter of the Estate of Timothy Njonjo Kamau 2016 KEHC 713\(KLR\) \(HCSC No.2398 of 2009\)](#), the widow was the nominee in respect of the deceased's terminal dues. In the course of the succession proceedings, she had, apparently as a conciliatory gesture, included other biological children of the deceased and their mother as beneficiaries of the terminal dues, effectively altering the nomination after the deceased's death. The court described this action as unnecessary and unprocedural, holding that pension benefits are not subject to succession and ought not to have been placed before the court for distribution. They ought to be distributed directly by the scheme manager without the need for court action.
75. In [GAAM & another-v-MOAO \[2016\] KEHC 6296 \(KLR\)](#), an application for revocation of grant also sought to compel the administrator to account, under [section 83](#) of the Law of Succession Act, for monies paid to her as the widow by the Pensions Department of the Ministry of Finance. The court declined to make such an order under [section 83](#), affirming

that under [section 3\(1\)](#) of the Pensions Act, pensions, gratuities and other allowances do not form part of the free property of a deceased person. They are dealt with strictly in accordance with the Pensions Act and Regulations, being a charge on the Consolidated Fund.

76. In [Re Estate of Carolyne Achieng Wagah \[2015\] KEHC 2453 \(KLR\)](#), the court held that where only the deceased's children had been named as beneficiaries, [section 36A of the Retirement Benefits Act](#) and [Regulation 23](#) of the [Retirement Benefits \(Occupations Retirement Benefits Schemes\) Regulations, 2000](#) were the applicable law. The court held that a probate court has no jurisdiction over such benefits.
77. In the absence of a nomination, retirement benefits may be subjected to probate proceedings, and payment may be made to the administrator or administrators. The absence of a nomination by the deceased does not absolve the scheme from making payment. The court underlined this in [Isaac Ingati Abong' & Another -v- Kenya Commercial Bank Ltd. \[2015\] KEHC 2154 \(KLR\)](#), where the scheme managers attempted to avoid payment on the basis that no beneficiaries had been nominated and, therefore, no payment was due. The court held that, since the applicants' status as dependants of the deceased had been established, the scheme's trust deed permitted payment to dependants at the discretion of the scheme managers in the absence of a nomination.
78. In [David Gachura Mukunu-v-Jackline Mbithe \[2016\] KEHC 5562 \(KLR\)](#), a party claiming to be the deceased's widow argued that the family had entered into an agreement under which she was to receive half of the deceased's "gratuities and pension". The court held that the benefits in question were statutory and were therefore governed by specific laws that could not be contracted out of by the parties. The purported agreement was therefore void and of no legal effect.

6.4.3 Shares in Co-operative Societies

79. The [Cooperative Societies Act](#) gives a member the right to nominate a person to whom the member's shares or interest may be transferred upon death under section ([section 39\(1\)](#)). In the absence of a validly nominated beneficiary, the committee of the co-operative society has discretion to pay any money due to a person who appears to be the personal representative of the deceased member. The phrase "appears to be" suggests a relatively low threshold of proof, meaning that a person may be considered eligible by the committee even without letters of administration. However, this is not always the

case in practice. Rule 32(9) provides further clarity by stating that, “if for any reason on the death of a member a nominee does not exist, the society may pay any money due to the deceased member to the personal representative or recognized heirs of that deceased member”. In this way, co-operative society benefits may end up falling within the succession process.

6.4.3.1 Judicial Precedent on Shares in Co-operative Societies

80. **In Victor K Sang v Agnes C Sitonik (Succession Cause No. 1413 of 2021) (unreported)**, the court excluded SACCO shares that had been listed in the schedule of proposed distribution, holding that they were not subject to the succession process.
81. In [Benson Mutuma Muriungi-v-CEO Kenya Police Sacco & another \[2016\] KEHC 7145 \(KLR\)](#), the court affirmed that SACCO shares do not form part of the estate. It therefore declined an application to have a nominee charged with intermeddling under [section 45](#) of the Law of Succession Act. The court need only take into account the value of the shares received when considering distribution of the intestate estate.
82. [GAAM & another-v-MOAO \[2016\] KEHC 6296 \(KLR\)](#), the court faulted previous proceedings in which the deceased’s shares in a teachers’ savings and co-operative society had been subjected to succession proceedings and divided among the beneficiaries.
83. [In Re Estate of Carolyne Achieng Wagah \(Deceased\) \[2015\] KEHC 2453 \(KLR\)](#), the administrator of the deceased’s estate sought to have the deceased’s SACCO shares transferred to the estate. The deceased had nominated her children as the only beneficiaries. The court cited [section 39\(11\) of the Co-operative Society Act](#) and ruled in favour of the children.

6.4.4 Benefits under Insurance Policies

84. Benefits under an insurance policy devolve according to the nomination made by the policyholder either at the time of effecting the policy or at any time before the policy matures for payment ([Insurance Act, section 111\(1\)](#)). If the nominee predeceases the policyholder, or if the nomination is ruled defective for any reason, the benefits are paid to the policyholder’s heir, legal representative or the holder of a succession certificate under section 111(5). Through this route, benefits under an insurance policy may become subject to succession proceedings, since the heir or legal representative can only be determined through that process.

6.4.4.1 Judicial Precedent on Benefits under Insurance Policies

85. [In the Matter of the Estate of Sylvester Charles Murumba Wafula \[2018\] KEHC 6473 \(KLR\)](#), the court affirmed that proceeds from insurance policies did not form part of the estate and were not subject to succession proceedings. A previous court order had therefore been wrongly issued stopping the insurance company from paying out pending determination of the succession matter.
86. [In Re Estate of Faith Muita \(Deceased\) \[2016\] KEHC 2458 \(KLR\)](#), the court emphasised that nominations operate outside the law of succession. Nominated funds cannot therefore pass by will. Scheme managers do not require a grant of representation in order to pay out funds to the nominee or beneficiary; they only require proof of death. The funds would vest in the administrators only in the absence of a valid nomination, such as where the nominee predeceases the policyholder. Where the nominee dies after the policyholder, the nomination remains valid, and the funds accrue to the nominee's estate and vest in the nominee's personal representatives.
87. [In Re Estate of Carolyn Acheng Wagh \(Deceased\) \[2015\] KEHC 2453 \(KLR\)](#), the administrator of the deceased's estate applied to have the proceeds of a group life insurance fund paid to him. The court cited [section 111\(1\) of the Insurance Act](#) and held that the proceeds did not form part of the estate but were to be paid directly to the deceased's children, whom she had nominated as beneficiaries.
88. Managers of discretionary schemes have discretion and are not bound by the policyholder's nomination. **In the Matter of Evenge Ndizi Mwanda, High Court Miscellaneous Application No. 48 of 2014**, guardians of the deceased policyholder's children applied to court to disregard the nomination of her husband, who had murdered the deceased. The scheme managers did not oppose the application. The court affirmed their discretionary powers to disregard the nomination.

6.4.5 Family Trusts

89. Property held in a family trust is not subjected to the succession process. Family trusts were made possible by the [2021 amendment to the Trustees \(Perpetual Succession\) Act](#). [Section 3D \(1\)](#) provides that:

"A family trust is a trust, whether living or testamentary, partly charitable or non-charitable, that is registered or incorporated by any person or persons, whether jointly or as an individual, for the purposes of planning or managing their personal estate."

90. A living trust is established during the lifetime of the settlor or founder through a trust deed, and the assets are transferred to the trust immediately upon registration. A testamentary trust, on the other hand, is established through a will, takes effect upon the death of the settlor or founder, and is managed by the executor of the estate.
91. A family trust serves the purpose of preserving or creating family wealth from one generation to the next, in contrast to predominant succession practices that involve dividing the estate among beneficiaries in the present generation.⁷⁷ Once a trust is established, the property vests in the trust, represented by trustees who have perpetual succession. The death of trustees does not extinguish the trust; they are simply replaced. Further property may be added to the trust after its establishment. The terms of the trust define the class of beneficiaries, for instance, all descendants of the settlor or founder. This may include persons not yet born or persons not related to the settlor or founder. The settlor or founder may also be a beneficiary of the trust.
92. For a trust to be valid, it must be established for purposes that are lawful in Kenya; its intended beneficiaries must be ascertainable; it must be established free of duress, fraud, misrepresentation or breach of fiduciary duty; its terms must be certain and capable of performance; and the settlor or founder must have legal capacity.
93. Vesting assets in a family trust may have advantages over vesting them in a limited liability company, a vehicle that some families have used. Once incorporated, a company operates through directors, with comparatively less room to hold them accountable for safeguarding the beneficial interests of some family members, particularly children who cannot be shareholders. Majority shareholders may also pass resolutions that jeopardize the interests of minority shareholders. The High Court has cautioned against the shortcomings of vesting estate property in a limited liability company in two cases.
94. [In re Estate of Susan Mwelu Mutia \(Deceased\) \[2025\] KEHC 2202 \(KLR\)](#), a purported consent among the beneficiaries would have vested property in a yet-to-be-incorporated company, which would then charge rent to the beneficiaries. The court instead recommended the setting up of a family trust, noting that this approach was consistent with the principle of sustainable development and intergenerational equity, and more

⁷⁷ That subdivision has become the predominant approach in succession matters (particularly intestate succession) is rather ironic, given that one of the general policy considerations that guided the 1968 commission was prevention of uneconomic subdivision and fragmentation of land holdings (See General Policy Consideration No. 15 at p.3), [Presidential Commission on the Law of Succession](#).

closely aligned with African practices of preserving the integrity of family or clan property rather than fragmenting it.

95. In [Parvir Properties Ltd-v-Bank of Baroda \(Kenya\) Ltd; Shah \(Intended Interested Party\) \[2025\] KEHC 18581 \(KLR\)](#), the beneficiaries had recorded a consent setting up a holding company in respect of the assets of the estate. The agreement was that all beneficiaries would become equal shareholders and directors of the company. An asset worth KSh 90 million was sold, and one of the executors involved was held in contempt for failing to account for the proceeds and for carrying out the operations of the company to the exclusion of the beneficiaries, some of whom had not been allocated shares or directorships more than twenty (20) years later. The court underlined that the concept of corporate personality does not align well with personal ownership of property bequeathed by will or distributed on intestacy. The intended interested party was the personal representative of a deceased beneficiary of the estate and therefore had limited protection under company law from oppressive conduct by some members of the company. The court allowed his joinder to protect the interests at stake, effectively reopening the succession process, which the parties may have sought to avoid by setting up the company. A trust, rather than a company, would have avoided this problem and would have enforced the fiduciary duties of trustees, thereby safeguarding the beneficial interests of the entire class of beneficiaries.

6.4.6 Shares in Companies Are Not Exempt from Succession

96. The [Companies Act](#), 2015, is silent on the transmission of shares upon death through nomination. The predecessor statute, Cap. 486, provided that such transmission was subject to the succession process, whether testamentary or intestate, under sections 75 and 87. However, as the Court of Appeal held [in the Matter of the Estate of Mbiyu Koinange \(Deceased\) Margaret Njeri Mbiyu-v-David Njunu Mbiyu Koinange & 13 Others \(Civil Appeal No.47 of 2016\) \[2017\] KECA 799 \(KLR\)](#), the combined effect of sections 75, 78 and 79 was to defer to the company's articles of association concerning a personal representative's power to transfer shares to the deceased's nominee.

6.4.6.1 Judicial Precedent on Succession to Shares in Companies

97. The current Companies Act makes no mention of transmission of company shares upon death. This marks a clear demarcation in jurisdiction between the Family Division and the Commercial Division. Matters arising from the point of death fall squarely within the

law of succession. If the shareholder died intestate, the shares are distributed according to the rules of intestate succession, as occurred [in the Matter of the Estate of Shadrack Kamanga Ngaruiya 2017 KEHC 7071\(KLR\)](#).

98. Where there is a will, shares are distributed according to the testator's instructions. [In re Estate of James Njenga Karume \[2025\] KEHC 8331 \(KLR\)](#) the court adjusted the distribution to allow inclusion of the estate of one of the deceased's sons who had been overlooked, awarding that estate a percentage of shares and proceeds from the sale of shares in various companies in which the deceased's estate had a stake.

6.5 Incongruity between the Law of Succession and the Law of Marriage in Defining "Spouse"

99. The definition of "spouse" in the Law of Succession Act is not fully aligned with the definition in the [Marriage Act](#). In an attempt to address this incongruity, a 2021 amendment to [section 3](#) of the Law of Succession Act inserted the phrase: "'spouse' means a husband or wife or wives recognised under the Marriage Act." The Marriage Act defines "spouse" to mean "a husband or a wife".

100. It appears that little was achieved by this one-line insertion. The incongruity remains because [section 3\(5\)](#) the Law of Succession Act was left intact. [Section 3\(5\)](#) broadens the definition of "spouse" for purposes of succession. It provides:

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

101. The legislative intent behind [section 3\(5\)](#) was to plug the gap left by the repeal of the Affiliation Act, which had placed an obligation on fathers of children born outside marriage to support their children upon proof of paternity. The effect of [section 3\(5\)](#) is to posthumously bestow status on women whose relationship with the deceased may not have been acknowledged or may have been bigamous during the deceased's lifetime. This provision was not in the original legislation proposed by the Commission on the Law of Succession and enacted in 1972. [Section 3\(5\)](#) was inserted by amendment in 1981.

102. The 2021 amendment appears to have been an attempt to restore the pre-1981 position. However, it fails to accomplish this purpose because [section 3\(5\)](#) begins with the phrase “notwithstanding the provisions of any other written law”. This overrides any contrary provisions of the Marriage Act, such as [section 9\(a\)](#), which bars a party in a monogamous marriage from contracting another marriage. It also overrides the Marriage Act’s requirements on registration and, arguably, creates a parallel category of marriage in addition to the five types listed under [section 6\(1\) of the Marriage Act](#).

6.5.1 Judicial Precedent on Incongruity between the Law of Succession and the Law of Marriage in Defining ‘Spouse’

103. There have been cases on the interpretation of [section 3\(5\) of the LSA](#) since the 1980s. A selection of those cases is highlighted below. Cases that predate the Marriage Act are included because the incongruity between the narrow definition of “spouse” in marriage law and the broader definition in [section 3\(5\) of the LSA](#) also predates the Marriage Act.

104. The Court of Appeal is split on the scope of application of [section 3\(5\) of the Law of Succession Act](#). In [MWG v EWK \[2010\] KECA 322 \(KLR\)](#), the majority opinion found in favour of a woman claiming ‘second widow’ status. The majority based its decision both on the presumption of marriage and on [section 3\(5\) of the LSA](#) to presume a Kikuyu customary marriage:

“In view of that provision [section 3\(5\)](#) makes the decision in *Yawe v Public Trustee* [on presumption of marriage] it is quite clear that the petitioner cannot in the circumstances of this case, be regarded otherwise than as the widow of the deceased.”

105. The majority opinion therefore went beyond the broad definition of spouse or marriage under [section 3\(5\) of the LSA](#) by extending recognition to a de facto cohabitation union.

106. The dissenting opinion faulted this approach because the text of section 3(5) expressly applies to “a woman married under a system of law which permits polygamy,” which the common law presumption of marriage is not. The dissenting judge stated:

“The contention that there can be a Kikuyu customary law marriage by virtue of a presumption imposed by a court is fallacious and hollow even on the basis of [the] Yawe case... With respect the respondent was not married under a system of law as contemplated by the section and the section did not apply to her and therefore the judgment is with respect, a clear misapplication of this provision.”

107. In the dissenting judge's view, by introducing the presumption of marriage, the majority opinion went beyond the scope and legislative intent of section 3(5).

108. [In the Matter of the Estate of Mbiyu Koinange \(Deceased\) Margaret Njeri Mbiyu-v-David Njunu Mbiyu Koinange & 13 Others \(Civil Appeal No.47 of 2016\) \[2017\] KECA 799 \(KLR\)](#), the Court of Appeal again adopted a broadened interpretation of [section 3\(5\)](#) to include cohabitation unions. The Court expressly stated that the common law presumption of marriage accommodates polygamy:

"To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to Margaret would not preclude Eddah from being recognised as a beneficiary of the deceased."

6.6 Synergy and Dissonance between the Law of Succession and Matrimonial Property Law

109. The issue of dissonance, or the need for synergy, between the law of succession and matrimonial property law under the ([Matrimonial Property Act, 2013](#)) been partially addressed in the discussion on distribution of intestate estates in polygamous families. The issue has arisen where a first wife seeks recognition of her contribution to the estate before the entry of another wife or wives into the marriage. In substance, this entails posthumous recognition of her matrimonial property interest.

110. There is a stark contrast between the approach of the Matrimonial Property Act and that of the Law of Succession Act in dealing with property in polygamous families. [Section 8 of the Matrimonial Property Act](#) addresses the property rights of spouses in polygamous marriages upon dissolution. [Section 8\(1\)\(a\)](#) provides that property acquired before the marriage became polygamous is to be divided equally between the man and the first wife, regardless of whether the property is jointly registered. Property acquired after the entry of other wives into the marriage is to be divided according to the contribution made by the man and each wife under [section 8\(1\)\(b\)](#). [Section 8\(2\)](#) qualifies [section 8\(1\)\(b\)](#) providing that, where there is clear agreement that specific property is to be held by the man and a specific wife, such property shall be considered as owned equally by that wife and the husband, to the exclusion of the other wife or wives. Here too, the language of the provision makes the issue of joint registration irrelevant.

111. By contrast, [section 40 of the LSA](#), which deals with intestate succession in polygamous families, does not refer to duration of marriage, seniority among wives, contribution, or agreements on exclusive holding of property by any wife or house to the exclusion of the others. [Section 40](#) adopts a “head count” approach: each wife and her children are considered a house, and each wife or child is treated as an equal unit within that house. The deceased’s personal and household effects and the residue of the net estate are distributed, in the first instance, to the houses based on the number of units in each house. A house with greater numerical strength will therefore receive a proportionately greater share of the estate, although courts may also consider factors such as whether one house has children with greater needs. Distribution within each house is then undertaken in accordance with sections [35](#) to [38](#).

112. The texts of the two statutes do not cross-reference each other. However, [Rule 4\(c\)](#) of the other. [Matrimonial Property Rules](#) lists, among those who may bring proceedings in relation to matrimonial property:

“an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership, vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.”

113. The most immediate practical circumstance where [Rule 4\(c\)](#) would apply is where a former spouse dies with pending litigation on matrimonial property. In such a case, the executor or administrator would step into the shoes of the deceased to continue the litigation. It is unclear whether [Rule 4\(c\)](#) may also apply to fresh litigation involving a posthumous claim to matrimonial property after the claimant’s death. More significantly, it is unclear which provisions of the parent statute, the Matrimonial Property Act, anchor [Rule 4\(c\)](#). Courts may therefore need to critically reflect on the legal basis for applying [Rule 4\(c\) of the Matrimonial Property Rules](#). This issue is flagged under “Areas for Reform”.

114. The Matrimonial Property Act and the Law of Succession Act also differ in their approach to customary law. Whereas the Law of Succession Act limits the application of customary law to the counties designated under [section 32](#), the Matrimonial Property Act expressly requires customary law principles to be taken into account in the division of matrimonial property, provided they are consistent with the values and principles of the Constitution

under [section 11](#). In addition, [section 6\(2\)](#) property held in trust, including customary trusts, from the definition of matrimonial property.

6.6.1 Judicial Precedent on Synergy and Dissonance between the Law of Succession and Matrimonial Property Law

115. Some judicial decisions have brought out the dissonance between the Matrimonial Property Act and the Law of Succession Act. The cases discussed below include decisions that expressly refer to the conflicting approaches of the two statutes and point to the need for greater statutory and doctrinal synergy.
116. In [Esther Wanjiru Githatu-v-Mary Wanjiru Githatu, \[2019 KECA 811 \(KLR\)\]](#), the Court of Appeal upheld the High Court's decision recognising a resulting trust in favour of the first wife, consisting of half of the property acquired before the marriage became polygamous. The High Court had taken cognizance of [section 8 of the MPA](#), noting that although the provision could not apply posthumously, the first widow's claim could be recognised on the basis of [Article 45\(3\) of the Constitution](#), which guarantees equality of parties to a marriage. The decision marks an attempt to address the dissonance between the Matrimonial Property Act and the Law of Succession Act.
117. In [Scolastica Ndululu Suva v Agnes Nthenya Suva \[2019\] KECA 1053 \(KLR\)](#), the Court of Appeal upheld the first widow's claim to a beneficial interest in land acquired before the marriage became polygamous. The beneficial interest was assessed at forty per cent (40%) and was excluded from the estate available for distribution. This reflects the principle in [section 8 of the MPA](#), although the Court did not directly refer to the Act.
118. The High Court expressly referred to the Matrimonial Property Act in [Re the Estate of the late George Cheriro Chepkosiom \(Deceased\) \[2017\] KEHC 7270 \(KLR\)](#). The court signaled that tempering the interpretation of section 40 of the Law of Succession Act with section 8 of the Matrimonial Property Act is the approach most consistent with the Constitution when deciding intestate succession disputes in polygamous families. By contrast, in [M M M'm v A I M \[2014\] KEHC 2647 \(KLR\)](#), the court rejected a similar claim, holding that although [section 40](#) is evidently unfair to widows vis-a-vis children, and to senior wives vis-a-vis junior wives, the formula in [section 40](#) left no room for judicial discretion.

6.7 Life Interest Versus Absolute Interest for a Surviving Spouse

119. The law of succession is based on the assumption that one of the purposes of succession is to transfer wealth from one generation to the next. Accordingly, where there is no will, the default position in intestate succession is that a surviving spouse does not acquire the property absolutely. Property passes to a surviving spouse absolutely in only two instances. The first relates to the personal and household items of the deceased under ([section 35\(1\)\(a\)](#)). The second applies where the deceased is survived by a spouse but no children. In that case, the first ten thousand shillings of the residue of the net intestate estate, or twenty per cent (20%) of the estate, whichever is greater, vests in the surviving spouse absolutely under [section 36\(1\)\(b\)](#).
120. In other cases, a surviving spouse acquires only a life interest in the estate: the whole net estate in the case of a monogamous marriage, or a proportion of it in the case of a polygamous marriage, under [section 35\(1\)\(b\)](#) and [section 40](#). A life interest means that the surviving spouse may use the property and benefit from income generated by it during their lifetime. Upon the death of the surviving spouse, the property passes to the children.
121. The text of [sections 35\(1\)\(b\)](#) and [35\(5\)](#) qualifies the duration of a widow's life interest by providing that it terminates upon her remarriage. Although this qualifying clause remains in the statute, it is no longer applicable, having been declared unconstitutional. In [Ripples International-v-AG \[2022\] KEHC 13210 \(KLR\)](#), petition successfully challenged these provisions as discriminatory on the basis of sex because they treated widows and widowers differently.
122. Notably, long before these provisions were declared unconstitutional in *Ripples International*, a High Court judge in a 2014 decision declined to grant a remarried widower's petition for recognition and enforcement of his life interest. It is significant that the parties had separated, and divorce proceedings between them had abated because of the wife's death. The judge faulted the provisions of the Law of Succession Act for discrimination contrary to [Article 27\(3\) of the Constitution](#), observing that a widow in the same position would have been required to relinquish her life interest. See [In the Matter of the Estate of the Late Rose Wanjiku Njoroge \(deceased\) \[2014\] KEHC 5051 \(KLR\)](#). This decision was subsequently cited in [Samson Mutonga Muriithi -v- Kenneth Matekwa \[2016\] KEHC 1775 \(KLR\)](#) which adopted a similar approach.

123. The powers that a surviving spouse, whether widow or widower, may exercise over property during the subsistence of a life interest are limited. The surviving spouse has no power to transmit the property by will under [section 35\(2\)](#). The surviving spouse's position is therefore akin to that of a trustee. They may transmit the property only by way of gift to a surviving child, and such gift must vest immediately. The transfer cannot be framed to vest at a future date. This limited power is known as the power of appointment. Further, a child may challenge the surviving parent's exercise of, or refusal to exercise, the power of appointment and may apply to the court for appointment of that child's share of the net intestate estate under [section 35\(3\)](#).

124. In determining such an application, the court considers a wide range of factors listed under [section 35\(4\)](#), including the needs and means of the parties, family relationship dynamics, and the surviving spouse's reasons for withholding or exercising the power of appointment.

125. The holder of a life interest has power to sell the property in question, but only with the consent of all adult children and any co-trustees, or with the consent of the court. If the property is immovable, the consent of the court is mandatory under [section 37](#).

6.8 Succession under Islamic Inheritance Law

126. This section is not intended to deal exhaustively with Islamic inheritance law, as a Bench Book for the Kadhis' Courts is at an advanced stage.

127. [Section 2\(3\) of the LSA](#) exempts the estates of Muslims from the application of the Act, but the exemption is qualified. It provides:

"Subject to subsection (4), the provisions of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law."

128. [Subsection 4](#) sets out the circumstances in which the Law of Succession Act's procedural provisions on administration of estates may apply to the estate of a person who professes the Islamic faith, whether that person died before or after commencement of the Act. It provides:

scholarly sources. The most commonly cited authority on Islamic inheritance law is Mulla's Principles of Mohammedan Law.⁷⁹ There are also local sources that discuss the application of Islamic inheritance law in the Kenyan legal context.⁸⁰ The Kadhis' Courts Bench Book is also a detailed source.

133. The sources of Islamic inheritance law are the Quran, particularly Qur'an 4:11, 4:12 and 4:176, the Prophetic Tradition, known as the Sunna, and the jurisprudence of the first three Caliphs.⁸¹ In brief, Islamic inheritance law employs a dual succession system, recognising both testate and intestate succession. It permits a Muslim person to will away up to one-third of the estate, thereby allowing limited testamentary freedom.⁸² The rationale for limiting testamentary freedom is to balance the testator's freedom with obligations towards family members, as the Court of Appeal underlined in [Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji \[2011\] KECA 400 \(KLR\)](#). The validity of a will involving a Muslim person's estate must therefore be assessed by reference to Islamic inheritance law criteria, in addition to the technical criteria set out in the Law of Succession Act. The Kadhis' Courts Bench Book discusses the validity of wills under Islamic inheritance law in detail.
134. The remaining two-thirds of the estate is distributed according to a clearly defined formula that distinguishes between principal heirs, modifying heirs and distant kindred, based on proximity to the deceased.
135. Principal heirs comprise the widow or widower; the mother and father, or, in their absence, grandparents; and the son or sons and daughter or daughters, or, in their absence, their children. Principal heirs must inherit unless barred by legally recognised grounds such as illegitimacy, culpability for the death of the deceased, or difference in religion.

⁷⁹ Mulla, D.F., (1938), *Principles of Mahomedan Law*, (11th Edition), Calcutta: The Eastern Law House.

⁸⁰ See, for example, Moza Jadeed, Attiya Waris & Celestine N. Musembi, 'The Application of Islamic Inheritance Law in Independent and Contemporary Kenya: A Muslim's Right to Equality and Freedom from Discrimination', Vol.8(1) *Africa Nazarene University Law Journal* (2020), available at https://www.researchgate.net/publication/352502715_The_application_of_Islamic_inheritance_law_in_independent_and_contemporary_Kenya_A_Muslim's_right_to_equality_and_freedom_from_discrimination; Moza Jadeed, 'The Inheritance Rights of Muslim Women in Kenya: Reality or Rhetoric?', (2020) PhD Dissertation, University of Nairobi, School of Law, available at <https://erepository.uonbi.ac.ke>.

⁸¹ The first three Caliphs were Abdullah bin Uthman (popularly known as Abu Bakr As-Siddiq), Umar bin Al-Khattab and Uthman bin Khaffan respectively. They reigned between 11 and 35 AH (ie 632 and 656 AD respectively). See Moza Jadeed, 'Developments in Islamic Law: Implications for Gender Equality and Freedom of Religion in Kenya' (2025) Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 156, available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3024>.

⁸² Opinion is divided as to whether this restriction of testamentary freedom to one-third of the estate applies where there are no heirs (no matter how remote). Some scholars have argued that where there are no heirs, the whole estate may be disposed of by will. See sources cited in Moza Jadeed, 'The Inheritance Rights of Muslim Women in Kenya: Reality or Rhetoric?', (2020) PhD Dissertation, University of Nairobi, School of Law, (see note 5) pp.127-8.

136. "Modifying heirs" refers to heirs whose presence affects the share of another heir, leading to partial or complete exclusion. For instance, a widow's share may be modified by the presence of children, reducing her share from one-quarter to one-eighth of the estate. The presence of the father of a deceased person who left no child may completely exclude siblings, while the presence of a mother may only modify their shares.
137. "Distant kindred" refers to persons related to the deceased through a female link, such as maternal aunts and uncles or maternal nieces and nephews. They rank lowest in priority and only benefit from the estate in the absence of the first two categories.
138. It is also important to note, in light of the discussion above on property not subject to succession, that all property forming part of a deceased Muslim person's estate is subject to the succession process. This raises questions concerning recognition of nominees and beneficiaries in respect of SACCO shares, pension or social security benefits, and insurance schemes. Inquiries on this issue yielded responses suggesting that while Muslims are not barred from making such nominations, the value of the shares or benefits must be disclosed and taken into account when apportioning the estate among the designated heirs. If the nominee is not among the designated heirs under Islamic inheritance law, the court will have to assess whether the value of the shares or benefits falls within the permissible one-third that a Muslim person may dispose of freely. If the value exceeds the permissible limit, the excess must be surrendered for distribution among the designated heirs.
139. Public debate on some aspects of Islamic inheritance law has drawn attention to the need for clarity on its application in light of the Constitution. Examples include differentiation among children on the basis of legitimacy and divergence of inheritance shares along gender lines. With respect to legitimacy, children born outside marriage are not recognised as heirs to their father's estate under classical Islamic inheritance law, although they may be provided for through a will, subject to the limited testamentary freedom.
140. With respect to gender-differentiated shares, in many situations, women receive half of the share taken by men who stand in the same degree of relationship to the deceased. For instance, a daughter receives half the share of a son. A widower receives one-half of his wife's estate if they had no children, and one-quarter if she is survived by a child. By contrast, a widow receives one-quarter of her husband's estate if there is no child, and one-eighth if there is a surviving child. If a deceased person is survived only by a sister, she takes one-half of the estate, while a brother in a similar position takes the entire

estate. Where the deceased is survived only by both parents, the father takes two-thirds and the mother takes one-third.

141. There are, however, instances where women and men similarly positioned in relation to the deceased receive the same shares. For instance, if the deceased has a surviving child, the father and mother each receive one-sixth of the estate. Another example relates to uterine brothers and sisters, who each receive one-sixth. The rationale for gender-differentiated shares, and its implications for equality jurisprudence, has been discussed extensively in the sources referred to in this chapter and remains a sensitive and contested subject.⁸³
142. It is important to note that Islamic inheritance law recognizes the right of beneficiaries to agree to share the estate equally, thereby departing from the standard formula. This was applied in [re Estate of Mwangi Suleiman Kahu \(Deceased\), \[2019\] KEKC 29 \(KLR\)](#). In that case, a Muslim man died intestate and was survived by his widow and four children. The High Court referred the matter to the Kadhis' Court for distribution under Islamic law. All beneficiaries agreed to share the estate equally, departing from the standard formula under which a son receives twice a daughter's share.
143. The court applied the **takharuj** doctrine, an Islamic inheritance mechanism that allows beneficiaries, by mutual and voluntary consent, to redistribute their shares differently from the standard formula. Since all beneficiaries freely consented, the equal distribution was upheld. The case demonstrates that Islamic inheritance law has built-in flexibility for families who agree on alternative terms of distribution.

6.8.2 Jurisdiction in Islamic Succession

144. The courts of first instance in matters involving the estates of persons who profess the Islamic faith are the Kadhis' Court, magistrates' courts and the High Court, exercising concurrent jurisdiction. [Section 47 of the LSA](#) confers on the High Court unlimited jurisdiction to determine any succession matter, including matters involving the estates of Muslims. [Section 48\(1\)](#) confers jurisdiction on magistrates' courts to determine succession matters, provided they fall within the relevant court's pecuniary jurisdiction.

⁸³ See Moza Jadeed, "Developments in Islamic Law: Implications for Gender Equality and Freedom of Religion in Kenya" (2025) Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, East African Law Journal, 156, available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3024>.

[Section 48\(2\)](#) confirms the jurisdiction of the Kadhis' courts with respect to any issue arising in relation to the estate of a Muslim.

145. The Court of Appeal in [Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji \[2011\] KECA 400 \(KLR\)](#) held that the effect of section 48 is to confer concurrent jurisdiction, and that nothing bars a Muslim litigant from bringing a succession matter before a magistrates' court or the High Court. The Court stated:

"Kenyan courts have held in past judgments that every litigant, of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhis' court."

146. This position was echoed by the High Court in [Fauzi Said Ali & 3 Others v. Said Ahamed Ali & Another \[2020\] KEHC 6755 \(KLR\)](#) where the Court added that [section 2 of the LSA](#) is consistent with [section 5 of Kadhis' Court Act](#). The Court interpreted the combined effect of these provisions as giving Muslims a choice of forum in succession matters.

147. The question that arises is whether, when a Muslim litigant, elects to proceed before the High Court or a magistrates' court, that choice of forum also operates as a choice of law that ousts Islamic inheritance law. If so, what effect would [section 2\(3\)](#) of the Law of Succession Act have? Some have argued that, regardless of the choice of forum, Muslim parties move with their substantive succession law, namely Islamic inheritance law, and that this remains the applicable law. This question was addressed in [Noorbanu Abdul Razak v AbdulKader Ismail Osman \[2017\] KEHC 5643 \(KLR\)](#). The Court distinguished between forum and applicable law when a matter moves from the Kadhis' Court to the mainstream courts, concluding that, by virtue of [section 2\(3\) of the Law of Succession Act](#), the applicable law is Islamic law and not the Law of Succession Act. Subsequent High Court decisions that have followed this precedent include [RB & RGO v HSB & ASB \[2014\] KEHC 1027 \(KLR\)](#); and [Nazima Janmohammed Nassar v Nasreen Kauser \[2015\] eKLR](#).

148. Appeals from the Kadhis' courts lie to the High Court and, with leave, to the Court of Appeal. For matters that originate in the magistrates' courts, subject to pecuniary jurisdiction, appeals lie to the High Court and, with leave, to the Court of Appeal. Matters that originate in the High Court are appealable, with leave, to the Court of Appeal. Engagement with Islamic inheritance law is therefore not confined to the Kadhis' courts. For this reason, a basic understanding of Islamic inheritance law is necessary across the Judiciary.

Matters of both procedure and substantive law on Islamic inheritance are addressed in detail in the Kadhis' Courts Bench Book.

6.8.3 Judicial Precedent Relevant to the Application of Islamic Inheritance Law

149. The Supreme Court was presented with a case in which it had to determine the constitutionality of applying Islamic inheritance law to exclude children from the estate of their Muslim father on the basis that they were born outside marriage. The children had been born during cohabitation before the solemnization of their parents' marriage: [FAAF v RFM & 2 others \[2025\] KESC 45 \(KLR\)](#). The Court concluded that the exclusion failed the proportionality test embodied in the phrase "to the extent strictly necessary" under [Article 24\(4\)](#), as well as the "reasonable and justifiable" test under [Article 24\(1\)](#). The Court also held that the exclusion departed from the paramountcy of the best interests of the child under [Article 53](#) of the Constitution. Specifically, [53\(1\)\(e\)](#) guarantees every child the right to parental care and protection, including the equal responsibility of the father and mother to provide for the child, whether or not they are married to each other.

150. The Court of Appeal had earlier ruled on the applicability of Islamic inheritance law in a case where not all parties were Muslim or had submitted to the jurisdiction of the Kadhis' Court: [CKC & another \(Suing through their mother and next friend JWN\) \[2019\] KECA 354 \(KLR\)](#). The case concerned the claim of a non-Muslim woman and her two children, who were born from her cohabitation with the deceased, a Muslim man. The Court of Appeal held that [Article 24\(4\)](#) of the Constitution, read together with Article 170 and section 5 of the Kadhis' Courts Act, established strict conditions for the application of Islamic law. These included that all parties must profess the Muslim religion and submit to the jurisdiction of the Kadhis' Court. The Court added:

"...where all the strict conditions we have adverted to are satisfied, the Constitution allows application of Islamic law even though it may be perceived as discriminatory."

The succession cause was remitted for trial before the High Court, with directions that the Law of Succession Act be applied.

151. These high-profile cases raise a question of national jurisprudential significance: how should Islamic inheritance law principles, such as denial of inheritance to **walad-al-zina**, meaning children born outside marriage, be interpreted in light of constitutional principles such as non-discrimination, the best interests of the child and freedom of religion? The

anxiety generated by these decisions in Muslim communities is acknowledged. At the same time, there are scholars and jurists within the community who take the view that rigid application of the exclusion of children born outside marriage is not inevitable, and that solutions consistent with constitutional principles are available within Islamic inheritance law itself. Omission of these perspectives represents a missed opportunity to foreground Islamic inheritance jurisprudence and shape the national discourse.

152. Kadhi Ishaq A. J.⁸⁴ authored an article entitled **“The Missed Opportunity: Why Kadhis’ Courts Fell Short in Leading Islamic Jurisprudence on Children’s Right to Inherit.”** In the article, he draws from contemporary scholarly debate to show that there are two competing schools of thought. The first, and majority, view is that there is no room in Islam to attribute paternity to a child born outside marriage, and that the child can therefore inherit only from the mother. The second, and minority, view is that where the biological father acknowledges paternity, paternity can be legally attributed to him. Acknowledgement may be inferred from conduct, such as active financial support, acknowledgement in documentation, cohabitation or, as in [FAAF v RFM & 2 others \[2025\] KESC 45 \(KLR\)](#) subsequent solemnization of the marriage. This second interpretation enables the court to distinguish between the conduct of the parents and the rights of the child, and to uphold the child’s inheritance rights in line with the best interests principle. This alternative jurisprudence was not presented to the court, with the result that a one-dimensional view of Islamic inheritance law as inherently in conflict with the Constitution may have been reinforced. Participation of diverse scholars of Islamic inheritance law and representative bodies as amici curiae would help ensure balanced representation of Islamic inheritance law. As Kadhi Ishaq points out, this is necessary not only at the level of superior courts, but also within the Kadhis’ courts.

6.9 Succession and Digital Assets

153. The United Kingdom Law Commission defines digital assets as “a digitally represented store of value or contractual right that can be transferred, stored or traded electronically.”⁸⁵ The United States [Uniform Fiduciary Access to Digital Assets Act \(2015\)](#) gives a slightly different definition: “electronic records, not including an underlying asset or liability, unless the asset or liability is itself a record that is electronic.”⁸⁶

⁸⁴ Deputy Registrar, Principal Kadhi.

⁸⁵ [UK Law Commission, Digital Assets: A Scoping Paper \(2023\)](#).

⁸⁶ Since the US has a federal structure, this federal statute only applies in states that have adopted it or enacted a law that is substantially the same.

154. Not all digital assets have commercial value. Digital assets with commercial value include cryptocurrencies, non-fungible tokens and decentralized finance assets. These assets are, in essence, records in a network of computers associated with the particular digital asset in question. Transactions are effected between users through electronic sharing of public wallet addresses on the blockchain, authenticated by a series of numbers and letters that function as signatures to authenticate the transactions.
155. The question of property in digital assets has not yet arisen before Kenyan courts, and the issue may be perceived as relevant only to estate planning by wealthy persons. However, the issue is broader when digital assets are understood to include repositories of digital photographs, videos and music collections, as well as online subscriptions, trading platforms, loyalty schemes, registered domain names and email accounts. The digital age is a global reality, and it is therefore important to understand the emerging jurisprudence in other jurisdictions on the property status of digital assets.
156. Courts in Canada, Singapore, the United Kingdom and the United States have provided some guidance on the preliminary question whether digital assets fit within the legal category of property.⁸⁷ Cases in England and Wales have affirmed that digital assets, particularly cryptocurrencies, constitute property.⁸⁸ In [AA-v-Persons Unknown \[2019\] EWHC 3556 \(Comm\)](#), a claim was brought by a company that provided insurance against cyberattacks. A hacker encrypted the computer systems of AA's customer and demanded payment of a ransom in bitcoin to a designated address in exchange for a decryption tool. AA paid the ransom and then brought a claim against the fraudster, the company operating the bitcoin exchange and an unidentified intermediary. In determining whether to issue the proprietary injunction, or asset preservation order, sought, the court first

⁸⁷ For Singapore see *CLM v CLN* [2022] SGHC 46 [https://www.elitigation.sg/gd/s/2022_SGHC_46]; *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 [https://www.elitigation.sg/gd/s/2023_SGHC_199]. For Canadian authorities see *Li et al. v Barber et al.*, 2022 ONSC 1176 [<https://nathanson.osgoode.yorku.ca/wp-content/uploads/2023/05/Li-v-Barber-Reasons-Feb-17-2022.pdf>]; <https://www.bennettjones.com/Insights/Blogs/Mareva-Injunction-over-Cryptocurrencies-in-the-Freedom-Convoy-Class-Action>; *Cicada 137 LLC v Medjedovic*, 2021 ONSC 8581 [<https://www.canlii.org/judgmentTabs/history/?judgmentId=37729012&lang=en>]; <https://canliiconnects.org/en/commentaries/87929>. For discussion of US authorities see *In re Celsius Network LLC*, 647 B.R. 631 (2023) (Case 22-10964) [<https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/880/2023/01/celsius-memo-opinion.pdf>]; <https://caselaw.findlaw.com/court/us-ban-crt-s-d-new-yor/2192699.html>]; On BlockFi wallet asset ownership (described in court materials: [https://www.govinfo.gov/content/pkg/USCOURTS-njb-3_23-ap-01144/pdf/USCOURTS-njb-3_23-ap-01144-0.pdf]; <https://www.reuters.com/legal/blockfi-gets-court-permission-return-297-million-wallet-customers-2023-05-11/>]; *Mango Labs, LLC v Eisenberg*, 1:23-cv-00665 [<https://www.courtlistener.com/docket/66760250/mango-labs-llc-v-eisenberg/>]

⁸⁸ The property status of some digital assets depend on the contractual agreement entered into with the online service provider. Some may not be transmissible upon death. Principles in other areas of law, such as contracts, intellectual property and data privacy also apply. For further discussion on this see [Heather Conway & Sheena Grattan, 'The 'New' New Property: Dealing with Digital Assets on Death' Research Paper 2021-12 \(Queens University Belfast School of Law\)](#).



157. In the subsequent case of [D'Aloia -v- Persons Unknown and others \(including Bitcub Online Co. Ltd\) \[2024\] EWHC 2342 \(Ch\)](#), the court went further by extending proprietary character to digital assets that do not fit into traditional categories of property. The case concerned stablecoin Tether, or USDT. The court held that such digital assets constitute a distinct form of property not premised on an underlying legal right. They are property because they can be subjected to tracing and constructive trust, as with other forms of property. The United Kingdom subsequently enacted [The Property \(Digital Assets etc.\) Act](#) in December 2025 giving statutory recognition to digital assets as a distinct category of property.

158. The evolving jurisprudence on digital assets has implications for estate planning and succession disputes. Given the complex litigation that may arise, involving property law, succession law, contract law, privacy law and data protection law, it is prudent for a person to exercise testamentary freedom and set out detailed instructions in relation to digital assets. It may also be necessary to appoint an executor who understands the nature of digital assets. Alternatively, a family trust may be established to hold and manage digital assets and other property without the need for probate.

159. Beyond digital assets with commercial value, such as cryptocurrencies, it may become necessary for persons to include instructions on their wishes concerning email accounts, online accounts and digital archives. This may pre-empt disputes among beneficiaries over assets or materials of sentimental value, such as photo and video archives or music collections.

7.0 COMMON PROCEDURAL ISSUES IN SUCCESSION PROCEEDINGS

160. Succession proceedings under the Law of Succession Act involve the administration of the estate of a deceased person, the appointment of administrators and the distribution of estate property. Courts are frequently called upon to determine who is entitled

to administer an estate, correct errors in grants of representation or certificates of confirmation of grant, preserve estate property and resolve limited disputes affecting third parties.

161. The law provides several mechanisms through which a court may intervene before and after a grant of representation has issued. These remedies serve distinct and non-interchangeable purposes. Courts should therefore carefully identify the nature of the application before them and align it with the appropriate statutory or inherent remedy.

162. This section discusses various procedural matters, with emphasis on providing checklists for easy reference by judges and judicial officers on the following concerns:

- judicial checklist at the outset of a succession matter;
- dealing with contested wills;
- ascertaining gifts inter vivos and gifts in contemplation of death;
- issuing various types of grants;
 - objection to grants under s of grants;
 - Objection to grants ([Section 68](#));
- confirmation of grants;
- revocation or annulment of grants under ([section 76](#));
 - substitution of an administrator under judicial practice relating to [sections 66, rules 44 and 73](#));
 - rectification of grants under ([section 74](#));
- review of a confirmed grant or distribution order under ([section 47, rule 73, Order 45 Civil Procedure Rules](#), 2010 by analogy;
- injunctions in succession matters; and
- claims by third parties for joinder or recognition in succession proceedings.

7.1 Judicial Checklist at the Outset of a Succession Matter

163. As in any matter before a court, the first step is for the court to satisfy itself that it is properly seized of jurisdiction. Establishing jurisdiction at the outset is particularly important in intestate succession matters, where the value of the estate may not always be provided at the time of filing. A Chief Magistrate's Court may proceed to determine

a matter and issue letters of administration, only for it to emerge at the confirmation stage that the value of the estate exceeds the court's pecuniary jurisdiction. At that point, uncertainty may arise as to whether the parties should proceed to seek confirmation before the Chief Magistrate's Court, apply for transfer of the matter to the High Court, or invoke the High Court's original and unlimited jurisdiction. A further question may also arise as to whether the High Court would confirm letters issued by the Chief Magistrate's Court or issue letters afresh.

164. The court must next establish whether the applicant has applied for the correct type of grant and followed the correct procedure. Ideally, the Deputy Registrar should verify this before the file is placed before the court. However, the court must independently satisfy itself that the application is properly before it, so as to avoid wasting judicial time and the parties' resources.

7.1.1 Table: Judicial Checklist for Establishing Whether the Application is for the Correct Type of Grant

165. The table below provides a quick reference checklist. Further descriptions and analysis may be obtained from textbooks and other specialised resources on the law of succession.⁸⁹

Type of grant	When applicable	Type of application and documents required, in addition to details required under Rule 7
Grant of probate	Where the deceased left a will and named an executor.	Petition (Form 78) ; affidavit in (Form 3) by the executor; original will; two copies of the will; and original death certificate.
Grant of letters of administration with will annexed	Where the deceased left a will but did not name an executor.	Petition (Form 79) affidavit in (Form 3) by any beneficiary; original will; two copies of the will; and original death certificate.
Grant of probate of proof of oral will	Where the deceased made an oral will in accordance with customary law and died within three (3) months.	Petition (Form 78 or 92); affidavit (Form 4 or 6) by any beneficiary; and details of the contents of the oral will.

⁸⁹ See, in particular, Mary Ang'awa, *Procedure in the Law of Succession* (Revised Edition, Law Africa, 2016).

Grant of letters of administration intestate	Where the deceased did not leave a will.	Petition (Form 80); affidavit (Form 5); affidavit of means (Form 12); affidavit of justification of proposed sureties (Form 11); guarantee of personal sureties (form 57); by any person eligible under section 66 LSA . At least two applicants are required where there are children under the age of eighteen (18) years. A maximum of four applicants applies in all cases.
Limited grants	Grants may be limited by purpose, time or property.	The requirements depend on the nature of the limited grant sought, as set out below.
Grant ad colligenda bona defuncti	A grant for the limited purpose of collecting and preserving the assets of the estate pending issuance of a full grant.	This grant may only be issued by the High Court. Petition in (Form 85); affidavit (Form 19); application by any person with an interest in the estate; and death certificate.
Grant ad litem	A grant limited to the purpose of representing the estate in legal proceedings that cannot await issuance of a full grant.	Petition (Form 90B); by anyone with an interest in the estate.
Grant pendente lite	A grant limited as to time, pending conclusion of litigation, for example litigation to determine the validity of a will or the right to administer the estate.	Petition in (Form 90); affidavit (Form 19); application by any person with an interest in the estate.

Grant for special purpose	A grant for a specific urgent purpose, for instance, to meet urgent needs of a beneficiary under a will that cannot await issuance of the full grant, such as educational expenses for a child.	Petition (Form 85A), by or on behalf of beneficiary.
Grant de bonis non administratis	Where part of an estate has been left unadministered, for example because of the death of an administrator.	Petition (Form 86); affidavit (Form 19); by anyone with an interest in the estate.

7.2 Judicial Checklist for Dealing with Contested Wills

166. This checklist is intended to assist the court to determine whether a challenge to the validity of a will is grounded in the Law of Succession Act and properly supported.⁹⁰ Where the challenge is directed at the testator's capacity, the court should determine the grounds relied upon and whether the supporting affidavit gives sufficient particulars of any of the following:

- mental incapacity or unsoundness of mind;
- the testator not having attained adult age;
- temporary incapacity arising from factors such as intoxication; or
- physical or mental illness impairing the testator's capacity at the time of execution.

167. Where the challenge to validity is based on the circumstances under which the will was made, the court should check whether the objection provides sufficient details of any of the following:

- circumstances suggesting that the testator did not know and approve the contents of the will;

⁹⁰ For a detailed discussion of the LSA's stipulations on the creation of a valid will see William Musyoka, *Law of Succession* (Chapter Six).

- suspicious circumstances negating the testator's free agency, such as manipulation by, or overwhelming influence of, a person who stands to benefit from the will;
- fraud; or
- coercion.

168. Where the objector alleges that the testator revoked the will, the court should check for the following details under ([sections 18](#) and [19](#)) of the Law of Succession Act:

- **Express revocation:** whether there is a codicil or another will clearly declaring an intention to revoke the earlier will; or whether there is evidence of burning, tearing or otherwise destroying the will with the intention of revoking it.
- **Implied revocation:** whether there is a subsequent written will or codicil that is inconsistent with the earlier will; or whether there is extrinsic evidence establishing implied revocation.
- **Revocation by the testator's marriage:** whether there is proof of a subsequent marriage, except where the will was expressed to have been made in contemplation of marriage to a specific person and that marriage took place.

169. Where the objection cites lack of compliance with formalities in respect of an oral will, the court should check that:

- the will was uttered in the presence of two competent witnesses;
- the testator died within three (3) months of the date of making the oral will;
- where the testator was a member of the armed forces or the merchant marine, the will was uttered during a period of active service and, if death occurred more than three (3) months later, the death occurred within that same period of active service; and
- the oral will does not contradict any written will made by the testator before or after the utterance, where the written will has not been revoked.

170. Where the objection cites lack of compliance with formalities in respect of a written will, and the objector's sole ground is that the alleged will was not duly executed in accordance with the law in force at the time, the court should check that the objection has been filed using Form 77 of the Probate and Administration Rules.

171. Where the objection alleges failure to comply with formalities on more than one ground, the court should check that the objection has been filed using Form 76.

172. There is a wide range of judicial precedent on matters that do not, by themselves, constitute grounds for invalidating a will. One example is omission of a potential beneficiary from a will. See [In re Estate of Philip Nthenge Mukonyo \(Deceased\) \[2018\] KEHC 7656 \(KLR\)](#); [In re Estate of Johana Keya Kikuyu \(Deceased\) \[2020\] KEHC 4503 \(KLR\)](#); [In re Estate of Timothy Mwaura Ndichu \(Deceased\) \[2020\] KEHC 6530 \(KLR\)](#). In such cases, courts have directed the omitted person to apply for reasonable provision under [section 26](#), rather than challenge the validity of the will.

173. Other examples include circumstances where the will omits some property belonging to the deceased. In such a case, the omitted property may be treated as intestate property,⁹¹ as illustrated in [In re Estate of Kariuki Wahome Njange \(Deceased\) \[2018\] KEHC 8662 \(KLR\)](#).

A will is also not invalid merely because the testator appointed executors who were not known to the family. See **in the Matter of Pilly Nyarani Otundo (Deceased), Nairobi High Court Succession Cause No. 2078 of 1997**. Similarly, where a will refers to property that is not part of the free property of the deceased, the gift fails, but the will is not invalidated on that basis alone. See [in re Estate of Kariuki Wahome Njange \(Deceased\) \[2018\] KEHC 8662 \(KLR\)](#).

7.3 Judicial Checklist for Ascertaining Gifts Inter Vivos and Gifts in Contemplation of Death

174. A party may claim that specific property, usually land, was gifted to them absolutely by the deceased and that distribution should therefore be confirmed in their favour. The following questions may assist the court in determining such a claim:

- Was there an actual transfer of title, or was there only possession?
- For the claim to qualify as a gift inter vivos, meaning a gift between living persons, did title pass before the deceased's death?
If title did not pass, is there evidence of a declaration of trust by the deceased, or conduct from which a resulting trust may be inferred? See [in re Estate of The Late Gedion Manthi Nzioka \(Deceased\) \[2015\] KEHC 944 \(KLR\)](#)
- Does the claim relate to a gift inter vivos or a gift in contemplation of death?

⁹¹ On the same point see also *In Re Estate of Lusila Wairu Waweru (Deceased)* [2020]; *In re Jackson Mubea Waweru (Deceased)* [2016]

175. For a gift inter vivos, there must be an actual transfer, or an inferred transfer by way of resulting trust. By contrast, a gift in contemplation of death may be valid even where title has not passed, provided that the conditions set out under [section 31](#) of the Law of Succession Act are met. The court should therefore consider whether:

- a. the person making the gift was contemplating the possibility of death as a result of present illness or imminent danger;
- b. the movable property given was property that the person could otherwise dispose of by will;
- c. possession, or the means of possession, such as documents or other evidence of title, was actually delivered to the intended beneficiary;
- d. the circumstances suggest that the person making the gift intended the gift to revert to them should they survive the illness or danger;
- e. the person making the gift died from any cause, having failed to survive the illness or danger;
- f. the intended beneficiary survived the person who made the gift;
- g. the person making the gift died of a cause other than suicide; and
- h. the person making the gift could lawfully request its return at any time before death.

176. [Rule 45\(2\)\(d\)](#) of the Probate and Administration Rules expects information on gifts received in contemplation of death to be disclosed in an application for reasonable provision under [section 26](#) of the Law of Succession Act.

7.4 Judicial Checklist for Issuing Grants

177. In determining whether to issue any grant, the court should satisfy itself on the following matters: jurisdiction; identification of the estate; entitlement and capacity of the applicant; procedural compliance; and absence, or proper resolution, of disputes, fraud or other vitiating factors.

7.4.1 Judicial Checklist for Issuing a Grant of Letters of Administration Intestate

178. In determining whether to issue a grant of letters of administration intestate, the following questions should guide the court.

Jurisdiction

- Is there proof of death of the deceased?
- Did the deceased die intestate?

- Did the deceased reside or leave property within the court's jurisdiction?
- Is the value of the estate within the pecuniary and territorial jurisdiction of the court, where the matter is before a magistrates' court?
- Is the application for a full grant or a limited or special grant?

Identification of the estate

- Is the deceased clearly identified, including full names and any aliases?
- Is there a full list of the assets forming the estate, both movable and immovable?

Entitlement and capacity of the applicant to administer the estate under [section 66](#):

- Who is the applicant?
- What is the applicant's relationship to the deceased?
- Is proof of relationship attached?
- Where does the applicant fall within the order of priority, for example spouse, child, parent, sibling, Public Trustee or creditor?
- If the applicant is not of the highest priority under [section 66](#), have persons who rank higher consented, renounced their right, or been cited?
- Is the applicant competent and fit to administer the estate?
- Would appointment of the applicant benefit the estate and serve the interests of the beneficiaries?
- Where there are children under the age of eighteen (18) years, are there at least two applicants for the grant?

Entitlement of beneficiaries

- Is there a full list of all surviving beneficiaries?
- Does the list disclose all beneficiaries, including married daughters?⁹²
- Are any of the beneficiaries children under the age of eighteen (18) years?
- Is there proof that all potential beneficiaries have been notified?
- Is the list of beneficiaries corroborated by the chief's letter or other relevant evidence?
- Has the Gazette notice been published?
- Has the statutory period for objections, being thirty (30) days, lapsed?

⁹² In the case of [re Estate of Susan Mwelu Mutia \(Deceased\) \[2025\] KEHC 2202 \(KLR\)](#) a married daughter of the deceased had been deliberately omitted from the list of beneficiaries. The court amended the list of beneficiaries, apportioning equal shares.

Procedural compliance

- Does the petition comply with the Probate and Administration Rules?
- Are the affidavits complete and truthful?
- Are all required supporting documents attached?
- Is there any legal bar to the issuing of the grant?

Disputes

- Have objections, if any, been heard and determined?
- Are there any competing petitions relating to the same estate?
- Is there any application for provision for a dependant under [section 26](#)?

7.4.2 Judicial Checklist for Issuing a Grant of Probate

179. In determining whether to issue a grant of probate, the following questions should guide the court.

Jurisdiction

- Is there proof of death of the deceased?
- Did the deceased reside or leave property within the court's jurisdiction?
- Is the value of the estate within the pecuniary and territorial jurisdiction of the court, where the matter is before a magistrates' court?
- Is the application for a full grant or a limited or special grant?

Validity of the will

- Did the deceased leave a valid will?
- Have objections to the will, if any, been heard and determined?

Entitlement to be appointed executor

- Is the applicant the person named as executor in the will?
- Is the executor competent, that is, an adult, of sound mind and not disqualified on any legal ground?
- If other persons are also named as executors, have they renounced or consented, in accordance with [sections 59](#) and [60](#)?

Procedural compliance

- Does the petition comply with the Probate and Administration Rules?
- Have all supporting documents been attached?
- Has the waiting period of fifteen (15) days been observed, or has leave of the court been granted under [Rule 25\(4\)](#)?
- Has the Gazette notice been published?
- Has the statutory period for objections, being thirty (30) days, lapsed?
- Is there any legal bar to the issuing of the grant?

Disputes

- Have all pending disputes been heard and determined?

180. The table below provides a helpful comparison between the checklist for grants of probate and the checklist for grants of letters of administration.

7.4.3 Table: Juxtaposition of Checklist for Issuance of Grant of Probate and Grant of Letters of Administration

Issue	Probate/Testate	Intestate
Jurisdiction	Has death been proved? Is court properly seized of jurisdiction?	
Identification of estate	Is there a prima facie valid will that lists the assets of the estate?	Is there a list of the assets of the estate?
Entitlement to administer	Is the applicant named executor in the will? If multiple executors are named and only one has applied, have the others renounced probate or consented to the application?	Is the applicant entitled to apply to administer the estate under section 66 ? If someone else ranks higher in the order of priority, is there proof that they have renounced or consented to the application?
Entitlement to benefit	Does the will clearly identify the beneficiaries?	Have all beneficiaries been listed?
Procedural compliance	Has the petition complied with the P&A rules?	
Disputes	Have all objections been heard and determined?	

7.5 Objection to the Making of a Grant

7.5.1 Concept and Purpose of Objecting to a Grant

181. An objection to a grant is a pre-grant procedure through which a person with an interest in an estate formally opposes the making of a grant of representation to a particular applicant. It is not a challenge to an existing grant, but a mechanism for preventing an improper grant from issuing in the first place. An objection is therefore anticipatory in nature: it is intended to stop the grant before it is made.
182. In most cases, an objection is accompanied by a cross-application. An objection without a cross-application may still succeed, but a cross-application clarifies the objector's entitlement to issuance of the grant.
183. [Rule 7 \(4\)](#) of the [Probate and Administration Rules](#) provides that, upon the filing of an application for a grant of letters of administration, the Registrar shall cause the application to be gazetted and also conspicuously exhibited in the court premises where the application is made. The notice must specify the period within which objections may be filed, which period shall not be less than thirty (30) days from the date of gazettelement.
184. [Section 68](#) of the Law of Succession Act provides for the filing of objections to a petition for a grant of representation in the prescribed form, Form 76, and within the prescribed time, usually thirty (30) days, or within such time as the court may allow upon an application for extension under [section 68](#)
185. Once a notice of objection is filed, the Registrar shall issue the objector with a notice to file an answer to the petition and a cross-application within the specified period.
186. [Section 69](#) of the Law of Succession Act sets out the procedure after notice and objection. Where a notice of objection is lodged but no answer or cross-application is filed as required, a grant may be made in accordance with the original application. However, where an answer and cross-application have been filed, the Registrar shall refer the matter to the court for directions and shall notify the petitioner and the objector of the time and place set for hearing the petition, answer and cross-application. The court may then hear and determine the dispute by issuing the grant of representation to the original petitioner, thereby dismissing the objection; issuing the grant to the objector, thereby allowing the objection and cross-petition; or, in appropriate cases, issuing the grant jointly to the petitioner and the objector, or to any other party the court considers best suited to administer the estate.

187. [Section 70](#) provides for the court's powers, whether or not the petition for a grant is objected to. The court may examine the applicant on oath or affirmation, call for further evidence on the due execution or contents of the will or another will, the making of an oral will, the rights of dependants and persons claiming interests on intestacy, or any other matter that appears to require further investigation before a grant is made. The court may also issue a special citation to any person who appears to have reason to object to the application.

7.5.2 When is an Objection Filed?

188. An objection is filed after publication of the petition for grant in the Kenya Gazette, but before the grant is issued. Once a grant has issued, the objection procedure is no longer available, and the proper remedy lies in revocation or annulment under section 76 of the Law of Succession Act.

7.5.3 Who May Object?

189. An objection may be lodged by a beneficiary or dependant of the deceased, a person entitled in priority under [section 66](#), a creditor of the estate, or any other person with a legally recognizable interest.

7.5.4 Grounds for Objection

190. The essence of an objection is the right to administration. It is not a claim for distribution. An objection may be grounded on, among other matters, the petitioner's lack of capacity, improper priority under [section 66](#), the existence of another valid will, exclusion of beneficiaries, unsuitability of the proposed administrator, or a dispute as to entitlement to administration.

7.5.5 Judicial Precedent on Objection

191. In [re Estate of James Njenga Karume \[2025\] KEHC 8331 \(KLR\)](#), the court proceeded to confirm the grant because the objection did not relate to permissible grounds for objection. The objection related instead to the mode of distribution and the objectors' grievance that they had been excluded from the boards of directors of companies connected to the estate.

192. In [re Estate of Peter Kiplangat Koech - Deceased \[2025\] KEHC 11053 \(KLR\)](#) the objection was grounded on improper priority under [section 66](#). The petitioner claimed to be the

son of the deceased through the deceased's second wife. The court found that he had not proved that he was a child or dependant of the deceased. He also failed to prove the existence of a marriage between his mother and the deceased. The court therefore upheld the objection and allowed the cross-petition, appointing the objectors, who were the spouse and children of the deceased, as administrators in accordance with section 66 of the Law of Succession Act.

193. [Holmes v Holmes \[2022\] KEHC 10837 \(KLR\)](#) also dealt with the order of priority under [Section 66](#). The petitioner was the spouse of the deceased, while the objector was a child of the deceased. The court found that, contrary to the objector's assertion, he did not rank equally with his mother and was therefore not entitled in the same degree to administer the estate. He had no priority over her.

7.5.6 Effect of Objection Proceedings

194. Once an objector files an objection, together with an answer to the petition and a cross-application, the petition for grant is stayed pending determination of the objection. No grant may issue while objection proceedings are pending. Objection proceedings culminate in a determination on entitlement to administration.

7.5.7 Judicial Checklist on Objection

195. Before determining an objection, the court should ask:

- Was the objection filed before issuance of the grant?
- Was it filed within the period specified in the Gazette notice, or was an extension sought and granted?
- Does the objector have locus standi?
- What is the competing entitlement under section 66?
- Has a cross-application been filed?
- Is the dispute about administration, rather than distribution?
- What order best serves the orderly administration of the estate?

196. The guiding principle is that objection proceedings are concerned with who should hold the grant, not who should ultimately benefit from the estate. Distribution is addressed at the confirmation stage.

7.6 Judicial Checklist for Confirmation of Grant

197. Section 71 of the Law of Succession Act requires that all grants be confirmed by the court within six (6) months of issuance, unless the court directs a shorter period. The table below juxtaposes the checklists for confirmation of a grant of probate and a grant of letters of administration.

Issue	Grant of Probate (Testate)	Grant of Letters of Administration (Intestate)
Statutory period	Have 6 months lapsed? If not, was shorter period permitted by court? (section 71(1) and (3)).	
Whether grant was rightly made to applicant	Was the will properly proved?	Was the administrator properly appointed?
Lawful administration	Is the executor lawfully administering (or will lawfully administer) the estate (section 71(2)(a)? If yes, confirm grant; if not, appoint alternative person, transfer grant to holder of a confirmed grant from another court, or postpone confirmation (section 71(2)).	Is the administrator lawfully administering (or will lawfully administer) the estate (section 71(2)(a)? If yes, confirm grant; if not, appoint alternative person, transfer grant to holder of a confirmed grant from another court, or postpone confirmation (section 71(2)).
Ascertain beneficiaries and distribution	Are beneficiaries' shares set out according to the will?	Is there full identification of all persons beneficially entitled and their respective shares?
Have all necessary consents been secured? ⁹³	Form 37 (Rule 40)	Form 38; Form 39 (as the case may be) (Rule 40)
Disputes	Have objections, if any, been heard and determined?	
Dependency (section 26)	Have applications for provision for dependents, if any, been heard and determined? Have details of all persons eligible for dependency been provided in accordance with Rule 40(3) ?	
Estate duty	Has all estate duty payable been paid?	

⁹³ See the case of *In re Estate of Susan Mwelu Mutia (Deceased)* [2025] KEHC 2202 (KLR) where consent had not been obtained from a married daughter of the deceased. The court cured this defect by amending the grant and adding her as an administrator, terming her exclusion by her unmarried sisters as unconstitutional under Article 27 of the Constitution.

7.6.1 Table: Juxtaposition of Checklist for Confirmation of Grant of Probate and Grant of Letters of Administration

7.7 Revocation or Annulment of Grant

198. Revocation or annulment of a grant is a post-grant process governed [section 76](#) the Law of Succession Act. Only the High Court may entertain an application for revocation or annulment of a grant under ([Rule 44 P&A](#)). [Section 76](#) empowers the court to nullify a grant of representation where fundamental defects exist in its procurement or in the administration of the estate. Revocation goes to the root of the grant itself and, once ordered, renders the grant void ab initio.

7.7.1 Circumstances under Which the Court Will Entertain Revocation or Annulment

199. The court will entertain an application for revocation or annulment only where one or more of the statutory grounds under [section 76](#) are established. These include defective proceedings⁹³ in obtaining the grant; fraud or concealment of material facts; untrue allegations essential in law, even where made innocently; failure by the administrator to apply for confirmation, administer the estate diligently or render accounts; or circumstances in which the grant has become useless or inoperative through intervening events.

200. [Section 76](#) is not a panacea for all grievances in succession matters. It addresses the validity and continued operability of the grant, not the fairness or equity of distribution.

7.7.2 Judicial Precedent on Revocation and Annulment of Grants

201. **In the Matter of the Estate of Margaret Mugure Waweru (Succession Cause No. 1320 of 2004) (unreported, decided July 2024)**, a grant was revoked on the ground of concealment of material facts. A daughter had obtained letters of administration in respect of her late mother's estate. Her father, who was divorced from her mother, objected and sought revocation of the grant under [section 76](#) of the Law of Succession Act. The concealment related to the fact that the petitioner knew that three of the properties she had listed as forming part of the estate had been jointly registered in the names of the deceased and the objector, and had therefore devolved to the objector by survivorship upon the death of the deceased. The court held that there had been concealment and non-disclosure of material facts and proceeded to revoke the grant.

202. [In re Estate of Samwel Muiruri Nganga \(Deceased\) \[2025\] KEHC 179 \(KLR\)](#), the court explained the scope of [section 76](#) in detail, categorizing the grounds for revocation into three sets of circumstances. The first relates to defective process. This may include omission of a mandatory procedural step; an application for representation by persons who are not competent or suitable for appointment; issuance of letters of administration intestate where the deceased died testate and a grant of probate should have issued, or vice versa; or a process marred by fraud, misrepresentation or concealment of material facts, such as failure to disclose some survivors or a false claim by an applicant that they are a survivor.
203. The second category relates to a grant that was obtained procedurally, but where the administrator subsequently mishandles the administration of the estate. This may include failure to apply for confirmation of grant within the time allowed, failure to proceed diligently with administration, or failure to render accounts as and when required.
204. The third category concerns a grant that has become useless or inoperative following intervening circumstances. Such circumstances may include the death, physical incapacity or loss of soundness of mind of a sole administrator, or the bankruptcy of a sole administrator, rendering that person unqualified to hold an office of trust.
205. In [re Estate of Samwel Muiruri Nganga \(Deceased\) \[2025\] KEHC 179 \(KLR\)](#), one of the deceased's sons filed an application for revocation of a grant issued to his biological mother. He alleged forgery of his signature in the consent to confirmation of grant and argued that the administrator, as a life interest holder, had no power to dispose of estate assets, including shares. The court dismissed the objection for failure to establish any of the grounds set out in [Section 76](#). More importantly, the court found that the respondent, who was the administrator, had demonstrated proper administration of the estate in accordance with the law and the deceased's wishes. The court cautioned that the primary purpose of succession law is to ensure orderly distribution of estates while respecting the deceased's wishes and protecting genuine dependants. It is not intended to become a vehicle for adult children to make unreasonable demands on estates built by their parents.
206. In [Albert Imbuga Kisigwa v Recho Kawai Kisigwa \[2016\] KEHC 1528 \(KLR\)](#), the court emphasized that the power to revoke a grant is discretionary and must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically

or capriciously. There must be evidence of wrongdoing for the court to invoke [section 76](#) and order revocation or annulment of a grant. In exercising this discretion, the court must take into account the interests of all beneficiaries and act in the interests of justice.

207. A court also has power to order revocation of a grant on its own motion. In [re Estate of Nduku Ndolo Wathome \(Deceased\) \[2025\] KEHC 18806 \(KLR\)](#) the court revoked a grant because it did not appear that all beneficiaries of the deceased's estate had been consulted or had given consent to issuance of the grant. The court issued directions for a fresh petition to be filed.

208. Courts have also established that where a sole administrator dies, the proper course is an application for revocation under [section 76](#), rather than substitution. In [re Estate of Muthoni Karanja alias Paulina Muthoni Karanja \(Deceased\) \[2024\] KEHC 14251 \(KLR\)](#), the court declared an application for substitution fundamentally flawed. It annulled the grant and directed the applicant to petition for a fresh grant.

7.7.3 Judicial Checklist on Revocation or Annulment

209. In determining an application for revocation or annulment, the court should ask:

- Is the application directed at the grant of representation, or at the certificate of confirmation?
- Which specific ground or grounds under [section 76](#) have been pleaded?
- Is there credible evidence supporting fraud, concealment, defect in process or other statutory ground?
- Has the administrator failed to discharge statutory duties under sections [83](#) and [71](#)?
- Has the grant become incapable of implementation?
- Would revocation or annulment serve the interests of justice and orderly administration of the estate?

7.8 Substitution of Administrator

210. The Law of Succession Act does not expressly provide for "substitution" of administrators.

211. The law does not contemplate substitution of a sole administrator. Where a sole administrator dies, the effect is that the grant becomes inoperative and is therefore amenable to revocation under [Section 76](#) of the Law of Succession Act.

212. Where one of two or more administrators dies or becomes incapacitated, [Section 81](#) of the Law of Succession Act provides as follows:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: Provided that, where there has been a grant of letters of administration which involves any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.”

7.8.1 Judicial Precedent on Substitution of Administrator

213. Courts have been emphatic that there is no provision for substitution of an administrator in succession proceedings. This position is affirmed in **Florence Okutu Nandwa and another v John Atembakojwa, Court of Appeal Civil Appeal No. 306 of 1998 at Kisumu (unreported)**; [In re Estate of Muthoni Karanja alias Paulina Muthoni Karanja \(Deceased\) \[2024\] KEHC 14251 \(KLR\)](#); [Re Estate Of Mwangi Mugwe Alias Elieza Ngware \(Deceased\) \[2003\] KEHC 872 \(KLR\)](#); [John Karumwa Maina v Susan Wanjiru Mwangi \(In the Estate of Gachuhi, Deceased\) \[2015\] KEHC 7267 \(KLR\)](#); [Changal v Maritim & another \(Succession \[2025\] KEHC 8667 \(KLR\) \(18 June 2025\) \(Ruling\)](#).

7.9 Rectification of Grant

214. Rectification is governed by [section 74](#) of the Law of Succession Act and [Rule 43](#) of the [Probate and Administration Rules](#). It is a narrow corrective power intended to address clerical or descriptive errors.

7.9.1 Circumstances under Which a Court Will Entertain Rectification

215. The court will entertain rectification only where the error relates to:

- names or descriptions of persons;
- descriptions of property, time or place of death; or
- description of the purpose of a limited grant.

216. It is important to note that rectification cannot be used to alter distribution or substantive rights.

7.9.2 Judicial Precedent on Rectification

217. [In re Estate of John Omae Nyangweso \(Deceased\) \[2024\] KEHC 4924 \(KLR\)](#) the court held that rectification is limited to correcting errors in names, descriptions or minor clerical details. Introducing new assets or beneficiaries must be done by applying for review or seeking fresh confirmation of grant. This position had been explained in greater detail in [the matter of the estate of Geoffrey Kinuthia Nyamwinga \(Deceased\) \[2013\] KEHC 3745 \(KLR\)](#). In that case, the court made clear that adding omitted assets requires a review application under [Order 45](#) of the Civil Procedure Rules, as imported into succession practice by [Rule 63](#) of Probate and Administration Rules. Rectification only extends to correcting clerical errors in property descriptions in a grant or certificate of confirmation of grant. For addition of omitted property, the proper avenue is a review application under Order 45. The court emphasized that a grant and a certificate of confirmation of grant are court orders, not pleadings, and therefore cannot be amended like pleadings. While section 74 of the Law of Succession Act provides for certain amendments to grants, where it does not apply, an applicant must seek relief by way of review under [Order 45](#).

7.9.3 Judicial Checklist on Rectification

218. In determining an application for rectification, the court should ask:

- Is the error clerical, typographical or descriptive in nature?
- Would the correction affect beneficiaries or shares?
- Is the correction supported by documentary proof?
- Is the application an attempt to circumvent revocation or review?

7.10 Review of Confirmed Grants or Certificates of Confirmation

219. The Law of Succession Act does not expressly provide for review of confirmed grants. Courts rely on [Section 47](#) of the Act, which grants the High Court broad jurisdiction to handle succession matters, including hearing applications, resolving disputes and issuing decrees relating to deceased persons' estates. Some jurisdiction is also extendable to resident magistrates in estates valued at less than KSh 20 million. Section 47 establishes the High Court as the primary forum for inheritance matters, ensuring

orderly administration, although complex land ownership questions may also implicate the jurisdiction of the Environment and Land Court.

220. Additionally, [Rule 63](#) of the Probate and Administration Rules imports certain orders from the [Civil Procedure Rules, 2010](#) into succession matters. It provides:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely [Order 5, rule 2](#) to [34](#) and Orders [11](#), [16](#), [19](#), [26](#), [40](#), [45](#) and [50](#) (Cap. 21, Sub. Leg.), together with the [High Court \(Practice and Procedure\) Rules](#) (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

221. [Order 45](#) of the Civil Procedure Rules, 2010, and [section 80](#) of the [Civil Procedure Act](#), both of which address review of orders, are therefore applicable to succession proceedings.

7.10.1 Circumstances for Entertaining Review

222. Review is the appropriate remedy where:

- there is discovery of new and important matter or evidence that was not within the applicant’s knowledge, or could not be produced at the time of confirmation of the grant;
- there is a mistake or error apparent on the face of the record, but the error does not fall within the scope of rectification under [section 74](#);
- there is any sufficient reason; or
- the new and important evidence discovered includes other assets or liabilities of the deceased that were not distributed.

7.10.2 Judicial Precedent on Review

223. In [re Estate of Prisca Ong’ayo Nande \(Deceased\) \[2020\] KEHC 6553 \(KLR\)](#), the court reiterated that an application for review is available to a dissatisfied party because the Law of Succession Act does not provide a specific remedy for parties dissatisfied with confirmation orders. The available avenues are appeal, review, or setting aside or vacating the confirmation orders under general civil law principles. The case involved a creditor who sought revocation of a certificate of confirmation of grant for failure to note the creditor’s interest in the deceased’s estate. The court also emphasised that a

certificate of confirmation of grant is not itself a grant of representation for purposes of revocation under [Section 76](#) of the Law of Succession Act. It is merely an extract of the court's confirmation orders under [section 71](#). It does not constitute a fresh grant and cannot therefore be the subject of an application for revocation.

7.10.3 Judicial Checklist on Review of Confirmed Grants

224. In determining an application for review, the court should ask:

- Is the applicant challenging distribution, rather than the grant itself?
- Are the grounds for review under [order 45](#) of the Civil Procedure Rules clearly pleaded and proved?
- Is the court functus officio upon confirmation, or does a recognised review jurisdiction remain available?
- Would review prejudice settled rights or third-party interests?
- Is the application an appeal in disguise?
- Would review serve the interests of expeditious and orderly distribution of the estate?

7.11 Do Injunctions Apply in Succession Matters?

7.11.1 General Principle

225. Although the Law of Succession Act does not expressly provide for injunctions, succession courts have jurisdiction to issue injunctive and preservative orders where this is necessary to preserve the estate, prevent waste, intermeddling or dissipation, or safeguard the subject matter pending determination.

226. This power flows from the court's inherent jurisdiction under [section 47](#) of the Law of Succession Act, read together with [Rule 73](#) of the [Probate and Administration Rules](#).

227. The absence of an express statutory provision does not deprive the court of power to preserve the estate.

228. [Section 47](#) High Court jurisdiction to "entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders as may be expedient".

229. This provision has been interpreted broadly to include injunctions and conservatory orders.

230. In addition, [Rule 73](#) of the [Probate and Administration Rules](#) preserves the court's inherent powers in the following terms:

"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

231. [Section 45](#) of the Law of Succession Act prohibits dealing with estate property without authority. Courts frequently issue injunctions to enforce this statutory prohibition.

7.11.2 Limits to Injunctive Relief in Succession Matters

232. Injunctions in succession matters are preservatory, not proprietary. Succession courts do not determine ownership disputes between the estate and third parties. Where a dispute concerns title or ownership, the succession court must decline jurisdiction on that issue. The court may, however, stay the distribution of the particular property pending determination of the dispute in the appropriate forum, which may be the Environment and Land Court or the Commercial Division, depending on the nature of the property.

233. An injunction cannot redistribute the estate, confer ownership or determine beneficiary entitlements. It only preserves the status quo. Further, the court must first be satisfied that the property belongs to the deceased's estate, or that there is a prima facie basis for treating it as estate property.

234. [Order 40](#) of the [Civil Procedure Rules](#) does not strictly apply, courts often borrow the principles in **Giella v Cassman Brown [1973] EA 358**, with necessary adaptation.

235. The court considers:

- whether a prima facie case has been made for the estate's interest;
- whether there is a real risk of waste, sale or intermeddling;
- whether refusal of the order would defeat the administration of the estate; and
- whether the balance of convenience favours preservation of the estate property.

236. Courts have issued injunctions to stop the sale of estate land before confirmation of grant, restrain intermeddling by non-administrators, preserve estate assets pending revocation proceedings, prevent administrators from acting outside their mandate, and maintain the status quo during disputes over beneficiaries, among other scenarios.

237. While succession courts do not resolve ownership disputes, they must preserve the estates of deceased persons during the pendency of succession proceedings. Injunctions are therefore tools of preservation, not adjudication.

7.11.3 Judicial Precedent on Injunctions in Succession Proceedings

238. [In re Estate of Kingongo Gachagua \(Deceased\) \[2024\] KEHC 13035 \(KLR\)](#), the court found that a beneficiary named in a valid will and confirmed grant has locus standi to seek interlocutory injunctive relief in a succession cause to protect estate property. The case also affirmed the High Court's jurisdiction under [Section 47](#) of the Law of Succession Act and [Rule 73](#) of the Probate and Administration Rules to grant such relief.

239. The court further held that where uncontroverted evidence shows that non-administrators are interfering with estate property, such conduct amounts to intermeddling, which is prohibited under [Section 45](#) of the Law of Succession Act. This establishes a prima facie case justifying a temporary injunction to preserve the estate pending final distribution.

240. In [Masuu v Mulandi & 5 others \[2023\] KEHC 19929 \(KLR\)](#), the court held that an interlocutory injunction issued in a succession cause lapses by operation of law after twelve (12) months under [Order 40 Rule 6](#) of the Civil Procedure Rules, unless extended for sufficient reason.

241. Where such an injunction has expired, and the applicant fails to demonstrate justification for its extension, particularly where the order has been used to create an inequitable situation and has contributed to delay in the substantive determination of the succession dispute, the court is entitled to discharge the injunction and restore the status quo ante. This ensures fairness and facilitates expeditious resolution of the main cause.

242. [In re Estate of Paul Gicheru \(Deceased\) \[2025\] KEHC 18589 \(KLR\)](#), the court held that a putative beneficiary who produces prima facie proof of paternity has sufficient locus standi to challenge succession proceedings and to obtain interlocutory injunctive relief to preserve disputed property, particularly where sale of the property would occasion irreparable loss and the estate has other undisputed assets available to meet financial needs. In that case, a grant had been obtained and confirmed over disputed property while a beneficiary's objection was still pending and without notice to that beneficiary. The court considered this a breach of the rules of natural justice and upheld the putative beneficiary's right to injunctive relief.



7.11.4 Judicial Checklist on Injunctive Relief

244. Before granting injunctive relief, the court should ask:

- Is the matter properly before the succession court?
- Does the applicant have a recognizable succession interest or locus standi?
- Is the property prima facie part of the estate?
- Is there evidence of intermeddling or risk of dissipation?
- Is the order sought preservatory rather than determinative?
- Would the order aid orderly administration of the estate?

7.12 Third-Party Purchasers and Creditors in Succession Proceedings

245. Succession courts frequently encounter applications by third parties who allege that they purchased property from the deceased during the deceased's lifetime and who seek recognition, protection or transfer of such property within succession proceedings.

246. These claims raise a fundamental jurisdictional question: what is the proper role of the succession court where a third party asserts proprietary rights against an estate?

247. Kenyan courts have developed clear guiding principles to prevent succession proceedings from being converted into ordinary civil suits.

248. The general principle is that a succession court does not determine contested ownership or title disputes between the estate of the deceased and third parties.

249. The court's mandate is limited to identifying the free property of the deceased under [section 3](#), Law of Succession Act and distributing such property to beneficiaries.

250. Where ownership is disputed, the matter ordinarily falls outside succession jurisdiction.

251. [Section 3](#) of the Law of Succession Act provides that the free property of the deceased

forms the estate. If property was validly sold and transferred during the deceased's lifetime, it ceases to be free property. [Section 45](#) prohibits dealings with estate property without authority. Purchasers who transact after death commit intermeddling and acquire no enforceable interest through succession proceedings. [Section 82](#) provides for the powers of personal representatives, including the power to complete transactions lawfully entered into by the deceased, but only after a grant has issued and subject to the law. [Section 83](#) sets out the duties of personal representatives, including settlement of lawful debts of the estate and valid contractual obligations.

7.12.1 Classification of Third-Party Purchaser Claims

252. Courts distinguish between three categories of claims by third-party purchasers. The first category relates to a completed sale during the deceased's lifetime. This category involves a valid contract where consideration was paid and transfer completed. Such property does not form part of the estate, and the succession court must exclude it from distribution in line with the requirement under [section 3](#) that the court deal only with the free property of the deceased.

253. The second category relates to incomplete sales where there is a contract or sale agreement, the property was not transferred and remains in the deceased's name, but the transaction is not disputed. In such a case, the purchaser may be treated as a creditor of the estate and may pursue completion through the administrators. The succession court may recognize the claim administratively, but cannot determine disputed validity. It follows that, in this second category, the extent of the succession court's jurisdiction to recognize the third party's interest may depend on whether the claim is admitted or disputed.

254. The third category concerns a disputed sale or contested ownership. In such a case, the sale is denied by the estate, or the authenticity of the agreement is questioned through allegations of fraud, forgery or lack of capacity on the part of the deceased. In such circumstances, the succession court must decline jurisdiction and direct the parties to file suit before the appropriate court, often the Environment and Land Court where the dispute concerns land.

7.12.2 Procedure Available to Purchasers in Succession

255. Purchasers may apply to be recognized as creditors or interested parties. Such joinder allows for limited participation without converting the succession proceedings into a civil trial.

the applicant demonstrated a direct claim to the property, the probate court's jurisdiction was limited to administrative matters concerning distribution of the estate among beneficiaries, dependants and personal representatives. It did not extend to resolving disputes with third-party claimants. Such claims, including those requiring examination of sale agreements and payments, must be pursued in a separate civil forum, specifically the Environment and Land Court.

262. [In re Estate of Njuguna Igwima \(Deceased\) \[2017\] KEHC 3272 \(KLR\)](#), the High Court, sitting as a succession court, held that it lacked jurisdiction to determine claims concerning ownership or co-ownership of estate property based on an alleged customary trust. Although the petitioner claimed a proprietary interest in two parcels of land, he was neither a beneficiary nor a dependant of the deceased under the Law of Succession Act. His claim involved the existence and implications of a trust, matters falling within the exclusive jurisdiction of the Environment and Land Court under [Article 162\(2\)\(b\)](#) the Constitution and the Environment and Land Court Act. Consequently, the two contested properties were excluded from the succession proceedings for determination by the Environment and Land Court, while administration of the undisputed portion of the estate continued.

7.12.4 Judicial Checklist on Third-Party Purchaser Claims

263. Before entertaining a third-party purchaser's application, the court should ask:

- Is the applicant a beneficiary or a third party?
- Was the alleged sale before or after death?
- Is the transaction complete or incomplete?
- Is ownership disputed by the estate?
- Does the claim require adjudication of title, fraud, forgery or contractual validity?
- Can the issue be handled administratively as a creditor claim?
- Should the matter be referred to the Environment and Land Court or another court with proper jurisdiction?
- Is preservation of the property necessary pending resolution?

7.12.5 Claims for Advocates' Fees

264. The High Court has ruled that legal fees do not constitute a debt on the estate in a manner that entitles an advocate to participate in distribution as though the advocate were a beneficiary. This was one of several rulings issued in [In the Matter of the Estate](#)

[of Mbiyu Koinange \(Deceased\) \[2015\] KEHC 81 \(KLR\)](#). The various administrators and beneficiaries had engaged multiple advocates, many of whom filed applications to have their legal fees settled before distribution of the estate. Even where a single advocate has been retained to act for the estate, although the advocate is entitled to recover fees from the estate, that entitlement does not translate into a right to participate in distribution. The advocate should agree on fees with the administrator or have the fees taxed in the ordinary manner at the end of the proceedings. Advocates appointed by individual beneficiaries should be paid by those beneficiaries, not by the estate.

7.13 Right of Appeal in Succession Matters

265. [Section 50](#) of the Law of Succession Act deals with appeals. It provides:

“(1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis’ Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”

266. A plain reading of section 50 shows that there is no explicit provision for appeals from the High Court to the Court of Appeal, except in matters involving a point of Muslim law, and even then, with leave of the High Court. The Law of Succession Act is silent on appeals in cases filed before the High Court exercising original jurisdiction under [section 47](#).

7.13.1 Judicial Precedent on Right of Appeal in Succession Matters

267. The Supreme Court rendered a decision on this matter on 31 March 2026 in [Eliud Mwendia Wandu-v-Kevin Wanjohi Muchira \(Suing as the administrator ad litem of Jane Muthoni Muchira\) \[2026\] KESC 29 \(KLR\)](#), holding that silence in the law does not translate into absence of a right of appeal.

268. Prior to this decision, the Court of Appeal had issued conflicting precedents on whether leave was required to appeal High Court decisions in cases filed under [section 47](#) of the Law of Succession Act. One line of cases held that section 50 means there is no automatic right of appeal. Under this approach, an aggrieved party must seek leave before the High Court and, if leave is denied, before the Court of Appeal. These cases include [Machuka & Another -v- Nyangute & Another \[2025\] KECA 538 \(KLR\)](#); [Boit-v-Kumin](#)

[& Another \(interested parties\) \[2025\] KECA 568 \(KLR\)](#); [Esther Kabon Rokoch & Another -v- Kobilu Chepkien & Another \[2021\] KECA 405 \(KLR\)](#). This line of precedent also holds that extension of time to file an appeal is at the discretion of the court, taking into account factors such as:

- the period and reason for the delay;
- the possible chances of the appeal succeeding if the application is granted;
- the degree of prejudice to the respondent if the application is granted;
- the effect of the delay on administration of justice;
- the importance of compliance with time limits;
- the resources of the parties; and
- whether the matter raises issues of public importance.

269. In [Everlyn Wairimu Njoroge-v-Patricia Njeri Odhiambo & 3 others, \[2026\] KECA 211 \(KLR\)](#), the Court of Appeal declined leave to file a notice of appeal out of time, approximately ten (10) months after the High Court had delivered judgment in a succession cause. The applicant's explanation was that she had been ill for nine (9) months, had been "in and out of hospital" and only became aware of the judgment at the end of that period. The Court held that she had not furnished sufficient evidence to show how the alleged illness had incapacitated her from pursuing the case. The Court also noted that extension of time is discretionary, and that allowing extension in that case would unfairly prejudice the interests of the respondents. It added that equity aids the vigilant, not the indolent.

270. The other line of Court of Appeal cases interpreted [Article 164\(3\)\(a\)](#) as establishing unqualified access to the Court of Appeal from the High Court in all cases, without the need for an express statutory provision granting the right of appeal or requiring leave. Examples include [In re Estate of RBC \[2023\] KECA 1553 \(KLR\)](#), where the Court reasoned that, since [Rule 63\(1\)](#) of the Probate and Administration Rules imports certain provisions of the Civil Procedure Rules into succession proceedings, including [Rule 45](#) on review, and since the right of appeal is automatic under those imported provisions, appeals arising from such provisions would also lie as of right.

271. The question, therefore, is how the silence in the text of the Law of Succession Act should be understood. The Supreme Court considered this question and concluded that there was no reason for courts to read the silence as meaning that leave is a prerequisite for appealing to the Court of Appeal. The Court pointed to examples showing that

where legislative intent is to make leave a prerequisite, this is usually clearly stated. The requirement for leave appears to have emerged from judicial practice. The Supreme Court concluded that it would be incongruous for [section 50](#) to extend an automatic right of appeal in respect of proceedings emanating from subordinate courts but curtail it when proceedings originate in the High Court, especially in light of the non-discrimination clause under [Article 27\(1\)](#). The Supreme Court reiterated that laws must be interpreted through the lens of the Bill of Rights and in a manner that promotes the purposes, values and principles of the Constitution, including access to justice.

7.14 Constitutionality Challenges to Some Provisions of the Law of Succession Act

272. To date, there have been three cases in which provisions of the Law of Succession Act have been declared unconstitutional. These cases have been discussed under the respective thematic headings above, but are highlighted here for ease of reference.

7.14.1 Judicial Precedent on Constitutionality Challenges to Some Provisions of the Law of Succession Act

273. The most recent successful constitutional challenge to the Law of Succession Act is the constitutionality of the LSA is [Dennis Kivuti Mungai -v- AG \[2025\] KEHC 8544 \(KLR\)](#). The petition challenged [section 29\(c\)](#) of the Act as discriminatory and contrary to [Articles 27](#) and [45\(3\)](#) of the Constitution, on the basis that it required husbands and former husbands, but not wives and former wives, to prove dependency on the deceased in the period immediately preceding death. The court found in favour of the petitioner and declared [section 29\(c\)](#) unconstitutional.

274. The implication of the judgment is that courts interpreting and applying [section 29\(c\)](#) must disregard the provision to the extent of its inconsistency with the Constitution, in line with [Article 259\(1\)](#).

275. The second case is [Ripples International-v-AG \[2022\] KEHC 13210 \(KLR\)](#), which declared sections [35\(1\)](#), [36\(1\)](#), and [39\(1\)\(a\)](#) and [\(b\)](#) unconstitutional for perpetrating discrimination on grounds of sex. Sections [35\(1\)](#) and [36\(1\)](#) were declared unconstitutional because they required a widow, but not a widower, to forfeit life interest in a deceased spouse's estate upon remarriage, thereby offending [Articles 27](#) and [45](#) of the Constitution. Section [39\(1\)\(a\)](#) and [\(b\)](#) was also declared unconstitutional for giving preferential treatment to the father and excluding the mother from distribution of the estate of a deceased person

who dies without a spouse or children. Under the impugned provision, a mother would only be considered if the deceased person's father was dead.

276. The court directed that those provisions of the Law of Succession Act must henceforth be "interpreted in a manner that gives effect to the equality of women and men with regard to the protections and benefits accruing under the said provisions".

277. The third case challenged [section 3\(2\)](#) of the Law of Succession Act, together with [section 12](#) of the [Registration of Persons Act](#), for establishing an unconstitutional "optional paternity scheme": [NSA & FIDA -v- Cabinet Secretary for Ministry of Interior and Coordination of National Government & the AG \[2019\] KEHC 9196 \(KLR\)](#). The court declared that the impugned provisions contravened [Article 53\(1\)\(e\)](#) of the Constitution, which requires both mothers and fathers to provide for their children regardless of whether they are married to each other.

8.0 AREAS FOR REFORM

278. Issues calling for reform have emerged from the preceding discussion of the key concerns in the law of succession. This section collates those issues in the hope that judicial actors will give them visibility in their engagement with justice sector stakeholders and contribute to evidence-informed reform efforts.

8.1 Reforms Concerning Dependency

279. Parliament should repeal or amend [section 3\(2\)](#) of the LSA in order to align it with [Article 53\(1\)\(e\)](#) as the subsection was declared unconstitutional in 2019 ([NSA & FIDA -v- Cabinet Secretary for Ministry of Interior and Coordination of National Government & the AG \[2019\] KEHC 9196 \(KLR\)](#)). The amendment should remove reference to birth within or outside marriage as a basis for affording different treatment among descendants of a deceased person. Such reform would also align with the Supreme Court's judgment in [FAAF v RFM & 2 others \[2025\] KESC 45 \(KLR\)](#) which declared unconstitutional the exclusion of children born outside marriage from distribution of the estate of their Muslim father.

280. Further reform concerning dependency should include amendment of [section 29\(c\)](#) to end the discriminatory distinction between wives and husbands in relation to automatic eligibility as dependants. This provision was also declared unconstitutional in [Dennis](#)

[Kivuti Mungai -v- AG \[2025\] KEHC 8544 \(KLR\)](#) but Parliament has not yet amended the statute to give effect to the decision.

281. As part of public sensitization on dependency, testators should be advised to make clear the reasons for excluding any person who may be eligible for provision as a dependant. This reform suggestion is directed to the Bar and to actors involved in civic education. The easiest way to ascertain the reasons for excluding a dependant from a will, or from a gift made in contemplation of death, is for the testator to state those reasons. This is often not done. Advocates could include such guidance in will-drafting templates and advise clients accordingly, with a view to minimizing protracted litigation.

8.2 Determination of Matrimonial Property Should Bar Succession Claims

282. With respect to former spouses as dependants, there should be a condition that where a former spouse has had a matrimonial property claim finally determined or settled, that determination or settlement should bar a future claim against the deceased former spouse's estate. A clause could be introduced under [Section 17](#) of the Matrimonial Property Act to provide that a determination under that section settles all property claims under any other law, including the Law of Succession Act.

8.3 Enhance Synergy between the Matrimonial Property Act and the Law of Succession Act

283. Cases involving widows in polygamous marriages claiming beneficial interests in their deceased husbands' estates on the basis of contribution to matrimonial property before the marriage became polygamous highlight the lack of synergy between the Matrimonial Property Act and the Law of Succession Act. Since some courts have honoured such claims by drawing parallels with [section 8](#) of the Matrimonial Property Act, there is need to institutionalize and standardize the Judiciary's approach to such claims. This is necessary pending statutory reform and revision of the Probate and Administration Rules to set parameters for synergy between the two statutes.

8.4 Applicability of Rule 4(c) of the Matrimonial Property Rules

284. As discussed above, [Rule 4\(c\)](#) of the [Matrimonial Property Rules](#) lists, among those who may bring proceedings in relation to matrimonial property:

“an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership,

vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.”

285. This rule applies where a former spouse dies with pending litigation on matrimonial property, making it possible for an executor or administrator to step into the shoes of the deceased to continue the litigation. It is unclear whether it also applies to fresh posthumous litigation on matrimonial property after the claimant’s death. The subsidiary rule has no clear anchor in the parent statute, the Matrimonial Property Act. It is reasonable to argue that upon death, such a dispute should transition from the realm of matrimonial proceedings into succession proceedings. The succession court may refer to principles underlying matrimonial property where such a claim is made, as the High Court did in [Esther Wanjiru Githatu-v-Mary Wanjiru Githatu, \[2019\] KECA 811 \(KLR\)](#), and [Re the Estate of the late George Cheriro Chepkosiom \(Deceased\) \[2017\] KEHC 7270 \(KLR\)](#). Synergy between the two areas of family law is needed. However, continuing to treat the dispute as a matrimonial property dispute posthumously, as rule 4(c) appears to do, risks introducing uncertainty rather than coherence.

8.5 Resolve the Scope of Section 3(5) of the Law of Succession Act

286. As noted above, the Court of Appeal is split on the scope of application of section 3(5) of the Law of Succession Act. In [MWG v EWK \[2010\] KECA 322 \(KLR\)](#) the majority extended the scope of section 3(5) beyond a proven polygamous relationship to de facto unions, while the minority delivered a strong dissent. There is need for clarity on the applicability of [section 3\(5\)](#) in light of the Marriage Act, 2014 and its silence on the status of cohabitation unions.

8.6 Consider Absolute Interest for a Surviving Spouse in Appropriate Cases

287. The assumption informing provision of only a life interest for a surviving spouse may not fit the circumstances of contemporary family life. Widows are often more likely to outlive their spouses and, with increasing longevity, may do so for a considerable period. There is a case to be made for allowing a surviving spouse, upon request and in appropriate circumstances, to obtain an absolute interest in separate property, as the court held in [In re Estate of M’mugwika Baitobi \(Deceased\) \[2024\] KEHC 7133](#). The case is reinforced where family relationships are tense [[Stephen Gitonga M’murithi-v-Faith Ngira Murithi](#)

[\[2015\] KECA 347 \(KLR\)](#). This would give the surviving spouse the freedom to manage the property in a manner that suits their circumstances, including the power to dispose of it where that is the most economically viable option.

8.7 Explore Contemporary Alternatives to Gazette Notice

288. It has been standard procedure since the colonial period for publication in the official Gazette to be treated as notice to the public, for instance, of the passage of a law or the making of appointments to office. Section 45, read with the Probate and Administration Rules,⁹⁴ requires Gazette publication of applications for grants of representation and also mandates conspicuous display of the notice at the courthouse. The requirement of display is itself an implicit legislative acknowledgement that Gazette notice alone may not reach all affected parties, even though publication in the Gazette is treated as notice to all persons who may have an interest in an estate.
289. Beyond fulfilling a bureaucratic formality, it is doubtful whether the official Gazette remains an effective means of communicating succession notices to affected persons. In practice, publication in the Gazette may serve limited practical purpose and may not meaningfully advance the ends of justice. It may also complicate the succession process, contrary to the goal of simplicity envisioned by the 1968 Commission. The Commission had contemplated, for instance, that forms for applications for probate and letters of administration would be made available at the lowest administrative unit, in English, Kiswahili and, where necessary, the relevant local language.⁹⁵
290. Reform could dispense with, or supplement, the requirement of Gazette notice and replace it with proof of publication through platforms reasonably likely to reach persons with an interest in the estate. Examples include national and local-language radio broadcasts, similar to funeral announcements, notices posted at the chief's office, or notice through a social media forum associated with the deceased person's residential or ancestral area, professional network or business community. The website of the court station where proceedings have been initiated could also be used. More generally, innovations made to the rules on service of summons in court proceedings could be adapted for succession proceedings. A combination of such measures would likely serve the ends of justice better than reliance on the official Gazette alone.

⁹⁴ Rule 7(4) of the Probate and Administration Rules (Legal Notice No. 104 of 1980)

⁹⁵ Recommendation No. 53, [Presidential Commission on the Law of Succession](#).

8.8 Establish a Limitation Period for Succession Matters

291. It is necessary for the law to provide a limitation period for succession matters, subject to exceptions for circumstances covered under [section 76](#), including revocation or annulment on grounds of fraud, defective proceedings, failure to apply for confirmation within the prescribed time, or failure to account for administration. As the law currently stands, litigation may continue indefinitely. An application for revocation of a grant, for instance, may be entertained long after distribution of the estate. This state of affairs creates uncertainty and may affect the rights of third parties connected to the succession matter.

8.9 Explicit Provision for Appeals to the Court of Appeal in Succession Matters

292. Since the Supreme Court has pronounced itself and dispensed with the requirement for leave to appeal to the Court of Appeal in succession matters originating in the High Court, the question remains whether statutory reform is nonetheless needed to fill the silence in the Law of Succession Act by amending [section 50](#)?

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David Gachura Mukunu-v-Jackline Mbithe 2016 KEHC 5562 (KLR)	111

Dennis Kivuti Mungai -v- AG 2025 KEHC 8544 (KLR)	101,161,163
Douglas Njuguna Muigai-v-John Bosco Maina Kariuki 2014 KECA 753 (KLR)	103,218,234
Eliud Mwendia Wandu-v-Kevin Wanjohi Muchira (Suing as the administrator ad litem of Jane Muthoni Muchira) [2026] KESC 29 (KLR)	159
Esther Wanjiru Githatu-v-Mary Wanjiru Githatu, [2019] KECA 811 (KLR)	103,120,164
Everlyn Wairimu Njoroge-v-Patricia Njeri Odhiambo & 3 others [2026] KECA 211 (KLR)	160
FAAF v RFM & 2 others [2025] KESC 45 (KLR)	19,35,128, 129,162
Fauzi Said Ali & 3 Others v. Said Ahamed Ali & Another [2020] KEHC 6755 (KLR)	127
Florence Okutu Nandwa and Another Vs John Atembakojwa Court of Appeal Civil Appeal in Civil Appeal No. 306 of 1998 at Kisumu (unreported)	149,
GAAM & another-v-MOAO 2016 KEHC 6296 (KLR)	104,110,112
Gesora v Gesora [2022] KECA 109 (KLR)	103,107
Giella v Cassman Brown [1973] EA 358	153
Grace Wanjiru Njuru v Loice Njeri Njuru [2020] KECA 605 (KLR)	104
Holmes v Holmes [2022] KEHC 10837 (KLR)	144
In Re Estate of Carolyn Acheng Wagah [2015] KEHC 2453 (KLR)	111,112,113
In Re Estate of Faith Muita (Deceased) [2016] KEHC 2458 (KLR)	113
In re Estate of James Njenga Karume [2025] KEHC 8331 (KLR)	116,143
In re Estate of Johana Keya Kikuyu (Deceased) [2020] KEHC 4503 (KLR)	137
In re Estate of John Omai Nyangweso (Deceased) [2024] KEHC 4924 (KLR)	150
In re Estate of Kamau Macharia (Deceased) Court [2025] KEHC 20 (KLR)	157
In re Estate of Kariuki Wahome Njange (Deceased) [2018] KEHC 8662 (KLR)	137
In re Estate of Kingongo Gachagua (Deceased) [2024] KEHC 13035 (KLR)	154
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In re Estate of Muthoni Karanja alias Paulina Muthoni Karanja (Deceased) [2024] KEHC 14251 (KLR)	148,149
Re Estate Of Mwangi Mugwe Alias Elieza Ngware (Deceased) [2003] KEHC 872 (KLR)	149
In re Estate of Mwangi Suleiman Kahiu (Deceased), [2019] KEKC 29 (KLR)	126
In re Estate of Nduku Ndolo Wathome (Deceased) [2025] KEHC 18806 (KLR)	148
In re Estate of Njuguna Igwima (Deceased) [2017] KEHC 3272 (KLR)	158
In re Estate of Patrick Mwangi Githinji (Deceased)[2025] KEHC 6867 (KLR)	157

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In re Estate of Peter Kiplangat Koech - Deceased [2025] KEHC 11053 (KLR)	143
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In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR)	151
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In re Estate of Susan Mwelu Mutia (Deceased) [2025] KEHC 2202 (KLR)	18,114, 139,145
In re Estate of Timothy Mwaura Ndichu (Deceased) [2020] KEHC 6530 (KLR)	137
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In the Matter of the Estate of Timothy Njonjo Kamau 2016 KEHC 713(KLR) (HCSC No.2398 of 2009)	110
Isaac Ingati Abong' & Another -v- Kenya Commercial Bank Ltd, [2015] KEHC 2154 (KLR)	111
John Gitata Mwangi & others -v- Jonathan Njuguna Mwangi & others 1999 KECA 184 (KLR)	102
John Karumwa Maina v Susan Wanjiru Mwangi (In the Estate of Gachuhi, Deceased) [2015] KEHC 7267 (KLR)	149

M M M'm v A I M [2014] KEHC 2647 (KLR)	120
Mary Rono-v-Jane Rono & another [2005] KECA 326 (KLR)	104,105
Masuu v Mulandi & 5 others [2023] KEHC 19929 (KLR)	154
Monica Jesang Katam -v-Jackson Chepkwony & another [2011] KEHC 4299 (KLR)	106,187
Muriungi v Mwongera & another [2024] KECA 1709 (KLR)	103
Mwangi-v-Mwangi	105,107
MWG v EWK [2010] KECA 322 (KLR)	117,164
Nazima Janmohammed Nassar v Nasreen Kauser [2015] eKLR	127
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Re Estate Of Mwangi Mugwe Alias Elieza Ngware (Deceased) [2003] KEHC 872 (KLR)	149
Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR)	151,157
Re the Estate of the late George Cheriro Chepkosiom (Deceased) [2017] KEHC 7270 (KLR)	120,164
Ripples International-v-AG 2022 KEHC 13210 (KLR)	97,105, 121,161
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Saifudean Mohamedali Noorbhai v. Shehnaz Abdehusein Adamji [2011] KECA 400 (KLR)	124,127
Samson Mutonga Muriithi -v- Kenneth Matekwa [2016] KEHC 1775 (KLR)	121
Scolastica Ndululu Suva v Agnes Nthenya Suva [2019] KECA 1053 (KLR)	103,120
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Victor K. Sang -v- Agnes C. Sitonik (Succession Cause No. 1413 of 2021) (Unreported)	112

10.0 REFERENCES FOR FURTHER READING

1. Ang'awa M, Procedure in the Law of Succession (revised edn, LawAfrica 2016).
2. Badbess, Khalil, 'Till Death Do Us Part: The Ailment Afflicting the Widow's Life Interest in Kenyan Intestate Succession', (2019) *Strathmore Law Review* 1.
3. Conway H and Grattan S, 'The "New" New Property: Dealing with Digital Assets on Death' (Queen's University Belfast School of Law Research Paper No 2021-12) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289171
4. Cotran E, *Casebook on Kenya Customary Law* (Professional Books and Nairobi University Press 1987).
5. Cotran E, *Kenya: The Law of Marriage and Divorce*, Restatement of African Law Series, Volume 1 (Sweet & Maxwell 1968).
6. Fila, Ali Elema, Patrick O. Kiage & Celestine N. Musembi, 'Partition in Life and in Death: Intestate Succession After the Matrimonial Property Act 2013', in *East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya]*, 135-155, (available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3015>).
7. Jadeed M, 'Developments in Islamic Law: Implications for Gender Equality and Freedom of Religion in Kenya' (2025) *East African Law Journal Special Issue, 'Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya'* 156 <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3024>
8. Jadeed M, 'The Inheritance Rights of Muslim Women in Kenya: Reality or Rhetoric?' (PhD thesis, University of Nairobi 2020) <https://erepository.uonbi.ac.ke>
9. Jadeed, Moza, Waris, Attiya & Musembi, Celestine N., 'The Application of Islamic Inheritance Law in Independent and Contemporary Kenya: A Muslim's Right to Equality and Freedom from Discrimination', Vol.8(1) *Africa Nazarene University Law Journal* (2020) – [\(PDF\) The application of Islamic inheritance law in independent and contemporary Kenya: A Muslim's right to equality and freedom from discrimination](#)
10. Jadeed M and others, 'Delimiting the Kadhis' Courts Probate Jurisdiction under the 2010

Constitutional Dispensation' (2019) *East African Law Journal* 95.

11. Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020) <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>
12. Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (2020) <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>
13. Judiciary of Kenya and International Development Law Organization, *Simplified Resource Tool on Inheritance and Related Family Law Practice in Kenya* <https://judiciary.go.ke/download/simplified-resource-tool-on-inheritance-and-related-family-law-practice-in-kenya/>
14. Mulla, D.F., *Principles of Mahomedan Law* (11th Edition, Calcutta: The Eastern Law House, 1938) Musyoka, William, *Law of Succession* (2nd Edition, Law Africa, 2022)
15. Presidential Commission on the Law of Succession, *Report of the Commission on the Law of Succession* (1968) <https://new.kenyalaw.org/akn/ke/doc/commission-report/2026-03-03/1968-report-of-commission-on-law-of-succession/eng@2026-03-03>
16. Rudman A, Musembi CN and Makunya T (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (PULP 2023) <https://www.pulp.up.ac.za/latest-publications/the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-a-commentary>
17. Simson R, 'Is Kenya's Gender Wealth Gap Narrowing? New Insights from Probate Records' (2025) 23(2) *Socio-Economic Review* 513 <https://academic.oup.com/ser/article/23/2/513/7748572>
18. UK Law Commission, *Digital Assets: A Scoping Paper* (2023) <https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/54/2025/12/Final-digital-assets-report-FOR-WEBSITE-2.pdf>

CHAPTER 4: MARRIAGE ACT

1.0 INTRODUCTION

1. The [Marriage Act, 2014](#) is the single framework law applicable nationwide to matters of marriage and divorce. The aspiration for a national framework law originated in the work of the [Presidential Commission on the Law of Marriage and Divorce](#), which submitted its report and draft Bill in 1968. This aspiration was captured in the Commission's two-pronged terms of reference:
 - "to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya..."; and
 - "to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society."⁹⁶
2. The reason it took forty-six (46) years to realize the goal of a single national framework law on marriage and divorce was the perception that such a law would obscure the country's diversity of cultural and religious norms governing family matters. Consequently, three attempts between 1971 and 1979 to secure enactment of the law by Parliament failed, as did advocacy efforts undertaken throughout the 1980s, 1990s and early 2000s.⁹⁷
3. [Marriage Act 2014](#), was enacted to align the law on marriage and divorce with the [Constitution of Kenya, 2010](#). Article 45 of the Constitution addresses the family. [Article 45\(1\)](#) declares the family to be the natural and fundamental unit of society and the necessary basis of social order, entitled to recognition and protection by the State. [Article 45\(2\)](#) provides for the right of every adult to marry a person of the opposite sex, based on the free consent of the parties. [Article 45\(3\)](#) guarantees equality of rights to parties to a marriage at the time of marriage, during the marriage and at its dissolution. [Article 45\(4\)](#)

⁹⁶ See Government of the Republic Kenya, [Report of the Commission on the Law of Marriage and Divorce](#) (Government Printer, 1968).

⁹⁷ For a comprehensive account of the history of the attempt to translate the 1968 commission's proposals into law see Celestine Nyamu Musembi, 'A journey of Five Decades: Family Law Reform in Post-colonial Kenya (1967-2015)', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 1-29.

addresses concerns relating to cultural and religious diversity by empowering Parliament to enact legislation recognising marriages concluded under any tradition, or system of religious, personal or family law, but only to the extent that such marriages or systems are consistent with the Constitution.

4. The [Marriage Act, 2014](#) recognizes five types of valid marriages in Kenya: civil, Christian, customary, Hindu and Islamic marriages. Its content includes:
 - general provisions that govern all marriages irrespective of type, including minimum age, conversion of potentially polygamous marriages to monogamous marriages, prohibited degrees of relationship, void and voidable marriages, and spouses' liability for torts;
 - procedures for establishing a valid marriage under each of the five systems;
 - procedures for dissolution of marriage through divorce under each of the five systems;
 - spousal maintenance and other reliefs applicable to all types of marriages; and
 - offences and penalties for non-compliance with the Act, applicable to all types of marriages.

2.0 CONSTITUTIONAL FRAMEWORK FOR THE LAW OF MARRIAGE

5. Kenya's law of marriage is anchored in [Article 45](#) of the Constitution, which declares the family to be the natural and fundamental unit of society and the necessary basis of social order. [Article 45\(2\)](#) provides that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. [Article 45\(3\)](#) guarantees equal rights to parties to a marriage at the time of marriage, during the marriage and at its dissolution. This guarantee of equality is situated within the broader constitutional principle of equality and non-discrimination under [Article 27](#). [Article 45\(4\)](#) empowers Parliament to enact legislation recognising marriages concluded under any tradition, or system of religious, personal or family law, to the extent that such marriages or systems are consistent with the Constitution. These and other constitutional provisions relevant to family law generally are discussed in detail in Chapter 1 of this Bench Book.

3.0 INTERNATIONAL AND REGIONAL FRAMEWORK RELEVANT TO MARRIAGE AND DIVORCE

6. The regional legal framework on marriage and divorce is more detailed and context-specific than the international framework. It addresses the family, equality in marriage, protection of children, elimination of discrimination against women and harmful practices, including child marriage and forced marriage.

3.1 African Charter on Human and Peoples' Rights

7. The African Charter on Human and Peoples' Rights affirms the centrality of the family in terms similar to [Article 45\(1\)](#) of the Constitution of Kenya. [Article 18\(1\) of the African Charter](#) provides:

"The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

8. [Article 18\(2\)](#) refers to the family as "the custodian of morals and traditional values recognized by the community", while [Article 18\(3\)](#) calls for the elimination of discrimination against women and the protection of the rights of women and children.
9. Article 18 was, for a long time, criticized for its broad and declaratory nature. This criticism contributed to the development of specialized regional treaties on the rights of children and the rights of women.

3.2 African Charter on Rights and Welfare of the Child

10. The [African Charter on the Rights and Welfare of the Child](#)⁹⁸ is relevant to matters of marriage and divorce. It articulates the principle of the best interests of the child, which should guide all actions and all judicial or administrative proceedings affecting children. [Article 18](#) reiterates the centrality of the family as the natural unit and basis of society, entitled to protection and support by the State. [Article 18\(2\)](#) calls on States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution, emphasizing the need for child protection in the event of marital breakdown. [Article 18\(3\)](#) underlines that no child should be deprived of maintenance on account of the parents' marital status.

⁹⁸ The African Children's Charter is available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf

11. [Article 19](#) guarantees every child the right to parental care and protection. This includes the right to reside with parents and appropriate legal arrangements to ensure that contact is maintained in the event of separation. [Article 20](#) sets out the matrix of responsibility for the child's welfare, placing primary responsibility on parents and guardians, with the State playing a supportive role. [Article 24](#) deals with adoption, while [Article 25](#) guarantees alternative family care in the event of temporary or permanent separation from parents.

3.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

12. [Articles 6](#) and [7](#) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly known as the Maputo Protocol, deal comprehensively with the equal rights of women and men in relation to marriage, family, separation and divorce. [Article 6](#) calls on States to enact legislation to ensure that:
- marriage is based on the free consent of the parties;
 - the minimum age of marriage for women is eighteen (18) years;
 - monogamy is encouraged as the preferred form of marriage, and the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected;
 - every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised;
 - husbands and wives mutually choose their matrimonial regime and place of residence;
 - married women have the right to retain their maiden name and to use it as they choose, jointly or separately with the husband's surname;
 - married women have the right to retain their nationality or acquire the nationality of the husband;
 - women and men have equal rights with respect to the nationality of their children, except where this is contrary to national legislation or national security interests;
 - women and men jointly contribute to safeguarding the interests of the family and to protecting and educating their children; and
 - married women have the right to acquire property independently and to administer and manage it freely.

13. [Article 7](#) deals with separation and dissolution of marriage. It requires States to enact legislation to ensure that separation, divorce and annulment are effected through a recognised lawful process that is equally accessible to women and men. Such a process must also guarantee equality with respect to children of the marriage, as well as equitable sharing of property acquired during the marriage.
14. The Protocol's provisions on elimination of discrimination in law and practice, including [Articles 2 and 8\(f\)](#), are also relevant. So too are the provisions on eliminating harmful practices, including child marriage and forced marriage, under [Article 5](#).
15. A [legal commentary](#) unpacking the normative content of each of these rights in the Maputo Protocol and analyzing comparative State practice in the region is available on an open-access basis.
16. It appears that no reported Kenyan case has cited [Article 6](#) of the Maputo Protocol. One reported Kenyan case has cited [Article 7\(d\)](#), which concerns matrimonial property upon dissolution of marriage.⁹⁹ That case is discussed in the chapter of this Bench Book on matrimonial property.

3.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

17. The Convention on the Elimination of All Forms of Discrimination against Women addresses equal rights in marriage under [Article 16](#), which provides for equality in marriage and family relations. It requires States to guarantee women and men, on a basis of equality:
- the same right to enter into marriage;
 - the same right to enter into marriage only with free and full consent, including through legislation specifying a minimum age for marriage and prohibiting child marriage and child betrothal;
 - the same rights and responsibilities during marriage and at its dissolution;
 - the same parental rights and responsibilities, regardless of marital status, with the best interests of the child being the paramount consideration;
 - the same rights to decide freely and responsibly on the number and spacing of

⁹⁹ [Federation of Women Lawyers \(Kenya\) -v-Attorney General; Initiative for Strategic Litigation in Africa \(Amicus Curiae\) \[2025\] KECA 1588 \(KLR\)](#).

- the same rights and responsibilities with regard to guardianship, wardship and adoption of children, with the best interests of the child being the paramount consideration;
- the same personal rights, including choice of family name, profession and occupation; and
- the same rights with respect to ownership, acquisition, management, administration, enjoyment and disposition of property.

19. The Committee on the Elimination of Discrimination against Women has issued [General Recommendations](#) elaborating on these articles. In addition, a legal commentary on CEDAW that unpacks the normative content of rights relating to equality in marriage and family relations is available.¹⁰⁰

20. The core international human rights treaties, namely the [International Covenant on Economic, Social and Cultural Rights](#), and the [International Covenant on Civil and Political Rights](#), together referred to as the “twin covenants,” address marriage directly.

¹⁰⁰ M Freeman, C, Chinkin & B Rudolf (eds.) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (2012).

22. The International Covenant on Civil and Political Rights addresses marriage and family relations in [Article 23](#). Like the International Covenant on Economic, Social and Cultural Rights, it declares the family to be the natural and fundamental group unit of society and calls on States to guarantee its protection. It guarantees men and women of marriageable age the right to marry and found a family, on the basis of full and free consent. It further provides that spouses shall have equal rights and responsibilities during marriage and at its dissolution, with necessary provision for the protection of any children of the marriage.
23. In addition, both Covenants contain a provision, worded in identical terms, expressly prohibiting discrimination on the basis of sex in the enjoyment of all the rights contained in the Covenants under Article 3. The general anti-discrimination clauses in the two Covenants are also framed broadly to prohibit discrimination on several grounds, including sex, religion and “other status”, which may include marital status.

4.0 JURISDICTION IN MATTERS OF MARRIAGE AND DIVORCE

24. Proceedings for separation and dissolution of marriage by divorce or annulment are initiated in the Chief Magistrate’s Court. Appeals lie to the High Court and thereafter to the Court of Appeal. However, proceedings relating to declaration of matrimonial property rights or distribution of matrimonial property upon divorce are initiated in the High Court. Chief Magistrates’ Courts may also entertain matrimonial property disputes within their pecuniary jurisdiction. Matters of child custody and maintenance arising in the course of divorce proceedings are handled by the Children’s Court. One marriage may therefore give rise to proceedings before three courts simultaneously, underscoring the need for coordination.

5.0 KEY CONCERNS ARISING FROM THE MARRIAGE ACT

25. There are textbooks and other resources that deal with the breadth and depth of marriage and divorce under the [Marriage Act, 2014](#). These references are listed in the footnote below,¹⁰¹ and this chapter will therefore not replicate them by presenting a systematic

¹⁰¹ Resources on the law of marriage and divorce: Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, Nairobi: Law Africa (2016); Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal* (2025). It is also useful to flag a special compilation of cases on gender and family, although it only dates up to 2008: *Kenya Law Reports (Gender & Family)*, Volume 1; cited as (2008) 1 KLR (G&F).

review of the statute. The focus of this chapter is on key issues identified by judicial actors as crucial or requiring clarity. These issues are:

1. status of cohabitation unions post-2014;
2. registration of customary marriages and the consequences of non-registration;
3. authoritative sources for proof of customary marriage;
4. divorce in customary marriage;
5. annulment of marriage;
6. application of the general provisions of the [Marriage Act](#), 2014 to persons professing the Islamic faith, including sections [49\(3\)](#), [4](#) and [11\(a\)](#);
7. evidentiary threshold for irretrievable breakdown of marriage;
8. common procedural concerns in marriage and divorce; and
9. constitutional challenges to some provisions of the [Marriage Act, 2014](#).

5.1 Status of Cohabitation Unions Post-2014

26. The [Marriage Act 2014](#) defines “cohabit” in [section 2](#) as “an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage”. Beyond this definition, however, the Act does not make further provision on cohabitation.
27. [Section 119](#) of the [Evidence Act](#) provides that the court “may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”. This provision forms the basis for the common law presumption of marriage, which relies on evidence of long cohabitation and repute to treat a cohabiting couple as legally married.
28. Another provision relevant to the legal status of cohabitation unions is [section 59](#) of the [Marriage Act, 2014](#), which sets out how a marriage may be proved. It lists only a marriage certificate and a copy of an entry in a marriage register, whether maintained by the Registrar of Marriages or in a recognised public place of worship. Since proof by evidence of long cohabitation and repute is not listed, it has been argued that cohabitation unions are excluded from the purview of the Marriage Act, 2014. See, for example, [CWN-v-DK \(Civil Suit 17 of 2017\) \[2021\] KEHC 12535 \(KLR\)](#), discussed below.
29. In light of the rich jurisprudence developed by Kenyan courts in applying the common law presumption of marriage to cohabiting couples, the legislative silence in the [Marriage Act](#),

[2014](#) raises a key question: does the Act mark the end of legal recognition of cohabitation unions? Put differently, what is the legal status of cohabitation after 2014?

5.1.1 Judicial Precedent on Applicability of the Common Law Presumption of Marriage after 2014

30. In 2023, the Supreme Court addressed the applicability of the common law presumption of marriage and, by extension, the legal status of cohabitation unions after 2014. In [MNK-v-POM Initiative for Strategic Litigation in Africa \(ISLA\) \(Amicus Curiae\) \[2023\] KESC 2 \(KLR\)](#), the claim concerned matrimonial property and was founded on an alleged marriage arising from long cohabitation. The Supreme Court reversed the judgment of the Court of Appeal, which had found that the evidentiary threshold for the common law presumption of marriage had been met and had ordered equal division of the disputed property. The Supreme Court restated the parameters within which the presumption applies, after reviewing existing precedents dating back to the 1976 East African Court of Appeal decision in **Yawe v Public Trustee**. The Supreme Court held that the presumption is “on its deathbed” and should only be applied sparingly, where there is cogent evidence to support it.
31. In MNK v POM, the parameters for the presumption of marriage were not met. However, the Court relied on the doctrine of constructive trust to determine the property dispute in favour of the appellant, awarding a 70:30 share.
32. The Supreme Court’s pronouncement endorses the approach taken in Court of Appeal judgments that continued to apply the presumption of marriage after 2014 where the evidence warranted it. In [Eva Naima Kaaka & Another -v- Tabitha Waithera Mararo \[2018\] KECA 762 \(KLR\)](#), the Court of Appeal concluded that the presumption had been rebutted by evidence that the claimant paid rent and was therefore a tenant, rather than a cohabitee or wife.
33. Earlier High Court judgments on the matter adopted different approaches.¹⁰² Some took the position that, after 2014, the statutory delineation of marriage systems and the requirement for registration of all marriages left no room for the common law presumption of marriage. [CWN-v-DK \[2021\] KEHC 12535 \(KLR\)](#) adopted this position, emphasizing that [section 59](#) of the [Marriage Act, 2014](#) did not list long cohabitation and repute as one of

¹⁰² This discussion does not include pre-2014 cases in which the courts pronounced themselves on the presumption of marriage (e.g. on the standard of proof). These are cited in the judgements discussed and may be accessed there.

the ways in which marriage may be proved. Other decisions took the position that the presumption remained applicable unless there was weighty evidence to rebut it. See [SWG-v-HMK \[2015\] KEHC 7595 \(KLR\)](#).

5.2 Registration of Customary Marriages and the Consequences of Non-registration

34. The Marriage Act, 2014 requires registration of all marriages. Under [section 12\(e\)](#), failure to register a marriage renders the marriage voidable.
35. The provision that specifically addresses registration of customary marriages is [section 55](#). It requires parties to a customary marriage to apply to the Registrar for a certificate of registration within six (6) months of complying with the necessary rites for a customary marriage under the law or customs of the relevant community. The section further requires both parties to appear in person before the Registrar before a certificate of registration is issued.
36. [Section 44](#) is also relevant. It requires parties, within three (3) months of complying with the customary rites that confer the status of marriage in the community concerned, to notify the Registrar of the marriage. [Section 45](#) sets out the contents of the notification. It must specify the customary law applicable to the parties and declare that the parties are adults, that they are not within the prohibited degrees of relationship, and that both consented to the marriage.
37. The language of the statute does not clearly indicate whether the requirements under [section 44](#) and section 55 are cumulative. The question that arises is whether compliance with [section 44](#) on notification is a prerequisite to compliance with [section 55](#) on registration. These details are addressed in the subsidiary legislation. The [Marriage \(Customary Marriage\) Rules, 2017](#) require the Registrar to display the notification made under [section 44](#) in a prominent place. If no objection is lodged, the Registrar issues the parties with an Acknowledgement Certificate under [rule 3](#). It is upon receipt of this Acknowledgement Certificate that the parties may proceed to apply for registration within six (6) months of completion of the customary marriage rites. If the Registrar is satisfied that registration is appropriate, the couple is issued with a Certificate of Customary Marriage under [rule 5](#).
38. [Section 59](#) of the [Marriage Act, 2014](#) addresses how the existence of a valid marriage may be proved in Kenya. It lists a marriage certificate and a copy of an entry in a marriage register. The register may be the public register maintained by the Registrar of Marriages

or a register maintained in a recognised public place of worship. There are two possible interpretations of [section 59](#). On the one hand, it may be read as leaving no room for proving a customary marriage by any means other than registration. On the other hand, the use of the word “may” suggests that the list is not exhaustive and that other forms of proof of customary marriage may be admitted. See [JTO V AP \[2024\] KEHC 10464 \(KLR\)](#).

39. Through the transitional provision under [section 96](#), all existing unregistered marriages, including customary marriages, were required to be registered within three (3) years of commencement of the [Marriage Act, 2014](#). However, the Rules operationalizing the statute were enacted only in 2017, a few weeks before expiry of the retrospective registration window. To address this, the Attorney-General issued [Legal Notice 46 of 2017](#), extending the registration period without specifying the duration of the extension. It could therefore be interpreted as having been extended indefinitely or, as some judgments discussed below have done, as having been extended for a further period of three (3) years, expiring in 2020. See [JTO-v-AP \[2024\] KEHC 10464 \(KLR\)](#) and [PWK-v-EWK \[2024\] KEHC 12146 \(KLR\)](#)
40. The saving clause under [section 98](#) is also relevant. [Section 98\(1\)](#) provides that “a subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.” Questions may arise as to whether subsisting unregistered customary marriages are saved by this provision, or whether there is an unstated condition that they must comply with the requirement for retrospective registration under [section 96](#). [Section 43\(2\)](#) is similarly ambiguous. It provides that “the payment of a token amount of dowry shall be sufficient to prove a customary marriage.” The law on registration of customary marriages would benefit from greater clarity.

5.2.1 Judicial Precedent on the Legal Consequences of Failure to Register a Customary Marriage

41. [MNK-v-POM Initiative for Strategic Litigation in Africa \(ISLA\) \(Amicus Curiae\) \[2023\] KESC 2 \(KLR\)](#) did not deal directly with registration, but it is relevant to the consequences of failure to register. The Supreme Court held that equitable doctrines, such as constructive trust, may be used to adjudicate property disputes among cohabiting couples. This implies that parties in unregistered relationships may still obtain some relief from the court, notwithstanding failure to register.

42. The High Court has addressed the question of non-registration of customary marriages. In [PWK-v-EWK \[2024\] KEHC 12146 \(KLR\)](#), decided in October 2024, the Court treated as valid a marriage conducted under customary law in 1998. Since the marriage predated the [Marriage Act 2014](#), it ought to have been registered retrospectively under [section 96](#). The Court, however, declined to treat the marriage as invalid solely for lack of registration, reasoning as follows:

“It would obviously yield ... an absurd result and therefore an unintended consequence of the legislation, if sections 3 of the Marriage Act, 2014 as read together with section 96 and (3) of the same Act were to be interpreted to mean that all unregistered marriages validly contracted prior to the commencement of the Act...became invalid after August 1, 2020 solely due to the failure by the parties to register them under the Act.”

43. The reasoning in [PWK-v-EWK \[2024\] KEHC 12146 \(KLR\)](#) departed from another High Court decision delivered two months earlier: [JTO-v-AP \[2024\] KEHC 10464 \(KLR\)](#). In that case, the petitioner sought dissolution of an unregistered customary marriage. The Court held that it could only order annulment because there was no valid marriage in the first place, the marriage not having been registered as required under [section 55](#). The Court observed, however, that the list in [section 59](#) on forms of proof of marriage in Kenya is not exhaustive. In the absence of registration, the petitioner could prove the existence of a customary marriage by providing evidence of compliance with the requisite rituals of a valid customary marriage [paras 22,28,29,31]. Since such evidence was not presented, divorce could not be granted, and the marriage could only be annulled.

44. It is noteworthy that both courts interpreted [section 96\(3\)](#) and the Attorney-General’s [Legal Notice 46 of 2017](#), which extended the period for retrospective registration under [section 96\(4\)](#), as meaning that the extension expired on 1 August 2020. This interpretation is based on the presumption that the extension was for a further period of three (3) years, although the language of the Legal Notice is open-ended. Such an interpretation would mean that no further retrospective registration of customary marriages can take place after expiry of the three-year period in August 2020.

45. The High Court had previously taken a similarly strict interpretation of [section 96](#) in [CWN-v-DK \[2021\] KEHC 12535 \(KLR\)](#). The Court observed that, even assuming the plaintiff had presented proof of customary marriage, lack of registration would render the marriage void or, at best, voidable (para 42-45; and 121,122).

46. By contrast, [DMK v IL \[2021\] KEHC 8611 \(KLR\)](#) took the position that proof of a customary marriage through evidence of rituals and cohabitation will suffice, notwithstanding lack of registration. Failure to register did not bar recognition of a pre-existing customary marriage where a party intended to contract a Christian marriage. These conflicting decisions are revisited in the section on “Areas for Reform” below.

5.3 Authoritative Sources for Proof of Customary Marriage

47. Even before the [Marriage Act, 2014](#) introduced the registration requirement, proof of customary marriage was a recurring issue in disputes concerning succession to estates or division of property upon dissolution of marriage. Courts have relied on well-established judicial precedents and scholarly sources dating back to the 1960s.

48. Among the most cited scholarly sources are two publications by Eugene Cotran, who served as a Judge of the High Court between 1977 and 1982 and as Secretary to the 1968 Commission on the Law of Marriage and Divorce:

- a. *Kenya: The Law of Marriage and Divorce*, Restatement of African Law Series, Volume 1, edited by Antony Allott, published by Sweet & Maxwell in 1968; and
- b. *Casebook on Kenya Customary Law*, published by Professional Books and Nairobi University Press in 1987.

49. The first publication was based on extensive empirical research conducted between 1961 and 1963 among various ethnic communities in Kenya. The research was conducted under the auspices of the School of Oriental and African Studies in London, with funding from the Nuffield Foundation. The publication remains authoritative because no similar study of customary law in Kenya has been carried out since. However, given that it is based on research conducted more than sixty (60) years ago, its use in court must accommodate contemporary practice and change over time, where persuasive evidence of living customary law is presented. Cotran himself acknowledged the fluid and dynamic nature of customary law and the need for the Restatement to be regularly updated. In addition, its use in court must remain open to evidence of divergent practices and variation within an ethnic group, particularly where the publication subsumed diverse nations or sub-tribes into one entity, as was the colonial practice, for example “Mijikenda”, “Kalenjin” and “Luhya”.

50. The second publication reproduces judgments that made authoritative declarations on customary law in diverse contexts, organised by subject matter, including essentials of

marriage, pregnancy compensation, matrimonial rights and duties, divorce and return of dowry, child custody and succession. It remains a useful resource, particularly because some of the cases it contains were previously unreported. The resource also includes some subordinate court decisions and, in some instances, traces the path of a dispute from the subordinate court to the superior court, thereby illustrating diverse judicial approaches to customary law.

51. Both books are out of print, but court libraries should have copies.

5.3.1 Judicial Checklist on Proof of Customary Marriage

52. In addition to the two published sources discussed above, some cases may be considered classics for setting out the essentials of proving customary marriage in various Kenyan communities. These include **Kimani v Gikanga [1965] EA 753**, reported at page 245 of Cotran's *Casebook on Kenya Customary Law*, which set out the general approach a court should take:

- a. first, a court may take judicial notice of customs without further proof, for instance where the particular customary law has been the subject of a previous judicial decision;
- b. secondly, a court may consult a book or reference document where the customary law has been documented, without needing to call the author as an expert; and
- c. thirdly, the court may rely on the evidence of witnesses called by the party relying on that particular customary law in support of that party's case.

53. On judicial notice, the High Court in [QMAO -v-DAW \[2024\] KEHC 4952 \(KLR\)](#) suggested that the court may take judicial notice of the fact that there are forty-two (42) recognised ethnic communities in Kenya, and that a litigant must therefore make clear which customary law applies to the matter before the court. However, whichever community's customary law a litigant relies on, the public nature of certain key events is well established, making it doubtful that a dowry ceremony could take place without any witnesses. In that case, a claim of matrimonial property founded on an alleged customary marriage failed for that reason.

54. Several cases have elaborated on the second and third points of the checklist. **Mwagiru v Mumbi [1967] EA 639**, reported at page 40 of Cotran's *Casebook on Kenya Customary Law*, underlines the need for the court to be clear on the key events or milestones in

establishing a valid customary marriage and whose participation is essential at each stage. In that case, the court established that the bride in the alleged customary marriage was absent during key stages that required her consent in person, making it improbable that a valid customary marriage had taken place.

55. Similarly, in **Case v Ruguru [1970] EA 55**, reported at page 57 of Cotran's *Casebook on Kenya Customary Law*, the court held that the witness's own admission that the **ngurario** ceremony, which is vital to Kikuyu customary marriage, had never been performed was sufficient proof that there could be no valid customary marriage.
56. However, **Hinga v Hinga, Civil Appeal No. 94 of 1977**, reported at page 62 of Cotran's *Casebook on Kenya Customary Law*, cautions that courts must not facilitate rigid invocation of the essentials of customary marriage out of context where doing so would defeat the ends of justice. The appellant denied that a customary marriage existed between himself and the respondent, with whom he had several children. He argued that, since the **ngurario** ceremony had not been performed, there was no customary marriage and the children were "illegitimate" and therefore not entitled to maintenance from him. He had moved out of the home they shared and entered into a statutory Christian marriage with another woman, over the respondent's objection.
57. The court refused to endorse the appellant's reliance on "a mechanical point in Kikuyu customary law so as to take advantage of the repeal of the Affiliation Act...". The court proceeded to pronounce the parties "man and wife" on the basis of "the evidence, the application of Divine Law, the true spirit of Kikuyu customary law and the relevant provisions of our Judicature Act 1967".
58. In the more recent case of [*In the Matter of the Estate of Mbiyu Koinange \(Deceased\) Margaret Njeri Mbiyu-v-David Njunu Mbiyu Koinange & 13 Others \(Civil Appeal No.47 of 2016\)*](#) ([2017] KECA 799 (KLR)), the Court of Appeal established the principle that compliance with rituals is not the only means of proving a customary marriage. The conduct of other family members towards the disputed wife or widow may also confirm the existence of a customary marriage. In that case, the Court paid particular attention to the manner in which clan elders had treated her in relation to ancestral land, suggesting their acceptance of her status as the youngest wife:

"But more importantly, it does not make sense to us that the clan of the deceased would agree to transfer to a total stranger, a mere copy typist of the deceased, the ancestral land known

as ..., which was to devolve to the deceased as his inheritance from his father... If there was ever any piece of evidence of the family of the deceased treating ... as the youngest wife of the deceased, it is this readiness or willingness of his clan and family to transfer in her name ancestral land that was meant for the deceased,..."

59. Ultimately, however, the Court of Appeal affirmed her widow status not on the basis of customary marriage, but by presumption of marriage.

60. In determining the validity of customary marriages, courts are called upon to balance the need to uphold the essence and integrity of customary practice with recognition that customary law is neither static nor rigid, but reflects dynamic social change. The adversarial courtroom setting heightens the need for balanced consideration, as demonstrated by the Court of Appeal in [*Eliud Maina Mwangi v. Margaret Wanjiru Gachangi \(Civil Appeal No.281A of 2003\) \[2013\] KECA 540 \(KLR\)*](#). The respondent claimed that she was "married" to the deceased woman through the Kikuyu customary practice of woman-to-woman marriage, and that the deceased had assumed responsibility for her children as her own. The appellant countered that the respondent had been no more than an employee and caregiver.

61. On proof of customary marriage practices, the Court acknowledged the dynamic nature of customary law. Dowry payments, for instance, may take a monetary form rather than literal delivery of livestock, beer and honey. At the same time, some essentials have not been erased by social change, such as the need for witnesses at key events. The Court stated:

"Even if we allow room for evolution and development of customary law, it does not appear to us that ngurario under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people."

62. A claim of a valid woman-to-woman marriage succeeded in [*Monica Jesang Katam -v- Jackson Chepkwony & another Msa \[2011\] KEHC 4299 \(KLR\)*](#), where there was conclusive evidence of compliance with Nandi customary law on establishing such a relationship.

63. In the post-2010 constitutional dispensation, courts also have a duty to ensure that the evidence they accept as proof of customary law and practice relating to marriage is aligned with [Article 2](#) and [Article 45\(4\)](#) of the Constitution, particularly the supremacy of

the Constitution and the requirement that recognition of customary, religious, personal or family law systems must be consistent with constitutional principles.

5.4 Divorce in Customary Marriage

64. Divorce in customary marriages is addressed under [sections 68](#) and [69](#) of the [Marriage Act, 2014](#). [Section 68](#) provides for conciliation or customary dispute resolution before a court determines a petition for dissolution of a customary marriage. Such mediation or customary dispute resolution must conform to the principles of the Constitution under [section 68\(2\)](#). [Section 68\(3\)](#) requires the mediator to prepare a report of the process for the court, suggesting that the provision contemplates a structured process linked to court proceedings.
65. [Section 69](#) sets out the grounds for dissolution of a customary marriage. The grounds generally mirror those applicable to civil marriage, except for the additional ground of “any valid ground under the customary law of the petitioner”. This allows consideration of customary-law grounds that may fall outside the standard civil marriage grounds. It is, however, unclear why the provision is limited to the customary law of the petitioner, rather than being framed more broadly to permit reference to the customary law applicable to either party to the marriage.
66. The [Marriage \(Matrimonial Proceedings\) Rules, 2020](#) contain procedural rules for matrimonial proceedings under all systems of marriage. With respect to divorce in customary marriages, the Rules must be adapted, where necessary, to comply with the requirement for conciliation under [section 68\(1\)](#) of the [Marriage Act, 2014](#). This is particularly so because [rule 23\(1\)](#) appears to limit the scope of alternative dispute resolution by excluding proceedings for dissolution of marriage.
67. Rule 23(1) provides:
- “Except in proceedings for dissolution of a marriage, the court may, with the consent of the parties at any stage in the proceedings, but before final judgment, refer any or all of the issues in dispute to an appropriate dispute resolution mechanism in accordance with the practice and procedure for the time being established to facilitate court-mandated mediation.”

5.4.1 Judicial Precedent on Divorce in Customary Marriage

68. It is important to observe that mediation and other forms of alternative justice remain the predominant methods by which marital disputes are settled, particularly in relation to customary marriages. For this reason, court records of divorce petitions relating to customary marriages are relatively rare, especially at superior court level.
69. In *Miller v Miller* (1989) KLR 257, the High Court asserted its original and unlimited jurisdiction to justify sitting as a court of first instance in respect of customary divorce. In [Sabina Syovinya Musyoka-v-Peter Musyoka Mwanzia \[2005\] KEHC 286 \(KLR\)](#) the High Court affirmed the jurisdiction of a magistrate's court not only to issue a decree of divorce, but also to adjudicate claims for matrimonial property and maintenance. The Principal Magistrate in that case had issued the divorce decree but had, without explanation, failed to address the prayers for division of matrimonial property and maintenance. Although these two cases predate the [Marriage Act, 2014](#), 2014, they remain useful precedents on jurisdiction over customary divorce.
70. For a court to exercise divorce jurisdiction over a customary marriage, the marriage must meet the criteria for marriage under the [Marriage Act, 2014](#). Some relationships characterized as "marriage" within customary logic may not constitute valid marriages under formal law. One example is the institution of woman-to-woman marriage, which is, in substance, a customary kinship and lineage arrangement in which children born to the younger woman are attributed to the older woman, who is regarded as a "female husband."¹⁰³ No sexual relationship takes place between the two women. In one such relationship, the older woman presented a petition for divorce before the Chief Magistrate's Court in Machakos: **ANM v JN, Machakos CM Divorce Cause No. 21 of 2016**. The magistrate held that jurisdiction belonged to the institutions of Kamba customary law under which the relationship was entered into. The relationship was not a valid marriage under the [Marriage Act 2014](#). However, for purposes of succession, courts have honoured the claims of dependants and beneficiaries where the requisite proof of the custom was presented.

¹⁰³ For further reading on the institution of 'woman-to-woman' marriage in Kenya and other parts of Africa see: J. Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (New York: Vintage Books, 1965); R. S. Oboler, 'Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya', *Ethnology* 19:1 (1980) 69-88. The practice has been documented in about 40 pre-colonial African societies, with some continuing to the present era. See J. Cadigan, 'Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa', *Journal of Comparative Family Studies* 29 (1998) 89-98; B. Greene, 'The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis', *Ethnology* 37:4 (1998) 395-412. See also I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (London: Zed Books, 1987), discussing woman-to-woman marriage with respect to Ibo society in Nigeria. Several cases are discussed in E. Cotran, *Casebook on Kenya Customary Law* (Milton Park: Professional Books & Nairobi University Press, 1987).

71. [JTO V AP \[2024\] KEHC 10464 \(KLR\)](#) takes the question of validity further by holding that an unregistered customary marriage is voidable under the [Marriage Act, 2014](#). A court cannot therefore order dissolution by divorce; it can only annul such a voidable marriage. It should be noted, however, that in that case the marriage was declared voidable not solely because of non-registration, but also because there was no evidence that the necessary customary rites for a valid marriage had been fulfilled.
72. The approach in [JTO V AP \[2024\] KEHC 10464 \(KLR\)](#) contrasts sharply with the approach in [PWK-v-EWK \[2024\] KEHC 12146 \(KLR\)](#). In the latter case, the court granted a decree nisi to dissolve an unregistered customary marriage, reasoning that interpreting [sections 3 and 96](#) of the [Marriage Act, 2014](#) as invalidating all unregistered customary marriages conducted before commencement of the [Act](#) would yield an absurd result contrary to public interest.

5.5 Annulment of Marriage

73. A marriage may be annulled on account of a defect that renders it either void or voidable. In the case of a void marriage, the defect generally goes to a fundamental feature of validity, usually touching on consent or capacity to marry. Examples include one party being below the minimum age of eighteen (18) years, one party being in a subsisting marriage, or the parties being within the prohibited degrees of relationship. Proof of coercion or fraud would also render a marriage void. In the case of a voidable marriage, the defect typically concerns compliance with formalities, such as failure to give notice or solemnization by an unlicensed person.
74. The [Marriage Act 2014](#) addresses void marriages under [section 11](#) and voidable marriages under [section 12](#). It then lists the grounds for annulment under [section 73\(1\)](#). The list does not distinguish between grounds that render a marriage void and those that render a marriage voidable. [Section 73\(2\)\(a\)](#) then introduces ambiguity by providing that: "The court shall only grant a decree of annulment if the petition is made within one year of the celebration of the marriage." The wording of [section 73\(2\)\(a\)](#) applies the one-year limitation period to void and voidable marriages alike. It does not restrict the one-year limitation to voidable marriages only, as had been the case under section 14(1) of the repealed Matrimonial Causes Act. The result is that parties who miss the deadline may, in effect, be required to remain in a marriage that the law otherwise treats as void.
75. Applying the one-year limitation period to void marriages produces a legal absurdity: the law regards the relationship as void, meaning that it was not a valid marriage in the first

place, but [section 73\(2\)\(a\)](#) nonetheless appears to require the parties to remain in the relationship if they do not apply for annulment within the first year. A void marriage is, by definition, invalid by operation of law, regardless of any action by the parties to terminate it. The drafting of the provision is therefore problematic.

76. In [S B M & Another -v- Attorney General \[2022\] KEHC 13920 \(KLR\)](#) discussed below, [section 73\(2\)\(a\)](#), was declared unconstitutional, although the problem could also have been addressed as one of legislative drafting. Since there is now a decision of the High Court's Constitutional and Human Rights Division declaring the provision unconstitutional, lower courts must treat the provision as inoperative. What remains unsettled is whether the provision is inoperative with respect to all the grounds listed in [section 73\(1\)](#), which combines void and voidable marriages. If so, the effect of the judgment would be to remove the one-year limitation period even in respect of applications to annul voidable marriages.

5.6 Application of the Marriage Act's Minimum Age Provisions to Persons Professing the Islamic Faith

77. [Section 49\(3\)](#), the [Marriage Act, 2014](#) limits the Act's scope of application in relation to persons who profess the Islamic faith. It provides: "Any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith."

78. As currently worded, [section 49\(3\)](#) generates internal inconsistencies. For instance, it may be read as overriding the minimum age requirement in [section 4](#) and [section 11\(1\)\(a\)](#). This internal inconsistency could be cured by prefacing [section 49\(3\)](#) with a qualifying phrase such as "subject to [section 4](#) and [section 11\(1\)\(a\)](#)."

79. It is worth mentioning that in December 2025, a Private Member's Bill titled the Marriage (Amendment) Bill, 2026 was tabled in Parliament to amend [section 49\(3\)](#) by prefacing it with the phrase: "Subject to [section 4](#) and [section 11\(1\)\(a\)](#)....."

80. Pending amendment to remove the ambiguity on minimum age for marriage, courts should invoke the conflict-of-law clause in [section 4 of the Children Act, 2022](#) to uphold the prohibition of child marriage in the best interests of the child.

5.7 Evidentiary Threshold for "Irretrievable Breakdown" of Marriage

81. Irretrievable breakdown of marriage as a ground for divorce has a relatively recent history in Kenyan law. It was introduced by the [Marriage Act, 2014](#), although proposals

to include it had been made as far back as 1968. The Presidential Commission on the Law of Marriage and Divorce had proposed replacing individual grounds for divorce with a single ground: irretrievable breakdown of the marriage. This reflected the trajectory of family law reforms in England and other Commonwealth jurisdictions at the time. The Commission reasoned that this approach was closer to the way divorce is understood in African customary law, where there is ordinarily less emphasis on proving particular fault-based grounds.¹⁰⁴ It would also be consistent with viewing divorce as remedial rather than punitive, and civil rather than accusatory.¹⁰⁵

82. The Commission listed ten possible factors that a court could take into account in determining whether a marriage had irretrievably broken down: adultery; cruelty; sexual perversion; wilful neglect; wilful desertion for three (3) years; voluntary separation for five (5) years; triple **talaka** at thirty-day intervals by the husband; incurable mental illness; change of religion where the religion of both parties recognizes repudiation of the faith as a ground for divorce; and imprisonment for five (5) years.¹⁰⁶
83. The [Marriage Act, 2014](#) did not adopt the Commission's recommendation to substitute the fault-based grounds with irretrievable breakdown as the sole ground. Instead, it added irretrievable breakdown to the existing enumeration of grounds for divorce. In defining irretrievable breakdown with respect to civil marriages, the Act largely reiterates the fault-based grounds of adultery, cruelty and desertion as components of irretrievable breakdown. For this reason, empirical research suggests that irretrievable breakdown is rarely pleaded as a stand-alone ground. It tends to be invoked alongside one or more fault-based grounds.
84. Irretrievable breakdown features as a ground for dissolution of Christian marriages under [section 65](#), civil marriages under [section 66](#), customary marriage under [section 69](#), and Hindu Marriage under [section 70](#). It is also applicable to Islamic marriages, although the text of the [Marriage Act, 2014](#) does not state this expressly, because the Act does not

¹⁰⁴ See Sussie Wairimu Mutahi & Elvira Akech, 'Insights from A Decade of Divorce Cases in Kenya: An Invitation Toward Multidisciplinary Collaboration for Marriage Enhancement', (27 Jan 2025) *Family Transitions*, DOI: 10.1080/28375300.2025.2457173

¹⁰⁵ Government of Kenya, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer, 1968), Paragraph 296. Available at <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968/eng@1968-08-01>

¹⁰⁶ Recommendation No.115, Report of the Commission on the Law of Marriage and Divorce (1968), available at <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968/eng@1968-08-01>

address substantive Islamic family law and instead provides that dissolution of Islamic marriages shall be in accordance with Islamic law.

85. [Section 66\(6\)](#) sets out factors that a court will regard as proof of irretrievable breakdown. These are: adultery; cruelty to a spouse or child of the marriage; wilful neglect of a spouse for at least two (2) years immediately preceding the petition; separation for at least two (2) years, whether voluntary or by decree of court; sentencing of a spouse to imprisonment for life or for more than seven (7) years; incurable insanity of a spouse, certified by two doctors, one of whom must be a psychiatrist; and any other ground the court may deem appropriate.
86. Some factors in the list, such as adultery and cruelty, also constitute stand-alone grounds for divorce. The final phrase, “any other ground as the court may deem appropriate”, indicates that irretrievable breakdown is broad in scope. Given the overlap with stand-alone grounds, and the breadth introduced by the phrase “any other ground as the court may deem appropriate”, questions have arisen about what constitutes sufficient proof of irretrievable breakdown of a marriage. The range of factors courts have considered, and the insights that have emerged on the evidentiary threshold, are explored through the judicial precedents discussed below.

5.7.1 Judicial Precedent on the Factors that Establish Irretrievable Breakdown of Marriage

87. In [JSM -v- ENB \[2015\] KECA 587 \(KLR\)](#), the parties had obtained a divorce from the High Court on the ground of irretrievable breakdown under [section 66\(6\)\(e\)](#) of the [Marriage Act, 2014](#), namely desertion. The Court of Appeal substituted the ground on which irretrievable breakdown was founded with section [66\(6\)\(h\)](#), “any other ground,” since the desertion had lasted less than one (1) year, far short of the three (3) years required by [section 66\(6\)\(e\)](#). The Court of Appeal elaborated on factors that a court may take into account in determining whether a marriage has irretrievably broken down within the meaning of the broad phrase in [section 66\(6\)\(h\)](#). These include “the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again”.

88. The Court of Appeal also took into account the fact that one of the parties had since entered into another marriage.

89. The High Court followed the Court of Appeal's lead in [CCK-v- VKK \[2024\] KEHC 15508 \(KLR\)](#), where the petition for divorce was founded on two grounds: cruelty and irretrievable breakdown. The evidence consisted of acts of emotional and psychological cruelty, including unresponsiveness, lack of communication, exclusion of the petitioner from decision-making, withholding of love and affection, and withholding of conjugal rights for over six (6) years as at the date of filing the petition. The Court also took into account the appellant's description of the marriage as "a dark place that she did not want to re-live".

90. In [CCK-v- VKK \[2024\] KEHC 15508 \(KLR\)](#), the Court formulated a question that may guide courts in weighing evidence of irretrievable breakdown:

"The general question is, can the appellant and the respondent with their character and personality, faults and other attributes good and bad and having regard to their behaviour during the marriage reasonably be expected to live with each other?"

This question was formulated slightly differently, but to similar effect, in [MNN-v-SMM \[2024\] KEHC 11757 \(KLR\)](#): have the parties conducted themselves in a manner that creates a home environment lacking trust and unconducive to marriage? Where the evidence supports such a finding, divorce may be granted.

5.8 Common Concerns on Procedure in Marriage and Divorce

5.8.1 Preliminary Formalities for Civil Marriages Imported into Christian Marriages

91. [Part III](#) of the [Marriage Act, 2014](#) sets out the preliminary formalities that parties must comply with when entering into a Christian marriage. [Part IV](#) sets out the formalities for a civil marriage. Under Part IV, parties entering into a civil marriage must first submit to the Registrar of Marriages a notice of intention to marry. The Registrar must cause the notice to be displayed for twenty-one (21) days on the premises intended for the ceremony under [sections 25](#) and [26](#). Objections to the marriage may be made during this period and resolved to the satisfaction of the Registrar before the ceremony may proceed. At the end of the notice period, or upon satisfactory resolution of an objection, the Registrar issues the parties with a certificate of no impediment, having established that they have capacity to marry: that they are above eighteen (18) years of age, are not in subsisting

marriages, and are not within the prohibited degrees of relationship. The parties must marry within three (3) months of the notice, failing which the notice expires and a new notice must be issued.

92. No requirement for a notice of intention to marry or a certificate of no impediment is mentioned in [Part III](#) in relation to Christian marriages. The only preliminary step concerns objections, and the procedure is the same as that outlined for civil marriages. The subsidiary legislation is also silent on preliminary procedural formalities for Christian marriage.
93. The previous statute governing Christian marriages, the African Christian Marriage and Divorce Act, repealed by the Marriage Act, 2014, set out a simplified procedure. It required only that the minister licensed to conduct the marriage ensure compliance with the denomination's formalities as to notice. This usually meant the reading of banns for three (3) consecutive weeks, in most cases in addition to displaying the announcement on church premises for twenty-one (21) days. Christian marriages were expressly exempted from the preliminary formalities that applied to civil marriages under section 7 of the repealed Act.
94. In the vacuum created by silence in the [Marriage Act, 2014](#) and the subsidiary legislation, an administrative practice emerged in which the Registrar of Marriages subjected parties entering into Christian marriages to the same procedures as parties entering into civil marriages.

5.8.2 Judicial Precedent on Preliminary Formalities for Civil Marriages Imported into Christian Marriages

95. The extension of civil marriage formalities to Christian marriages has been challenged in two High Court cases.
96. In [Murage & another -v- A.G. Registrar of Marriages, \(Misc. Cause E152 of 2023\) \[2023\] KEHC 21949 \(KLR\)](#), the High Court held that the Registrar of Marriages had acted outside the powers conferred by the [Marriage Act, 2014](#) by requiring parties intending to enter into a Christian marriage to obtain a certificate of no impediment. The parties had submitted a notice of intention to marry, but upon appearing before the Registrar, were denied the certificate of no impediment because the first applicant had an undissolved customary marriage. Leaving aside the substance of the impediment, the Court focused on the basis for the Registrar's extension of the requirements of [Part IV](#) on civil marriages to marriages under [Part III](#) on Christian marriages. The Court held that, although issuance

of certificates of no impediment is listed as one of the Registrar's functions under [section 50\(2\)\(d\)](#), that function must not be read in isolation but in conjunction with [Part III](#) and [Part IV](#). Part III contains no basis for the administrative practice introduced by the Registrar of Marriages. The practice was therefore ultra vires.

97. The judgment exposes a gap in the law: if no objection is raised to an intended Christian marriage under [section 19](#), yet an impediment exists, such as the subsisting customary marriage in **Murage**, by what process is the impediment to be discovered and addressed? This gap is flagged in the section on areas for reform below.

98. In the second case, [AWW & Another, \(Misc. Application E299 of 2025\) \[2026\] KEHC 2917 \(KLR\) \(Family\)](#), the Court reiterated that the designated marriage officer in a Christian marriage is the minister officiating the ceremony. The Registrar of Marriages has no role in the preliminaries of a Christian marriage and should not unreasonably impede the process. In that case, the Registrar refused to publish the twenty-one-day notice following the parties' submission of a notice of intention to marry. The reason for the refusal was an inconsistency in the parties' identity documents: the names appearing on the birth certificates did not match the names on the national identity cards. The parties applied to register a deed poll, on the advice of the Registrar of Marriages, but the Land Registrar declined the application because the names requested already appeared on the national identity cards. The parties then requested the Registrar of Marriages to accept their affidavit of declaration of name, indicating that they wished to use the names appearing on their national identity cards. The Registrar declined to post the notice and ceased communication, effectively freezing their wedding plans.

99. The Registrar of Marriages did not participate in the court proceedings either, prompting the judge to fault that office for falling short of the values and principles of public service under [Article 232](#) of the Constitution. The Court held that there was no legal basis for the Registrar's actions and ordered that the parties be allowed to proceed with the marriage.

5.8.3 Recognition of Foreign Marriages and Divorces

100. [Sections 22](#) and [38](#) of the [Marriage Act 2014](#) provide for recognition of Christian and civil marriages, respectively, celebrated outside Kenya. The conditions for recognition are that the marriage must meet the legal requirements of the country in which it was celebrated; at least one of the parties must be domiciled in Kenya at the time of entering into the marriage; and the parties must have capacity to marry under both Kenyan law and the



101. The Registrar of Marriages in Kenya may facilitate the foreign marriage of a Kenyan citizen by issuing a certificate of no impediment in accordance with Kenyan law under [section 36\(2\)](#). [Section 37](#) provides that a non-Kenyan who wishes to marry under Kenyan law may do so at a Kenyan embassy, high commission or consulate, before a person designated by the Registrar of Marriages as a marriage officer.

102. The [Marriage Act, 2014](#) is silent on recognition of customary, Hindu or Islamic marriages celebrated in other jurisdictions.

103. [Section 61](#) enables recognition of foreign decrees for dissolution or annulment of marriage, without specifying whether the provision, like those on foreign marriages, is restricted to Christian and civil marriages. It simply provides that such a foreign decree must be registered with the Registrar of Marriages in Kenya in order to be valid. The application for registration must attach a copy of the decree, accompanied by a translation where the decree is not in one of Kenya's official languages. It must also be accompanied by a declaration witnessed by a legal practitioner in that country, certifying that the decree is valid in that country as if the marriage so dissolved or annulled had been celebrated there.

5.8.4 Judicial Precedent on Recognition of Foreign Divorce Decrees

104. In [MNN-v-SMM \[2024\] KEHC 11757 \(KLR\)](#), the respondent to a petition for dissolution of a customary marriage argued that he had obtained a decree nisi from a county court in the State of Missouri, United States of America. The Kenyan High Court declined to recognize the decree for failure to meet the criteria for recognition under [section 61](#). The decree had not been registered with the Registrar of Marriages in Kenya, more than a decade after it was issued. In addition, the appellant questioned its authenticity and legal validity because the divorce proceedings had purportedly been conducted while she was outside the United States, despite a declaration by the respondent to the county court in Missouri claiming that she was resident in the county and that service had been effected through a local newspaper.

5.8.5 Three Courts, One Marriage

105. Questions have arisen about the three-pathway approach to marital disputes: the unbundling of one family matter so that divorce proceedings are assigned to the

magistrates' court, matrimonial property disputes to the High Court, and matters of child custody and maintenance to the Children's Court.¹⁰⁷ This structure has been in operation for at least two decades. The history and rationale for its establishment are not immediately clear.

106. The structuring of family and children's matters varies across Commonwealth jurisdictions. Rwanda has no designated family courts among its courts of first instance, namely primary courts. At the level of Intermediate Courts, [Rwanda has designated the Chamber for Minors and Family](#), which combines family matters such as divorce, marital disputes and succession matters where the subject matter exceeds the pecuniary jurisdiction of the primary courts, with criminal matters involving children in conflict with the law.
107. Uganda fuses jurisdiction over family matters with jurisdiction over children's matters, including matters involving children in conflict with the law, in its [Family and Children Courts established in every district \(section 39\(1\) of Children Act, 2005](#). The [UK, too, operates a unified Family Court system](#) of magistrates' courts and a Family Division of the High Court, which handle family-related matters, including those involving children. With regard to children, the family court system handles both matters that arise in the family context, such as custody and maintenance in divorce proceedings, and matters involving public authorities, such as removal by children's services on grounds of abuse or neglect.
108. [Australia](#) has a family court system organised at state level, operating alongside a system of children's courts organised at the federal level. The children's courts distinguish between private and public matters. Private matters arising in the family context are allocated to the state-based family court system, while public matters involving public authorities are placed within the federal children's court system.
109. In [South Africa](#), every magistrate's court is considered a children's court for purposes of the [Children Act, 2005 under section 42](#). There is a demarcation determined by subject matter, albeit with some overlap, between orders that a Children's Court may make and orders that fall within the family jurisdiction of the High Court. A Children's Court may make orders concerning protection and care of a child, including temporary and alternative care; paternity; child support; abuse, neglect and exploitation of a child, but

¹⁰⁷ See, for instance, Leah Kiguatha, 'Three Courts and a Marriage', slide presentation reflecting on the parceling out of family matters and the challenges that litigants are likely to encounter in navigating the system.

not criminal prosecution; adoption, including inter-country adoption; supervision and intervention orders; and shared care orders, whether between parents or third-party care facilities. The High Court is responsible for orders relating to guardianship, surrogacy and assisted reproduction, removal of a child from and return of a child to the jurisdiction, determination of age of majority or legal capacity, and safeguarding of a child's interest in property.

110. The models adopted by other jurisdictions are instructive in evaluating Kenya's three-pathway approach and in weighing its benefits against its costs. Relevant questions include: what justification was advanced for Kenya to adopt the three-pathway approach? What has the experience been so far? Does the approach require duplication of court attendance by parties? What feedback has been received from court users and other stakeholders? Has implementation of this structure been subjected to any formal evaluation?

5.9 Constitutionality Challenges to Some Provisions of the Marriage Act, 2014

111. Two cases have declared provisions of the [Marriage Act, 2014](#) unconstitutional.¹⁰⁸ The impugned provisions are section 73(2)(a) and section 66(1).

5.9.1 Constitutionality Challenge to [Section 73\(2\)\(a\): S B M & Another -v- Attorney General \[2022\] KEHC 13920 \(KLR\)](#).

112. The High Court's Constitutional and Human Rights Division declared [section 73\(2\)\(a\)](#) of the [Marriage Act 2014](#), unconstitutional in [S B M & Another -v- Attorney General \[2022\] KEHC 13920 \(KLR\)](#). [Section 73\(2\)\(a\)](#) stipulates that actions for annulment of marriage must be instituted within one (1) year of the celebration of the marriage. The petitioner had entered into a civil marriage and later discovered that her spouse was in a pre-existing customary marriage that he had not disclosed. For context, [section 11\(1\)\(c\)](#) of the [Marriage Act, 2014](#) provides that "a union is not a marriage if at the time of the making of the union - either party is incompetent to marry by reason of a subsisting marriage."

¹⁰⁸ For an article that discusses the cases highlighted here as well as other family law cases with constitutional implications see Evance Ndong, 'Case Review: Key Judicial Pronouncements on Constitutionality of Aspects of Family Law in Post-2014 Kenya' [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 253.

113. The legal effect of the petitioner's circumstances was that she was not in a valid marriage ab initio. Her situation fell within one of the grounds for annulment under [section 73\(1\)\(c\)](#), but because more than one (1) year had lapsed, the text of [section 73\(2\)\(a\)](#) left her with no avenue for seeking leave to apply for annulment outside the limitation period.

114. The petitioner challenged the constitutionality of the provision on the basis of Articles [3](#), [22](#), [27](#), [32](#), [45](#), [48](#), [159](#), [165](#), [258](#), and [259](#) of the Constitution. In summary, the petition implicated the right to equal benefit and protection of the law, the right to marriage based on free consent, and the right of access to justice.

115. The Court equated the petitioner's position to living in "detention", denied the right "to access court in real time", and declared [section 73\(2\)\(a\)](#) unconstitutional.

5.9.2 Constitutionality Challenge to [Section 66\(1\): National Assembly of Kenya -v- Tukero Ole Kina & Another \[2022\] KECA 548 \(KLR\)](#)

116. [Section 66\(1\)](#) of the [Marriage Act, 2014](#) relates to the procedure for instituting divorce proceedings to dissolve a civil marriage. The subsection stipulates that parties may not petition the court for an order of separation or divorce unless the marriage has subsisted for at least three (3) years. This restriction does not apply to other types of marriage under the Act. The petitioner challenged the constitutionality of [section 66\(1\)](#) on the basis that it discriminated against persons in civil marriages.

117. The High Court agreed with the petitioner and declared the section unconstitutional on the ground of discrimination. The Court of Appeal also declared [section 66\(1\)](#) unconstitutional, but not on the ground of discrimination. The Court's position on the discrimination argument is captured in the following passage:

"...Firstly, it is notable that the parties to the different marriage systems are not similarly situated to require uniformity in treatment, as urged by Mr. Ole Kina. They have dissimilar situations in terms of religion, belief and conscience which leads them to contract different types of marriage. In the circumstances, we cannot adopt an interpretation of equality that requires all the parties to the different marriage systems to be simply treated alike, and must of necessity interpret equality in the context of the constitutionally permitted social, religious and personal differences that influence the choice of the different marriage systems."¹⁰⁹

¹⁰⁹ *Ole Kina* Petition, para 48.

118. Different treatment was legitimate and anticipated in the mandate given to Parliament under Article 45(4) of the Constitution, namely to “enact legislation that recognizes any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.”

119. The Court of Appeal declared [section 66\(1\)](#) unconstitutional for failing the proportionality test under [Article 24](#) of the Constitution. While the legislature was legitimately acting pursuant to [Article 45\(1\)](#) to protect the family as the fundamental unit of society by promoting stability in marriage, it went too far in advancing public policy at the expense of safeguarding the freedoms of parties in civil marriages. The Court held that an appropriate balance would have been achieved by providing an exception to allow divorce in situations that are “unavoidable and unendurable for reasons of exceptional hardship or depravity, irrespective of the duration of the marriage...to protect the rights of the parties involved.”

120. It is notable that [section 6\(1\)](#) of the repealed [Matrimonial Causes Act](#) contained such an exception. It provided:

“No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules made under this Act, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent,…”

121. The current position is that [rule 4](#) of the [Marriage \(Matrimonial Proceedings Rules\) 2020](#) [Legal Notice 122 of 2020](#), sets out the procedure for petitioning the court for divorce before the expiry of three (3) years. However, this stopgap measure in subsidiary legislation does not substitute for an express statutory provision in the parent Act. This is one of the issues flagged under “Areas for Reform” below.

6.0 AREAS FOR REFORM AND LESSONS FROM OTHER JURISDICTIONS

6.1 Status of Cohabitation Unions

122. In considering whether the law should recognize cohabitation unions and accord them the same rights as married couples, the judge in [CWN-v-DK \[2021\] KEHC 12535 \(KLR\)](#) drew a contrast between the approaches taken by Scotland and the United States of America. The current Scottish law on marriage, enacted in 2006, makes clear that “marriage by cohabitation with habit and repute” has been abolished and that no rights can arise under it. The United States presents a mixed picture. Some states extend legal recognition to cohabitation unions that meet the evidentiary requirements, including specified duration of cohabitation, capacity and intention to marry, and repute. A similar position applies in Tanzania, where proof of cohabitation for at least two (2) years, together with the other requirements, gives rise to a presumption of marriage and shifts the burden of proof to the party denying the existence of the marriage under Section 160, [Law of Marriage Act, Tanzania](#).

123. The Judiciary could nudge Kenya’s legislature towards taking a clear position: either expressly abolishing the common law presumption of marriage or codifying the criteria developed by courts over time, culminating in the Supreme Court’s 2023 judgment in [MNK-v-POM Initiative for Strategic Litigation in Africa \(ISLA\) \(Amicus Curiae\) \[2023\] KESC 2 \(KLR\)](#). The issue of duration could be left to judicial discretion or, borrowing from Tanzania, a minimum period could be specified.

6.2 State of the Law on Registration of Customary Marriages Needs Clarity

124. With respect to registration of customary marriages, approaches adopted by other African jurisdictions have been classified as either permissive or facilitative on the one hand, or punitive on the other.¹¹⁰ The distinction turns on whether registration is mandatory and whether punitive consequences, such as invalidation of the relationship, attach to non-registration. [Uganda’s Customary Marriage \(Registration\) Act of 1973](#); [South Africa’s Recognition of Customary Marriages Act of 1998](#); and [Ghana’s Marriages Act](#) fall within

¹¹⁰ See Nyokabi Njogu and Gatura Wameru, ‘Registration of Customary Marriages in Kenya: A Legal Solution for a Social Problem?’ [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 89-114, available at <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3016>.

the permissive or facilitative category. Examples of laws that adopt a punitive approach amounting to non-recognition of unregistered marriages include [Cameroon's Law No.2024/016](#); [Democratic Republic of Congo's Code of the Family \(2016\)](#); [Zimbabwe's Marriage Act \(2022\)](#).

125. Kenya's approach falls in the middle but leans towards the punitive category, since [section 12\(e\)](#) provides that failure to register a marriage renders it voidable. Judgments that have taken a strict approach to annul unregistered customary marriages include [CWN-v-DK \[2021\] KEHC 12535 \(KLR\)](#) and [PWK-v-EWK \[2024\] KEHC 12146 \(KLR\)](#). However, other judgments have taken the position that evidence of validity beyond registration may be considered, including [JTO-v-AP \[2024\] KEHC 10464 \(KLR\)](#) and [DMK v IL \[2021\] KEHC 8611 \(KLR\)](#). These disparate outcomes point to the need for clarity in the law.

6.3 Amend [Section 49\(3\)](#) of the Marriage Act to Underline the Ban on Child Marriage

126. As noted above, there is an ongoing initiative in Parliament to amend [section 49\(3\)](#) by prefacing it with the words "Subject to [section 4](#) and [section 11\(1\)\(a\)](#)..." in order to remove the impression that marriages under Islamic law are exempt from the prohibition of child marriage. Pending legislative amendment, courts should invoke the conflict-of-law clause in [section 4](#) of the Children Act, 2022 in order to uphold the prohibition of child marriage in the best interests of the child.

6.4 Preliminary Procedural Formalities for Christian Marriages

127. As discussed above, the High Court has faulted the Registrar of Marriages for importing preliminary formalities intended for civil marriages into Christian marriages without legal basis. Arguably, the Registrar's action sought to fill a gap in the law, since no express provision is made for a process of discovering impediments to Christian marriage where no objection is raised. There is no explicit requirement for the licensed minister of religion conducting the ceremony to satisfy themselves that the parties meet the legal requirements of eligibility to marry, namely age, consent, absence of a subsisting undissolved marriage, and absence of prohibited proximity. It is common knowledge, however, that the marriage rites of established Christian denominations provide for such a process, even up to the ceremony itself, before the parties take their vows.

128. The law should not remain silent or ambiguous on this issue. There are two options. The first is to revert to the position under the repealed [African Christian Marriage and](#)

[Divorce Act](#), where the law deferred to the internal procedures established by the Christian denomination under which the marriage was to be conducted. The second is to amend [Part III](#) of the Marriage Act, 2014 to introduce a procedure for certifying compliance with eligibility requirements and setting out a process for dealing with impediments, whether or not an objection has been raised. The duty of establishing eligibility could be devolved from the Registrar of Marriages to the officiating minister, who would file the necessary certificates.

6.5 Amend or Repeal Marriage Act Provisions Declared Unconstitutional

129. Two provisions of the [Marriage Act, 2014](#) have been declared unconstitutional, but Parliament has not yet amended or repealed them. The first is [section 73\(2\)\(a\)](#), which was declared unconstitutional in [S B M & Another -v- Attorney General \[2022\] KEHC 13920 \(KLR\)](#) for requiring parties to remain in void marriages if they fail to institute annulment proceedings within one (1) year of entering into the relationship. This produces a legal absurdity because a void marriage is invalid by operation of law whether challenged or not.
130. The second is section 66(1), which was declared unconstitutional in [National Assembly of Kenya -v- Tukero Ole Kina & Another \[2022\] KECA 548 \(KLR\)](#) for requiring parties in civil marriages to wait three (3) years before instituting divorce proceedings. The provision failed the proportionality test because it did not properly balance the public policy objective of preserving the family under [Article 45\(1\)](#) with the personal freedoms of parties to a civil marriage. As discussed above, this balance could be achieved by inserting a provision similar to [section 66\(1\)](#) of the repealed [Matrimonial Causes Act](#), which allowed a petition to be presented before three (3) years had passed where the case involved exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent.
131. The stopgap measure in rule 4 of the [Rule 4 of the Marriage \(Matrimonial Proceedings Rules\), 2020](#) is insufficient, as a subsidiary rule must be anchored in the parent statute.

6.6 Evaluate the Three-Pathway Approach to Family Disputes

132. Institutional memory on the rationale for the three-pathway model for processing family disputes appears to have diminished over time. It is therefore necessary to recover that rationale and reflect on whether, in the current context, unbundling family disputes remains the most suitable approach to administering justice in family matters. An evaluation of the model's implementation, drawing on the experiences of diverse justice

sector stakeholders and comparative lessons from other jurisdictions, would be useful. Such an evaluation should consider whether the model promotes efficiency, access to justice, consistency of outcomes and child-sensitive adjudication, or whether it results in duplication, delay, increased costs and fragmented relief for families.

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8.0 REFERENCES FOR FURTHER READING

1. Amadiume I, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1987).
2. Cadigan J, 'Woman-to-Woman Marriage Practices and Benefits in Sub-Saharan Africa' (1998) 29 *Journal of Comparative Family Studies* 89.
3. Cotran E, *Casebook on Kenya Customary Law* (Professional Books and Nairobi University Press 1987).
4. Freeman M, Chinkin C and Rudolf B (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press 2012).
5. Government of Kenya, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer 1968) para 296 <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968/eng@1968-08-01>.
6. Greene, B. 'The Institution of Woman-Marriage in Africa: A Cross-Cultural Analysis', *Ethnology* 37:4 (1998) 395-412.
7. Kenyatta J, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (Vintage Books 1965).
8. Kiage P, *Family Law in Kenya: Marriage, Divorce and Children* (LawAfrica 2016).

9. Kiguatha, Leah, 'Three Courts and a Marriage', slide presentation reflecting on the parceling out of family matters and the challenges that litigants are likely to encounter in navigating the system.
10. Mutahi SW and Akech E, 'Insights from a Decade of Divorce Cases in Kenya: An Invitation Toward Multidisciplinary Collaboration for Marriage Enhancement' (2025) *Family Transitions* <https://doi.org/10.1080/28375300.2025.2457173>.
11. Ndong E, 'Case Review: Key Judicial Pronouncements on Constitutionality of Aspects of Family Law in Post-2014 Kenya' (2025) *East African Law Journal* Special Issue, 'Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya' 253.
12. Njogu N and Wameru G, 'Registration of Customary Marriages in Kenya: A Legal Solution for a Social Problem?' (2025) *East African Law Journal* Special Issue, 'Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya' 89 <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3016>
13. Oboler RS, 'Is the Female Husband a Man? Woman/Woman Marriage Among the Nandi of Kenya' (1980) 19(1) *Ethnology* 19:1 (1980) 69-88.

CHAPTER 5: MATRIMONIAL PROPERTY

1.0 INTRODUCTION

1. In [Echaria-v-Echaria \[2007\] KECA 504 \(KLR\)](#), the Court of Appeal lamented that inaction by the Kenyan Parliament had left “the country shackled to a 125-year-old foreign legislation which the mother country found wanting more than 30 years ago!” The Court was referring to the English statute of general application, the Married Women’s Property Act, 1882, whose application in Kenya was only brought to an end by the Matrimonial Property Act, 2013. Kenya had an opportunity to end this legislative inertia in 1968 but did not seize it. The Report of the [Presidential Commission on the Law of Marriage and Divorce](#),¹¹¹ and the draft Bill attached to it, made comprehensive proposals on matrimonial property. However, those proposals suffered the same fate as the Commission’s other proposals: the Bill failed in Parliament three times between 1971 and 1979.¹¹²
2. The Commission’s report and draft Bill contained detailed proposals on matrimonial property. First, it specified that the applicable matrimonial property regime in Kenya would be separate property, not community of property. Second, it provided for parties’ freedom to enter into agreements on their property arrangements, whether before or after marriage. Third, the draft Bill accorded special protection to the matrimonial home. If the home was registered in the name of one spouse, that spouse could not transact in it without the consent of the other spouse. The other spouse’s beneficial interest in the property could be protected through a caveat or caution. The Commission also affirmed the right of a deserted wife to continue living in the matrimonial home, even if it was legally owned by the husband. Finally, after listing the factors that a court was required to consider in dividing matrimonial property, including the customary law of the relevant community, the contribution made by each party, and whether the parties had infant children, the draft Bill added that division “shall incline towards equality of division.”¹¹³

¹¹¹ See Government of the Republic Kenya, [Report of the Commission on the Law of Marriage and Divorce](#) (Government Printer, 1968).

¹¹² For a comprehensive account of the history of family law reform in post-colonial Kenya, see Celestine Nyamu Musembi, ‘A journey of Five Decades: Family Law Reform in Post-colonial Kenya (1967-2015)’, [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 1-29, available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3025>

¹¹³ Section 123(2) Draft Law of Matrimony Bill.

3. Some of these legislative proposals were echoed forty (40) years later in the Kenya Law Reform Commission's Draft Matrimonial Property Bill, 2007. It would take another six (6) years before a revised version of that Bill was introduced in Parliament as a Government Bill and enacted as the [Matrimonial Property Act \(MPA\) of 2013](#).¹¹⁴ Nine (9) years later, the rules necessary for its implementation were enacted.

2.0 CONSTITUTIONAL FRAMEWORK FOR MATRIMONIAL PROPERTY

4. [Article 68\(c\)\(iii\)](#) of the Constitution mandated Parliament to enact legislation “to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage”. This provision is the constitutional foundation of the Matrimonial Property Act, 2013.
5. [Article 60\(1\)\(f\)](#) further declares that “elimination of gender discrimination in law, customs and practices related to land and property in land” is one of the principles that shall guide land policy in Kenya. Other constitutional provisions relevant to matrimonial property include [Article 40](#), which guarantees every person the right to acquire and own property of any description in any part of Kenya, either individually or in association with others; [Article 27](#) on equality and non-discrimination; and [Article 45\(3\)](#) on equal rights of parties to a marriage. These provisions collectively undergird the determination of matrimonial property disputes.

3.0 INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK RELEVANT TO MATRIMONIAL PROPERTY

6. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly known as the Maputo Protocol, is the most detailed regional or international human rights instrument on matrimonial property. The Convention on the Elimination of All Forms of Discrimination against Women also addresses matrimonial property, supplemented by various General Recommendations of the Committee on the Elimination of Discrimination against Women.

¹¹⁴ Matrimonial Property Rules, 2022.

3.1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

7. Article 7 of the Maputo Protocol deals with dissolution of marriage. Article 7(d) addresses division of matrimonial property upon separation, divorce or annulment. It requires States to enact legislation to ensure that “in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage”.
8. Article 6(j) is also relevant. It requires States to accord women equal legal capacity to acquire, administer and manage their own property during marriage. This has direct implications for the division of matrimonial property upon divorce.
9. In 2020, the African Commission issued [General Comment No.6](#) interpreting Article 7(d), particularly the phrase “equitable sharing”. The drafting history shows that the term “equitable” was chosen over “equal” following objections from some States. In the General Comment, the African Commission’s elaboration of “equitable sharing” leans towards substantive equality by calling on States to ensure that legislative and policy measures, as well as judicial decisions, take context into account. The Commission observed that women often experience unequal enjoyment of property rights during marriage, and that their contributions tend to be non-monetary, overlooked and therefore not translated into tangible, registrable interests in property.
10. These contextual factors are elaborated in the background paragraphs of the General Comment. They include continent-wide trends such as women’s limited or complete lack of economic decision-making power in the household; restrictive practices in the registration of land and land-based assets; traditional and statutory property-rights institutions that vest control of family property exclusively in husbands as holders of “marital power” or as “heads of households”; and gendered responsibilities under which women use their resources for family upkeep and maintenance of the home, while men use theirs for acquisition of property.¹¹⁵

¹¹⁵ African Commission General Comment No. 6, paragraphs 2, 3 and 5.

3.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

11. Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which addresses equality in marriage and family relations, deals with matrimonial property in Article 16(1)(h). The provision calls on States to guarantee women and men:

“The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”

12. Other CEDAW provisions relevant to matrimonial property include Articles 2(f) and 5(a), which call on States to modify or abolish discriminatory laws, regulations, customs and practices, as well as prejudices based on ideas of superiority or inferiority of either sex. Article 13(b) is also relevant, as it guarantees equal access to bank loans, mortgages and other forms of financial credit. This presupposes equal control over resources that may be needed as collateral in accessing credit. Similarly, Article 14, which addresses the rights of rural women, provides in Article 14(2)(g) for equal treatment of women and men in access to “agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes”.

13. The CEDAW Committee has supplemented these provisions through various [General Recommendations](#), including [General Recommendation 29](#) on the economic consequences of marriage, family relations and their dissolution. The Committee expressed concern that “decisions on division of roles during the marriage should not be used to bring about adverse economic consequences for any party to the marriage”.¹¹⁶

3.3 General International Legal Provisions on Non-discrimination

14. The core international human rights treaties, namely the [International Covenant on Economic, Social and Cultural Rights](#), and the [International Covenant on Civil and Political Rights](#), together referred to as the “twin covenants”, do not address matrimonial property directly. However, both contain Article 3, which prohibits sex discrimination in the enjoyment of all rights enumerated in the Covenants. This covers non-discriminatory treatment in relation to matrimonial property.

¹¹⁶ CEDAW Committee, ‘[Economic Consequences of Marriage, Family Relations and their Dissolution](#)’ (2013), CEDAW/C/GC/29, paragraph 45.

4.0 JURISDICTION IN MATRIMONIAL PROPERTY DISPUTES

15. Matrimonial property disputes are handled by the High Court. They may also be handled by magistrates' courts, subject to pecuniary jurisdiction. However, as underlined in Chapter 1 in the discussion on the constitutional commitment to promotion of alternative dispute resolution (ADR), most family matters, including matrimonial property disputes, are settled through alternatives to litigation, such as mediation, conciliation, and traditional or religious forums. In appropriate cases, the Judiciary refers some matters filed in court to ADR mechanisms such as mediation. In 2025, for instance, out of a total of 377 cases referred to ADR by the High Court's Family Division, 133 recorded settlement agreements.¹¹⁷

16. Courts deal with matrimonial property disputes relating to all five types of marriages recognised under the Marriage Act, namely Christian, civil, customary, Hindu and Islamic marriages. With regard to Islamic marriages, however, the Kadhis' Courts have concurrent jurisdiction. [Section 3](#) of the Matrimonial Property Act states that a person who professes the Islamic faith "may be governed by Islamic law in all matters relating to matrimonial property". Since the section says nothing about forum, a matrimonial property matter involving a Muslim party may be filed before the High Court, a magistrate's court or a Kadhi's Court. The parties may also elect between Islamic law and the Matrimonial Property Act as the applicable law. [Rule 6\(2\)](#) of the Matrimonial Property Rules provides:

"Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law."

Muslim parties therefore have a choice of both forum and applicable law.

17. Some matrimonial property disputes may originate in the Environment and Land Court as land ownership disputes or as claims relating to trespass.

4.1 Judicial Precedent on Jurisdiction in Matrimonial Property Disputes

4.1.1 Jurisdiction in Relation to Muslim Marriages

18. [RMM v. BAM \[2015\] KECA 1013 \(KLR\)](#) was filed before the Matrimonial Property Act came into force. The applicable law at the time was the English statute of general application, the

¹¹⁷ Of the remaining cases, 157 ended with no agreement, 30 were terminated, 12 were ongoing, and 35 were marked as non-completions. Source: Case Monitoring Report, 2025 (High Court, Family Division)



Married Women's Property Act, but the issue of forum and applicable law in matrimonial property disputes involving Islamic marriages remains pertinent. The dispute was between a Muslim man and his former wife, who had formerly professed the Islamic faith. Most of the property in dispute had been acquired during a two-decade period of cohabitation before solemnisation of an Islamic marriage between them. Following divorce, the former wife reverted to her Catholic faith. The man argued that Islamic law was applicable and that the appropriate forum was the Kadhis' Court. The former wife argued that Islamic law no longer applied because she was no longer Muslim, and that not all the property had been acquired during the Islamic marriage.

19. The High Court held that, by marrying the man with knowledge that he was Muslim and later solemnising an Islamic marriage, the former wife had submitted to Islamic law. The Court therefore held that the Kadhis' Court was the appropriate forum and that Islamic law, rather than the Married Women's Property Act, was the applicable law. Without going into the merits, the High Court referred the dispute to the Kadhis' Court.

20. The appeal was placed before a five-judge bench of the Court of Appeal because the appellant sought to challenge the High Court's departure from the Court of Appeal precedent in **Essa v Essa (Civil Appeal No. 101 of 1995)**, which had held that the Married Women's Property Act was applicable to Muslim marriages. The Court of Appeal affirmed the precedential value of *Essa v Essa* and held that the applicable law was the Married Women's Property Act and that the appropriate forum was the High Court. The Court stated:

"We think on our part, that the trial court, faced with such complexity, should have opted for the law that best accords with the Constitution and was protective of the interests of both parties. ... the Kadhis' Courts Act, Cap 11 was not an impediment as it did not oust the jurisdiction of the High Court."

21. Reading [RMM v. BAM \[2015\] KECA 1013 \(KLR\)](#) together with [section 3](#) of the Matrimonial Property Act suggests that Kadhis' Courts have concurrent jurisdiction and that Muslim parties have a choice of applicable law. However, in **AWA v HDD [2018] KEHC 645 (KLR)**, the High Court interpreted section 3 of the Matrimonial Property Act as mandating the application of Islamic law to matrimonial property disputes involving Muslims, regardless of forum. Section 3 provides that: "A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property."

22. In **AWA v HDD [2018] KEHC 645 (KLR)**, the respondent approached the High Court for orders relating to distribution of matrimonial property. The applicant sought to transfer the matter to the Kadhi's Court, where divorce proceedings were pending, citing section 3 of the Matrimonial Property Act as mandating application of Islamic law. The Court held that it did not matter whether the matrimonial property dispute was heard by the Kadhis' Court or the High Court, provided that Islamic law was "used as the determinant factor."
23. In [Salim Ali Amran-v-OC Police Division Kisauni & 4 others \[2015\] KEHC 3586 \(KLR\)](#) a Muslim husband involved in divorce proceedings alleged that police action infringed his property rights. The police had detained and subsequently released to his wife a motor vehicle he claimed belonged to him. Ownership of the motor vehicle was disputed. He alleged that it had been fraudulently registered in the wife's name, but made no formal complaint regarding the alleged fraud. The Court held that the police were right to infer beneficial ownership from the fact of registration and that no right of the petitioner, including the right to property, had been violated. The ownership dispute was a matrimonial property dispute which, this being a Muslim marriage, would be determined before a Kadhi's Court under Islamic law.
24. By referring only to the Kadhis' Court, the judgment did not imply that the Kadhis' Court's jurisdiction is exclusive. Rather, it reflected the fact that the matter would be conclusively determined in that forum, where the divorce proceedings were already pending.

4.1.2 Jurisdiction in Relation to the Environment and Land Court

25. The Court of Appeal set out the "predominant issue" test in [Co-operative Bank Ltd –vs- Patrick Kangethe Njuguna & Others \(2017\) KECA 79 \(KLR\)](#) to determine whether a matter falls within the jurisdiction of the High Court or the specialised Environment and Land Court, which is of equal status. Courts have applied this test in cases that present a mix of family and land issues.
26. In [CWN-v-DK \(Civil Suit 17 of 2017\) \[2021\] KEHC 12535 \(KLR\)](#), the suit had initially been filed in the Environment and Land Court seeking determination of the ownership status of the land in question, with prayers that it be declared matrimonial property and that the plaintiff be declared entitled to live on it peacefully. The defendant had also earlier filed a suit seeking eviction and mesne profits. Based on the predominant issue test, the Environment and Land Court transferred the matter to the High Court to be dealt with as

a family matter because determining the suit required determination of the prior question whether the parties were validly married, a matter within the family jurisdiction of the High Court.

27. Similarly, in [*Isabel Chelangat -v- Samuel Tiro Rotich & 5 others* \[2012\] KEHC 5520 \(KLR\)](#), the Environment and Land Court applied the predominant issue test, but this time to determine that jurisdiction belonged to the Environment and Land Court, although the parties were married to each other. The husband and wife were joint tenants of property, part of which the wife used as business premises, and had pending matrimonial proceedings. Since the husband was resident in the United States, he executed a power of attorney in favour of his five brothers, who took possession of part of the property. The wife applied for an injunction to bar them from accessing the property and interfering with her business.
28. Regardless of the marital relationship between the parties, the Court determined the issue whether the holder of a power of attorney on behalf of one joint owner could be regarded as a trespasser in relation to the other joint owner. The Court held that the nature of joint tenancy is that joint tenants are, in law, regarded as one. Therefore, one joint tenant could not impose a stranger on the other through a power of attorney, since [section 91\(4\)\(c\)](#) of the Land Registration Act only gives each joint tenant power to transfer that joint tenant's interest inter vivos to the other joint tenant, and to no other person. The Environment and Land Court therefore determined the joint tenancy and trespass issue without addressing the substance of the matrimonial property dispute, which remained within the jurisdiction of the family court.

4.2 Judicial Precedent on Scope of Application of the Matrimonial Property Act

29. The question whether the principles of the Matrimonial Property Act apply to cases filed before the Act came into force has arisen before the courts. The Supreme Court settled the matter in [*JOO -v-MBO* 2023 KESC 4 \(KLR\)](#). The originating summons for division of matrimonial property had been filed in 2010, following the filing of a petition for divorce in 2008. Both proceedings predated the promulgation of the Constitution of Kenya, 2010 and the enactment of the Matrimonial Property Act, 2013. However, by the time the suit was determined, both the Constitution and the Matrimonial Property Act were in force. The appellant was aggrieved by the Court of Appeal's application of the Matrimonial Property Act.

30. The Supreme Court held that the Matrimonial Property Act, being an ordinary statute, could not apply retrospectively. The applicable law was therefore the Married Women's Property Act, 1882. The Constitution, however, was not bound by the principle of non-retroactivity. Consequently, the constitutional principle of equality of spouses under [Article 45\(3\)](#) was applicable and had to be taken into account in applying the Married Women's Property Act.

31. The Court of Appeal had earlier taken a similar position on the non-retroactivity of the Matrimonial Property Act in [DEN -v-PNN 2015 KECA 819 \(KLR\)](#).

5.0 KEY CONCERNS ARISING FROM THE MATRIMONIAL PROPERTY ACT

32. This chapter does not set out to present a systematic analysis of all aspects of matrimonial property in Kenya. Such analysis may be found in the resources listed below, which address this area of law more broadly. This chapter of the Family Law Bench Book focuses on key issues identified by judicial actors as crucial or requiring clarity, namely:¹¹⁸

1. judicial checklist in determining matrimonial property disputes;
2. trends in assessing non-monetary contribution;
3. prenuptial and postnuptial agreements;
4. whether all inherited property is exempt;
5. matrimonial property in pensions;
6. matrimonial property in future earnings;
7. matrimonial property in digital and intangible assets;
8. matrimonial property in company shares and company property;
9. synergy or dissonance between the law of matrimonial property and the law of succession;
10. relevance of customary law in matrimonial property; and
11. constitutional challenges to the Matrimonial Property Act.

¹¹⁸ Resources on the law of matrimonial property: Sussie Mutahi, 'The Matrimonial Property Act 2013 in Action: Empirical Analysis of a Decade of Decided Court Cases', *East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya]* (2025) 115 [115-134] (available at <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3028>); Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, Nairobi: Law Africa (2016).

5.1 Judicial Checklist in Determining Matrimonial Property Disputes

33. The Matrimonial Property Act establishes a separate property regime in which ownership vests by virtue of contribution, not by virtue of marriage alone under [section 7](#). This has been restated and elaborated in judicial precedent, including [JOO -v-MBO 2023 KESC 4 \(KLR\)](#). Besides assessing contribution, however, there are several other factors that a court must consider in determining disputes on division of matrimonial property. These are summed up in the checklist below:

1. Was there a valid marriage between the parties?
2. Has the marriage been dissolved?
3. Has the matrimonial property claim been instituted within twelve (12) months of the decree absolute, in compliance with [Rule 5\(2\)](#) of the Matrimonial Property Rules, 2022? If not, has leave to file out of time been sought?
4. Does the claim conform to the procedural requirements under [Rule 7](#) of the Matrimonial Property Rules, 2022?
5. Is the property in question “matrimonial property” within the meaning of [section 6](#) of the Matrimonial Property Act?
6. Is any of the property exempt from the category of matrimonial property because it is inherited property, property acquired before marriage under [section 5](#), or property held under a trust, including a customary trust, under [section 6\(2\)](#)?
7. Did the parties enter into a valid prenuptial agreement under [section 6\(3\)](#)?
8. Is the property registered in the names of both parties, or all parties in the case of a polygamous marriage? If jointly registered, does the presumption in [section 14\(b\)](#) on equal beneficial ownership apply, or has it been rebutted? If individually registered, does the presumption in [section 14\(a\)](#), that the spouse so registered holds the other spouse’s beneficial interest in trust, apply, or has it been rebutted?
9. Has there been any gifting of property between or among the spouses? If so, does the presumption in [section 15](#), that the property belongs absolutely to the recipient, apply, or has it been rebutted?
10. Has there been any previous declaration of rights over the property in dispute under [section 17](#)?
11. Are the customary law principles of the parties’ communities relevant to the dispute? If so, are they consistent with the values and principles of the Constitution, as required by [section 11](#)?

5.1.1 Judicial Precedent on Additional Factors to Consider in Determining Matrimonial Property Disputes

34. Case law suggests that there are other considerations a court may need to take into account, even though they are not stated expressly in the Matrimonial Property Act. One such consideration is whether children of the marriage reside in the matrimonial home.
35. In [DEN -v-PNN 2015 KECA 819 \(KLR\)](#), the Court of Appeal upheld a High Court decision that had taken into account the housing needs of the children of the marriage, and where they and the custodial parent, the mother, were residing, in deciding whether to order sale of the matrimonial home. One of the appellant's grounds of appeal was that the High Court had considered extraneous factors. The Court of Appeal reasoned that, provided this did not determine the extent of the parties' shares in the matrimonial property, the High Court's approach was consistent with the requirement to treat the best interests of the child as paramount in all proceedings, in line with [Article 53](#) of the Constitution.

5.2 Trends in Assessing Non-Monetary Contribution

36. Express recognition of non-monetary contribution is one of the most significant milestones of the Matrimonial Property Act. It signaled a clear departure from [Peter Mburu Echaria V Priscilla Njeri Echaria \[2007\] KECA 504 \(KLR\)](#), which had disregarded non-monetary contribution, a position affirmed in **Njoroge v Njoroge**.¹¹⁹ As the Supreme Court recognised in [JOO -v-MBO 2023 KESC 4 \(KLR\)](#), and as the Court of Appeal had recognised in [PNN-v-ZWN 2017 KECA 753 \(KLR\)](#), these pre-Matrimonial Property Act decisions gave exclusive focus to direct and indirect monetary contribution, while ignoring non-monetary contribution.
37. [Section 2](#) sets out the components of non-monetary contribution as including:
- a. domestic work and management of the matrimonial home;
 - b. child care;
 - c. companionship;
 - d. management of family business or property; and
 - e. farm work.

¹¹⁹ Other than disregarding non-monetary contribution, Echaria has been declared to be an accurate statement of Kenyan matrimonial property law at the time, and therefore still good law. See [JOO -v-MBO 2023 KESC 4 \(KLR\)](#).

38. The use of the word “includes” indicates that the list is not exhaustive. In [AMM v SMN \[2022\] KEHC 367 \(KLR\)](#), the High Court considered a former wife’s round-the-clock palliative care of her mother-in-law as contribution.

5.2.1 Judicial Precedent: Trends and Insights on Assessing Non-monetary Contribution

39. Sussie Mutahi, a researcher at Strathmore University’s Institute for Family Studies and Ethics, analysed ninety-four (94) reported High Court and Court of Appeal cases decided between 16 January 2014, the commencement date of the Matrimonial Property Act, and 30 August 2024.¹²⁰ On non-monetary contribution, the data shows that courts often affirm the equal status of monetary and non-monetary contribution.¹²¹ The data also revealed that women, rather than men, tend to rely more frequently on proof of non-monetary contribution. Former wives proved non-monetary contribution in seventy-eight (78) of the ninety-four (94) cases, compared to former husbands in sixteen (16). The analysis of monetary contribution also revealed that former wives proved financial contribution in seventy-four (74) of the ninety-four (94) cases, meaning that most women claim a combination of monetary and non-monetary contribution, while men prove almost exclusively monetary contribution. This finding is framed by the further finding that sixty-three per cent (63%) of matrimonial property was registered in the husband’s name alone.

40. The study observes that attributing a share of matrimonial property to the assessed value of non-monetary contribution is inherently subjective and is filtered through cultural and religious lenses that shape expectations around gender roles.

41. The cases highlighted in this section flag salient insights that have emerged on non-monetary contribution: the relative weight accorded to non-monetary contribution compared to monetary contribution; courts’ concerns about the inevitable absence of documentary evidence of non-monetary contribution; and the diversity of approaches to quantifying non-monetary contribution.

42. This section combines cases decided under the Married Women’s Property Act, 1882 and cases decided under the Matrimonial Property Act, 2013, because the principle of contribution applies under both. The section does not attempt to capture every case

¹²⁰ See footnote 7 above

¹²¹ [HNM v FTS \[2021\] KEHC 5370 \(KLR\)](#); [JCL v JMN; RNN \(Interested Party\) \[2024\] KEHC 1843 \(KLR\)](#).

decided on non-monetary contribution. Rather, the intention is to identify signposts from selected cases that may be developed into guidance for future judgments involving non-monetary contribution.

43. In [JOO -v-MBO 2023 KESC 4 \(KLR\)](#), the Supreme Court affirmed the equal status of monetary and non-monetary contribution. The respondent, a former wife, proved both indirect monetary and non-monetary contribution and was awarded a fifty per cent (50%) share in the property at both the Court of Appeal and Supreme Court. However, it is not possible to determine how much weight the courts placed specifically on the non-monetary component.
44. On proof of indirect financial and non-monetary contribution, the Supreme Court affirmed the Court of Appeal, which had in turn affirmed the approach taken by the High Court. The High Court had noted the inevitability of lack of records in a relationship founded on trust:
- “...no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions.”

The Court accepted evidence of the respondent's gainful employment for fifteen (15) of the eighteen (18) years of marriage, and loans taken by her, as evidence of indirect monetary contribution. This did not, however, specifically address proof of non-monetary contribution.

45. A subsequent Court of Appeal decision is instructive on the mode and standard of proof of indirect monetary and non-monetary contribution: [Resma Commercial Agencies-v- Joel Karumba Ngattah \(suing as legal representative of the estate of Leah Wangui Ngata\) & Francis Ngata Kingori \(Civil Appeal No. 16 of 2019\) \[2025\] KECA 2214 \(KLR\)](#). A wife challenged her husband's sale of a house to the appellant, claiming it was matrimonial property and that he therefore had no power to sell it without her consent. She died while the litigation was pending; her husband also died mid-suit. Her challenge succeeded before the High Court but failed before the Court of Appeal.
46. The relevant issue for this section is proof of indirect financial and non-monetary contribution. The wife based her claim wholly on indirect monetary and non-monetary contribution. Indirect monetary contribution consisted of expenditure of income from her own business ventures to meet family needs, including school fees, thereby freeing up her husband's



income to service the mortgage on the suit property. Non-monetary contribution consisted of child care and labour in her husband's hotel business. The Court of Appeal, by majority, held that her claim failed because she did not produce documentary evidence or oral testimony of her alleged income invested in her husband's business, or of family expenses paid. In the majority's view, the couple appeared to have managed their property affairs separately. The majority stated:

"While raising children and managing household expenses are undoubtedly valuable to family life, they do not automatically translate into proprietary rights without proof that such activities enabled the acquisition or improvement of the specific property in question."

47. The majority judgment raises a practical question: what would proof of the connection between domestic work and acquisition or improvement of specific property look like? The judgment does not provide detailed guidance on this. A recent report by the Kenya National Bureau of Statistics on the economic value of unpaid domestic and care work may offer guidance in making this connection at a broader policy level, thereby reducing the need to justify, in every individual case, the causal connection between unpaid domestic and care work and the acquisition or improvement of matrimonial property.

48. The report's objective was to make recommendations on how the value of unpaid domestic and care work may be computed and reflected in extended Gross Domestic Product. This has been a long-standing global concern. Using 2021 statistics, the report estimates the annual value of such work to the national economy at KShs. 269,581 million. The range of methods used to arrive at this figure may suggest approaches that a court could employ in assessing the percentage share of matrimonial property attributable to non-monetary contribution. A court may employ either the replacement-cost method or the opportunity-cost method, or a combination of both. The replacement-cost method considers what it would cost to obtain the services on the labour market. The opportunity-cost method considers what the specific person providing the domestic service would have earned had that person engaged in paid labour, given their skills and qualifications. The first approach would likely yield a lower figure, given the reality of low wages in the domestic and care sector and the undervaluation of domestic work.

49. The dissenting judgment in [*Resma Commercial Agencies-v-Joel Karumba Ngattah \(suing as legal representative of the estate of Leah Wangui Ngata\) & Francis Ngata Kingori \(Civil*](#)

[Appeal No. 16 of 2019](#)) [[2025](#)] [KECA 2214 \(KLR\)](#) expresses concern about the standard of proof and nature of evidence required for non-monetary and indirect monetary contribution. The judge notes an apparent trend towards insistence on documentary proof. The judge also notes the gendered impact of such a trend in the context of domestic relations and Kenya's predominantly informal economy, spaces largely occupied by women and characterized by limited formal accounts. The Kenya National Bureau of Statistics report confirms the predominance of women in unpaid domestic and care work, presenting statistics showing that the ratio of female to male participation in such work is 6:1.

50. The dissenting opinion stressed that the standard of proof is on a balance of probabilities, which is not necessarily established through documentary proof alone. The judge stated:

"To demand bank statements as the only acceptable proof of contribution is to privilege a male-coded documentary economy over the reality of women's labour. ... Such a heightened documentary threshold would, in my respectful view, systematically harm women, whose domestic and informal contributions have historically been undervalued or invisibilized."

51. A similar concern about emphasis on documentary evidence was expressed by the High Court in [NWK v BKG \[2024\] KEHC 163 \(KLR\)](#). The Court stated:

"The institution of marriage will be at risk if at its termination parties are required to present a record similar to audited accounts of their direct and indirect financial contribution towards the acquisition of matrimonial properties. This would mean that during the pendency of the marriage time and effort that should be spent on building the home may be spent keeping a brick by brick record of the contribution. This would not make for healthy marriages."

52. The Court of Appeal has referred to lessons from other jurisdictions on assessing non-monetary contribution. In [JKO v CKO \[2023\] KECA 115 \(KLR\)](#), the Court of Appeal adopted the approach taken by the Supreme Court of Singapore in [ANJ-v-ANK \[2015\] SGCA 34](#). Under that approach, the court first considers direct monetary contribution and determines the percentage attributable to each party. It then considers indirect monetary and non-monetary contribution and determines the percentage attributable to each party. The court then averages the two to arrive at the final division. This approach was justified as avoiding a broad-brush method that is likely to privilege monetary contribution over indirect and non-monetary contribution.

5.3 Prenuptial and Postnuptial Agreements

53. The Matrimonial Property Act introduced prenuptial agreements into Kenyan law for the first time. The 1968 Commission had recommended recognition of both prenuptial and postnuptial agreements, but [section 6\(3\)](#) of the Matrimonial Property Act expressly recognizes only prenuptial agreements. However, some cases have treated postnuptial agreements as valid and enforceable, as highlighted below.

5.3.1 Judicial Precedent on Validity of Postnuptial Agreements

54. In [JJM -v- JLM \[2025\] KEHC 15576 \(KLR\)](#), the parties had entered into a divorce settlement agreement during divorce proceedings. The respondent, a former husband, claimed that he had subsequently repudiated the agreement by sending an email to the couple's adult son. However, before the alleged repudiation, he had acted on the basis of the agreement by unilaterally disposing of one of the properties assigned to him under it. The applicant sought enforcement of the agreement as reflecting the intention of the parties, arguing that the respondent was, by his conduct, estopped from repudiating it. The Court agreed with the applicant on the estoppel argument.

55. On enforceability of a postnuptial agreement, the Court acknowledged that such agreements are not expressly provided for under [section 6\(3\)](#) of the Matrimonial Property Act. However, the Court reasoned that they may be treated as sui generis contracts and enforced under general principles of contract law. The Court cited the earlier High Court decision in [DNK v KM \[2021\] KEHC 868 \(KLR\)](#), which had taken the same approach. The Court also justified its position on public interest grounds, stating:

"It is in the public interest to encourage parties to amicably settle their own affairs, and where they do so freely and voluntarily, the Court should be slow to interfere."

56. In [QMAO -v- DAW \[2024\] KEHC 4952 \(KLR\)](#), the parties entered into an agreement settling property matters between them. The agreement was drafted by a legal practitioner two and a half years into the marriage, in anticipation of marital breakdown. The applicant prayed that the Court adopt the agreement as binding in determining the matrimonial property dispute. The respondent repudiated the agreement, argued that he had acquired the property single-handedly, and denied that the applicant had any beneficial interest in it.

57. The Court opted to treat the postnuptial agreement as a mediation settlement agreement, in line with [Article 159\(2\)](#) of the Constitution, which requires courts to encourage settlement

of disputes through alternative dispute resolution mechanisms. The Court also grounded its decision in the broader principle of freedom of contract, stating:

“The question may arise as to whether a couple whilst still in a marital union may enter into a legally ... binding contract with each other. In my view I do not see why not. The fact of marriage does not preclude spouses from entering into ... validly binding contracts with each other.”

58. In [DNK-v-KM \[2021\] KEHC 868 \(KLR\)](#), the parties had executed an agreement on division of matrimonial assets in anticipation of divorce proceedings, which were instituted less than one (1) year later. The husband sought to repudiate the agreement, alleging coercion on the basis that the wife had conditioned removal of a caveat she had placed on one of the properties on his signing of the agreement.

59. In addressing enforceability of the postnuptial agreement, the Court acknowledged that the Matrimonial Property Act contains no express provision on postnuptial agreements. It nevertheless held that the agreement was enforceable under the general law of contract.

5.4 Is All Inherited Property Exempt?

60. Inherited property is addressed in [section 5](#) of the Matrimonial Property Act, which provides:

“Subject to [section 6](#), the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.”

61. The opening phrase “subject to [section 6](#)” means that the exemption of inherited property is not absolute. [section 5](#) must also be read together with [section 9](#), which provides:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

62. Therefore, inherited property may, in some circumstances, fall within the category of matrimonial property or give rise to a beneficial interest. The cases highlighted below examine how courts have interpreted these circumstances and the scope of the exemption.

5.4.1 Judicial Precedent on Matrimonial Property Rights in Inherited Property

63. In [JKO v CKO \[2023\] KECA 115 \(KLR\)](#), the appellant, a former wife, claimed as matrimonial property land that had been bequeathed to the respondent by his father before the marriage but registered thirty (30) years later during the marriage. The Court held that registration during marriage did not, of itself, make the land matrimonial property. The appellant had also not proved contribution towards improvement of the property.
64. In [SN v FM \[2019\] KEHC 6924 \(KLR\)](#), the disputed property had been inherited from the defendant's father during the subsistence of the marriage. The plaintiff claimed that the property had in fact been gifted to the defendant upon marriage, and that she was therefore the reason the property had been passed on to him. She further claimed that she made improvements to the house, valued at KSh. 2 million, using a loan obtained from her women's group. The Court affirmed that, as the property passed to the defendant from his father during the subsistence of the marriage, it constituted matrimonial property. The Court assessed the plaintiff's specific monetary contribution, as well as her non-monetary contribution in managing the home and farm, as entitling her to thirty per cent (30%) of the value of the matrimonial property.
65. In [AKM V NNN \[2019\] KEHC 7687 \(KLR\)](#), the respondent, a former husband, tendered evidence that three parcels of land registered in his name and claimed by the appellant as matrimonial property were inherited from his father. At the hearing, the appellant conceded that the specific properties in question were the respondent's inheritance. However, the matrimonial home stood on one of the parcels. The Court held that the house became matrimonial property, even though it was situated on inherited land. The land itself, however, was not matrimonial property, and the appellant was barred by [section 5](#) from acquiring any beneficial interest in it. The Court assessed and awarded her the value of her monetary and non-monetary contribution to construction and improvement of the matrimonial home.
66. In [NGV v CNV also known as CHM \[2022\] KEHC 16645 \(KLR\)](#), one of the properties in dispute was a house that the applicant, a former husband, claimed did not form part of matrimonial property because it had been inherited from his father. The respondent's position was that, because transmission took place during the subsistence of the marriage and not before it, the applicant's one-quarter share in the value of the house constituted matrimonial property. The Court agreed that the applicant's portion constituted matrimonial property, but noted that the other spouse did not thereby become automatically

entitled to a beneficial interest. She had to prove contribution, which she did not. The Court therefore found that she had no beneficial interest in the property. The Court took a similar position in [ENK-v- JNK \[2015\] KEHC 2041 \(KLR\)](#), which involved similar facts.

67. Courts appear to be developing a principle that, where inherited property is concerned, there must be specific proof of improvements to the particular property in question. General evidence of indirect or non-monetary contribution to the family's overall property position during the marriage will not suffice where inherited property is concerned.
68. However, in [AMM v SMN \[2022\] KEHC 367 \(KLR\)](#), the Court ruled in favour of a former wife on the basis of non-monetary contribution to inherited property. Proceedings for division of matrimonial property were running concurrently with a succession cause relating to the former husband's mother. The property in dispute was the deceased mother's house, which had also served as the parties' matrimonial home throughout their marriage. The former husband sought a determination that the house did not form part of matrimonial property because it was his inheritance. The former wife argued that, since he inherited it after marriage and not before marriage, it did not fall within [section 5](#). The Court found that, because the house had served as the couple's only matrimonial home, it constituted matrimonial property. Her beneficial interest accrued through non-monetary contribution, including serving as the sole caregiver for her mother-in-law during a protracted terminal illness, as well as house and farm work.

5.5 Matrimonial Property in Pensions

69. The Matrimonial Property Act does not address pension benefits in relation to matrimonial property. Kenyan courts have had limited opportunity to pronounce themselves on this question.

5.5.1 Judicial Precedent on Pension Benefits and Matrimonial Property

70. The issue of pensions arose in [JKO v CKO \[2023\] KECA 115 \(KLR\)](#), where a joint dollar account was listed among the property claimed by the appellant, a former wife, as matrimonial property. The respondent sought a declaration that his pension monies, which had been deposited into that account together with other funds, did not form part of matrimonial property. The Court held that this would require the court to undertake the impractical exercise of combing through deposits and withdrawals from the account.



5.6 Matrimonial Property in Future Earnings

71. So far, no Kenyan case appears to have considered a spouse's claim to the other spouse's future earnings as matrimonial property. Courts in Malawi have considered future earnings in matrimonial property disputes. This is significant because, unlike Kenya's Matrimonial Property Act, which is based on proof of contribution, [Malawi's Marriage, Divorce and Family Relations Act of 2015](#) calls for equitable distribution of matrimonial property. This arguably affords courts greater flexibility in considering the range of factors relevant to matrimonial property disputes.

5.6.1 Judicial Precedent on Matrimonial Property in Future Earnings: Malawi

72. In [*Ellen Tewesa v Chimwemwe S. Tewesa \(Matrimonial Cause Number 9 of 2012\) \[2020\] MWHC 28*](#), the High Court of Malawi determined a claim to matrimonial property in a spouse's future earnings. The parties had been in a customary marriage for seventeen (17) years. The respondent was a teacher who later enrolled for, and graduated from, a diploma programme and then a degree programme. These qualifications enabled him to secure employment as a lecturer in a college of education. The appellant engaged in small-scale trading, which helped finance the respondent's education, while also taking care of the home, the children and the respondent's siblings. The award of the degree was closely followed by the divorce decree, initiated by the respondent.

73. The appellant prayed for a declaration that there was property in the respondent's educational qualifications, namely a Bachelor of Education Humanities degree and a Diploma in Education. She further argued that such property was family property in which she had a fifty per cent (50%) beneficial interest.

74. The Court relied on precedent from the United States to hold that there is no property in educational qualifications. By the same logic, educational qualifications could not constitute family or matrimonial property. However, future or enhanced earning capacity, or practising licences attached to the qualification, could form part of matrimonial property. The Court stated:

“However, future earning capacity and practicing licence which are attendant to these educational qualifications are marital property. This is so because with future earning capacity, the family and other beneficiaries will benefit from whatever is realized by the degreed person so long as that person lives and works. As for a practicing licence, it is also family property because when the owner dies, his practice can be inherited and continued by his family and friends.”

75. This does not translate into a literal valuation and division of future earnings. Rather, the future earning capacity of the spouse in question may be taken into account in the division of matrimonial property. Some courts have ordered reimbursement to the contributing spouse, as in the New Jersey Supreme Court decision in [Mahoney v. Mahoney](#). This is the path that the Court took in **Ellen Tewesa v Chimwemwe S Tewesa**. The respondent was ordered to build a house for the appellant or pay her a lump sum of 2 million Kwacha. The household goods, land and motor vehicle were divided on a 50:50 basis.

76. Kenyan courts have been cautious about this path. In **Lucy Nyambura Murage v Julian Rowa (HC, Nairobi, Civil Suit No. 64 of 2012)**, the respondent sought to have his investment in the appellant’s education offset against her claim to beneficial interest in matrimonial property. Some of the property was jointly registered and some was registered in his name alone. He produced evidence to show that he had paid for the appellant’s undergraduate education in Kenya and postgraduate education abroad, after which she earned a good salary. The Court acknowledged, in principle, that contribution to a spouse’s education may be taken into account in division of matrimonial property, citing a decision of the Supreme Court of Colorado.¹²² However, the Court made no specific attribution to this educational contribution in the actual division of matrimonial property.

5.7 Matrimonial Property in Company Shares and Company Property

77. Generally, shares held in a company, as well as property registered in the name of a company, are excluded from matrimonial property. This is because a company has distinct legal personality. However, there are instances where courts may lift the corporate veil and recognise matrimonial property rights in company shares or company-owned property.

¹²² [In Re Marriage of Graham](#), 194 Colo.429, P.2d 75,78 (1978).

5.7.1 Judicial Precedent on Matrimonial Property in Company Shares and Company Property

78. In [SNK v MSK & 5 others \[2015\] KECA 1010 \(KLR\)](#), the Court of Appeal upheld the doctrine of separate legal personality of limited liability companies. The High Court had ordered payment of KShs. 80 million to a former wife, the respondent, in lieu of her shares in a company in which the spouses were shareholders. It had also ordered transfer of land owned by a company. The companies joined the suit and filed cross-appeals challenging divestiture of their property in a suit to which they had not been parties.
79. The Court of Appeal held that it was not within the family court's jurisdiction to make orders affecting property held by limited liability companies. Such orders could only be made by the High Court pursuant to proceedings brought under [sections 211](#) or [222\(2\)](#) of the [Companies Act](#). The Court relied on **Mereka v Mereka (Civil Appeal No. 236 of 2001) [2004] eKLR**.
80. In [PWK v JKG \[2015\] KECA 535 \(KLR\)](#), among the properties in dispute was the matrimonial home, which was registered in the name of a company in which both spouses were shareholders. The Court noted the approach taken by a differently constituted bench of the Court of Appeal in [SNK v MSK & 5 others \[2015\] KECA 1010 \(KLR\)](#), but departed from it on the authority of [Muthembwa-v-Muthembwa \[2002\] KECA 318 \(KLR\)](#), which established that where company property is commingled with matrimonial property, injustice may result if a family court declines jurisdiction. This is especially so where the couple are the only shareholders and no third-party interests are involved. The Court also took account of the circumstances under which the property became company property. The respondent had transferred it, for no consideration, into the name of the company, which appeared calculated to defeat justice in the matrimonial cause.
81. In the subsequent Court of Appeal decision in [JKO v CKO \[2023\] KECA 115 \(KLR\)](#), shares in a company in which the respondent, a former husband, was a shareholder were listed among the property claimed as matrimonial property. The High Court had included them in arriving at a 30:70 division of matrimonial property. The respondent objected on the basis that the company was a separate legal entity and therefore the shares should not have been treated as matrimonial property. The Court of Appeal agreed, adding that, as the company was dormant and had no tangible assets, there was in fact no need to make any order in respect of it.

82. In [NWK-v-BKG \[2024\] KHEC 163 \(KLR\)](#), among the properties claimed by the applicant, a former wife, as matrimonial property were shares in an investment company held by the respondent. The Court held that it is well established that a family court does not have jurisdiction to determine a dispute over shares in a company.
83. In [NGV v CNV also known as CHM \[2022\] KEHC 16645 \(KLR\)](#), part of the disputed property consisted of profits from a company in which both spouses were directors. The husband used to draw a monthly salary of between KShs. 100,000 and KShs. 300,000, depending on the performance of the business. The wife claimed that she rendered services to the company but drew no salary. She argued that, as an equal shareholder in the company, any money realized from the company's operations should be deemed matrimonial property and divided equally. The Court held that it is trite law that a company is a separate legal entity. Therefore, all assets or accounts held in the name of the company are subject to the company's Memorandum and Articles of Association, and generally to the law governing limited liability companies under the [Companies Act](#). A family court has no jurisdiction to declare that one shareholder holds shares in trust for another. Any claim against the company, including the respondent's claim for salary arrears, could only be ventilated before the High Court's Commercial Division.
84. [NNN-v-SNM \[2017\] KEHC 3155 \(KLR\)](#) involved a claim to a matrimonial home and other structures built on land registered in the name of the respondent, a former husband, and subsequently registered in the name of a company in which the respondent and his brothers were shareholders. The Court dismissed the claim to the assets registered in the company's name, as well as the claim to shares in the company, citing the separate legal personality of a limited liability company.

5.8 Matrimonial Property in Digital Assets

85. The UK Law Commission defines digital assets as "a digitally represented store of value or contractual right that can be transferred, stored or traded electronically"¹²³. The United States [Uniform Fiduciary Access to Digital Assets Act \(2015\)](#) gives a slightly different definition: "electronic records, not including an underlying asset or liability, unless the asset or liability is itself a record that is electronic"¹²⁴.

¹²³ [UK Law Commission, Digital Assets: A Scoping Paper \(2023\)](#)

¹²⁴ Since the US has a federal structure, this federal statute only applies in states that have adopted it or enacted a law that is substantially the same.

86. Not all digital assets have commercial value. Digital assets of commercial value include cryptocurrencies, non-fungible tokens (NFTs) and decentralized finance (DeFi) assets. These assets are, in essence, records in a network of computers associated with the particular digital asset in question. Transactions are effected between users through electronic sharing of public “wallet” addresses on the blockchain, authenticated by a series of numbers and letters that function as signatures.
87. The issue of property rights in digital assets has not yet arisen before Kenyan courts. Such disputes might be perceived as relevant only to wealthy litigants. However, the scope is wider when digital assets are understood to include repositories of digital photographs, videos and music collections, as well as online subscriptions, trading platforms, loyalty schemes, registered domain names and email accounts. The digital age is a global reality. It is therefore important to understand the insights emerging from jurisprudence in other jurisdictions on the property status of digital assets. Although the disputes litigated so far have arisen outside matrimonial property proceedings, they offer guidance on the preliminary question whether property rights can exist in digital assets.
88. Courts in England and Wales have affirmed that digital assets, specifically cryptocurrencies, may constitute property. In [AA-v-Persons Unknown \[2019\] EWHC 3556 \(Comm\)](#), a claim was brought by a company that provided insurance against cyberattacks. A hacker encrypted the computer systems of AA’s customer and demanded a ransom to be paid in bitcoin to a designated address in exchange for a decryption tool. AA paid the ransom and then brought a claim against the fraudster, the company operating the bitcoin exchange and an unidentified intermediary. In determining whether to issue the proprietary injunction, or asset-preservation order, sought, the Court first had to decide whether bitcoins counted as property. The Court held that bitcoins met the criteria for property because they were definable, identifiable by third parties, capable of assumption by third parties, and had some degree of permanence.
89. In the subsequent case of [D’Aloia -v- Persons Unknown and others \(including Bitcub Online Co. Ltd\) \[2024\] EWHC 2342 \(Ch\)](#), the Court went further and extended proprietary character to digital assets that do not fit within traditional categories of property. In that case, the asset was Stablecoin Tether, USDT. The Court held that such assets constitute a distinct form of property not premised on an underlying legal right. They are property because they can be subjected to tracing and constructive trust, just as with other forms of property.

The United Kingdom subsequently encoded this judicial affirmation of digital assets as a distinct category of property into law through the [Property \(Digital Assets etc.\) Act](#).

90. Similar conclusions have been reached by courts in Singapore, Canada and the United States.¹²⁵
91. This evolving jurisprudence has implications for matrimonial property. It means that digital assets may be listed in claims for matrimonial property. Transactions involving them may be subjected to requirements for spousal consent, which may necessitate disclosure of marital status in transactions, as well as disclosure of such assets in matrimonial proceedings. In the Kenyan context, this means that principles contained in the Matrimonial Property Act, 2013 may become applicable to digital assets, including the rebuttable presumptions under section 14.
92. The United Kingdom already requires disclosure of cryptocurrency wallet addresses, NFT holdings and DeFi investments under the full and frank disclosure rule in its Family Procedure Rules¹²⁶. Tracing such assets and linking them to a spouse is not easy, since the use of pseudonyms and advanced technology makes it easier to conceal assets. The fact that transactions may involve multiple legal jurisdictions and diverse data protection regimes further complicates tracing. This has necessitated the deployment, in matrimonial property disputes, of investigative tools commonly used in financial fraud matters, including forensic accounting, blockchain analysis and device forensics.
93. This challenge would be magnified in the Kenyan context, where the required expertise is not yet widely available. The complexity of resolving matrimonial property disputes involving digital assets makes prenuptial agreements particularly useful. Parties may

¹²⁵ For Singapore see *CLM v CLN* [2022] SGHC 46 [https://www.elitigation.sg/gd/s/2022_SGHC_46]; *ByBit Fintech Ltd v Ho Kai Xin* [2023] SGHC 199 [https://www.elitigation.sg/gd/s/2023_SGHC_199]. For Canadian authorities see *Li et al. v Barber et al.*, 2022 ONSC 1176 [<https://nathanson.osgoode.yorku.ca/wp-content/uploads/2023/05/Li-v-Barber-Reasons-Feb-17-2022.pdf>]; [<https://www.bennettjones.com/Insights/Blogs/Mareva-Injunction-over-Cryptocurrencies-in-the-Freedom-Convoy-Class-Action>]; *Cicada 137 LLC v Medjedovic*, 2021 ONSC 8581 [<https://www.canlii.org/judgmentTabs/history/?judgmentId=37729012&lang=en>]; [<https://canliiconnects.org/en/commentaries/87929>]. For discussion of US authorities see *In re Celsius Network LLC*, 647 B.R. 631 (2023) (Case 22-10964) [<https://www.consumerfinancialservice-lawmonitor.com/wp-content/uploads/sites/880/2023/01/celsius-memo-opinion.pdf>]; [<https://caselaw.findlaw.com/court/us-ban-crt-s-d-new-yor/2192699.html>]; On BlockFi wallet asset ownership (described in court materials: [https://www.govinfo.gov/content/pkg/USCOURTS-njb-3_23-ap-01144/pdf/USCOURTS-njb-3_23-ap-01144-0.pdf]; [<https://www.reuters.com/legal/blockfi-gets-court-permission-return-297-million-wallet-customers-2023-05-11/>]; *Mango Labs, LLC v Eisenberg*, 1:23-cv-00665 [<https://www.courtlistener.com/docket/66760250/mango-labs-llc-v-eisenberg/>].

¹²⁶ For a useful and accessible overview of UK law on digital assets in relation to family proceedings see Blockchain Lex Group, 'When Harry Leaves Sally: Digital Assets in Divorce and Succession', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5214895

make detailed arrangements concerning digital assets and may agree that related disputes be resolved through arbitration before forums with appropriate technological expertise.

5.9 Synergy or Dissonance Between Matrimonial Property and the Law of Succession

94. This issue has been discussed extensively in the chapter on the Law of Succession. See Chapter 3 of this Bench Book.

5.10 Relevance of Customary Law in Matrimonial Property

95. The Matrimonial Property Act refers explicitly to customary law in two instances. First, under [section 6\(2\)](#), it defines matrimonial property to exclude property held in trust, including under customary trust. The interpretation section, [section 2](#), does not define “customary trust”. The Supreme Court set out a five-point criterion for establishing a customary trust in [Isack M’Inanga Kiebia -v- Isaaya Theuri M’Lintari, Isack Ntongai M’Lintari](#).¹²⁷ The Court stated that the following elements must be proved:

1. the land in question was, before registration, family, clan or group land;
2. the claimant belongs to that family, clan or group;¹²⁸
3. the relationship of the claimant to the family, clan or group is not so remote or tenuous as to make the claim idle or adventurous;
4. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and
5. the claim is directed against the registered proprietor, who is a member of the family, clan or group.

96. Land that meets this five-point criterion cannot be treated as matrimonial property.

97. The second instance in which the Matrimonial Property Act makes explicit reference to customary law is [section 11](#). The section requires courts to take into account the customary law of the relevant communities in dividing matrimonial property between and among spouses. This includes the communities’ customary law on divorce and dissolution of marriage; the principle of protection of rights of future generations to community and ancestral land as provided for under [Article 63](#) of the Constitution; and the right of wives or former wives to access ancestral land or the cultural home.

¹²⁷ [2018] KESC 22 (KLR) (Supreme Court Petition No.10 of 2015)

¹²⁸ Para 52

98. It remains to be seen, on a case-by-case basis, how consideration of customary law under [section 11](#) interacts with other provisions of the Matrimonial Property Act, including the rebuttable presumptions under [section 14](#).

99. Beyond these two explicit references in the Matrimonial Property Act, customary law features prominently in matrimonial property disputes involving customary marriages or alleged customary marriages. This is because the validity of the marriage must first be established before a matrimonial property claim may be prosecuted, where the claim is anchored on proof that the property was acquired during a customary marriage. Cases on proof of customary marriage are discussed in detail in Chapter 4 on marriage.

100. Cases on customary law in relation to matrimonial property are discussed below.

5.10.1 Judicial Precedent on Matrimonial Property and Customary Law

101. In [QMAO -v-DAW \[2024\] KEHC 4952 \(KLR\)](#), the applicant's matrimonial property claim depended on proving that a customary marriage had preceded the couple's statutory marriage two (2) years later, because most of the property in dispute had been acquired before the statutory marriage. The Court was not satisfied that she had proved the existence of a customary marriage, as she could not state exactly when the alleged dowry ceremony took place, the specific community's customary rites under which it was conducted, or call any witness to support the claim.

5.11 Cases that Have Challenged the Constitutionality of the Matrimonial Property Act

102. So far, no provision of the Matrimonial Property Act has been declared unconstitutional. There has been one constitutional challenge that was unsuccessful. That decision, as well as decisions affirming the constitutionality of the Matrimonial Property Act, are summarized below.

5.11.1 Judicial Precedent on Constitutionality of the Matrimonial Property Act

103. In [JOO -v-MBO 2023 KESC 4 \(KLR\)](#), the Supreme Court addressed the apparent friction between [section 7](#) of the Matrimonial Property Act, which makes contribution the basis for entitlement, and [Article 45\(3\)](#) of the Constitution, which guarantees equality of parties to a marriage. Endorsing the view taken by the Court of Appeal in [PNN-v-ZWN 2017 KECA 753 \(KLR\)](#), the Supreme Court clarified that the equality clause in [Article 45\(3\)](#) does not

translate into automatic co-ownership of property. Nor does the fact of marriage alone give a court power to vary existing proprietary rights of parties, as that would be contrary to the right to property under [Article 40](#) of the Constitution.

104. The Federation of Women Lawyers - Kenya lost an appeal before the Court of Appeal in a petition challenging the constitutionality of [section 7](#) of the Matrimonial Property Act, which designates contribution as the basis for entitlement to matrimonial property: [Federation of Women Lawyers \(Kenya\) -v-Attorney General; Initiative for Strategic Litigation in Africa \(Amicus Curiae\) \[2025\] KECA 1588 \(KLR\)](#). The petition was framed in terms of alleged inconsistency between [section 7](#) of the Matrimonial Property Act and Article 45(3) of the Constitution, which requires parties to a marriage to be treated equally. The petitioner argued that, in a context where previous judicial decisions had over-emphasised financial contribution, non-monetary contribution would be more difficult to quantify and prove. Since women generally tend to make more non-monetary contribution, the provision was argued to have the effect of denying wives the equality promised under [Article 45\(3\)](#). The petitioners further argued that it was inconsistent for [section 10](#) of the Matrimonial Property Act to apportion responsibility for expenses equally among spouses, rather than on the basis of contribution.
105. Before the Court of Appeal, the appellant emphasised the need for the Court to adopt a substantive equality approach that takes into account the socio-economic realities of gender dynamics within families in Kenya. The appellant argued that these realities place women at a disadvantage because women generally rely on non-monetary contribution more than men. The appellant further argued that lack of clarity on how to value women's indirect contribution results in discriminatory impact in a context that undervalues such contribution.
106. The Court of Appeal responded that recognition of non-monetary contribution in the Matrimonial Property Act was itself a response to these socio-economic realities and to the history of disregard for domestic work. The fact that non-monetary contribution is more difficult to prove, because of the absence of records, does not automatically translate into discrimination. Courts are equipped to assess the weight and credibility of evidence presented, whether documentary or non-documentary, and to determine whether contribution has been proved.

6.0 AREAS FOR REFORM AND RELEVANT LESSONS FROM OTHER JURISDICTIONS

107. This section highlights the key concerns that point to the need for legal reform.

6.1 Develop Guidelines on Proof of Non-monetary and Indirect Monetary Contribution

108. The split in opinion in the recent Court of Appeal judgment in [Resma Commercial Agencies-v-Joel Karumba Ngattah \(suing as legal representative of the estate of Leah Wangui Ngata\) & Francis Ngata Kingori \(Civil Appeal No. 16 of 2019\) \[2025\] KECA 2214 \(KLR\)](#) suggests that proof of non-monetary contribution remains a vexed issue. There is a case to be made for guidelines or a checklist on assessing non-monetary contribution. Such guidelines should clearly articulate the expected standard of proof and set out the range of acceptable sources of evidence. They would be applied flexibly, but would provide a useful starting point for consistent adjudication.

6.2 Develop Guidelines on Factors that a Court Should Consider in Dividing Matrimonial Property

109. A related concern is the singular focus on contribution. Courts adjudicating matrimonial property disputes no doubt consider more than computation of contribution. As discussed above, the best interests of the child may also inform a court's approach to matrimonial property disputes. There may therefore be need for a checklist that makes explicit the range of factors courts take into account in adjudicating matrimonial property disputes. [Malawi's Marriage, Divorce and Family Relations Act of 2015](#) treats contribution as one of a range of factors that courts take into account in order to "equitably divide and re-allocate property" among the parties. The other factors include the parties' income, assets, financial needs and obligations, age, health, and the standard of living enjoyed by the family during the subsistence of the marriage.¹²⁹

6.3 Validity of Postnuptial Agreements

110. Thirdly, the emerging practice of recognising postnuptial agreements outside the express text of the Matrimonial Property Act calls for a uniform judicial position. High Court

¹²⁹ Section 74, Marriage, Divorce and Family Relations Act of 2015 (Malawi).

decisions that have recognised such agreements have justified them variously on the basis of general freedom of contract, as sui generis contracts, and as being in the nature of mediation settlement agreements in line with [Article 159\(2\)](#) of the Constitution. Clarity and uniformity in judicial approach could support eventual statutory reform.

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SNK v MSK & 5 others [2015] KECA 1010 (KLR)	229

8.0 REFERENCES FOR FURTHER READING

1. Blockchain Lex Group, 'When Harry Leaves Sally: Digital Assets in Divorce and Succession' (2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5214895
2. Committee on the Elimination of Discrimination against Women, 'General Recommendation No 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women: [Economic Consequences of Marriage, Family Relations and their Dissolution](#)' (2013), UN Doc CEDAW/C/GC/29.
3. Government of Kenya, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer 1968) <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968/eng@1968-08-01>

4. Kiage P, *Family Law in Kenya: Marriage, Divorce and Children* (LawAfrica 2016).
5. Musembi, Celestine Nyamu, 'A journey of Five Decades: Family Law Reform in Post-colonial Kenya (1967-2015)', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 1-29, available at <https://uonjournals.uonbi.ac.ke/ojs/index.php/EALJ/article/view/3025>
6. Mutahi S, 'The Matrimonial Property Act 2013 in Action: Empirical Analysis of a Decade of Decided Court Cases' (2025) *East African Law Journal* Special Issue, 'Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya' 115 <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3028>
7. [UK Law Commission, Digital Assets: A Scoping Paper \(2023\)](#).

CHAPTER 6: MENTAL HEALTH

1.0 INTRODUCTION

1. The [English Mental Health Act of 1959](#) was the applicable law in Kenya at independence. It governed the treatment and care of “mentally disordered persons,” as well as matters relating to their property and affairs. The Mental Health Department was then under the control of the Inspector of Prisons, a structure that has been cited as contributing to stigma¹³⁰ and the criminalization of persons with mental health conditions.¹³¹
2. The English Mental Health Act, 1959 was repealed in 1989 by the Mental Health Act, Cap 248, Laws of Kenya. The Act was later substantially amended by the [Mental Health \(Amendment\) Act](#), 2022, which now governs Kenya’s mental health system. The amended law reflects a normative shift from a custodial model to a rights-based framework aligned with the Constitution of Kenya, 2010, and Kenya’s international obligations under the [United Nations Convention on the Rights of Persons with Disabilities \(CRPD\)](#) ratified in 2008, and the [African Charter on Human and Peoples’ Rights](#).
3. In addition to the Mental Health Act, the Persons with Disabilities Act adopts an inclusive definition of disability, encompassing:

“any physical, sensory, mental, psychological or other impairment, condition or illness that has or is perceived to have a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities.”
4. This broad definition expressly includes mental and psychological impairments, thereby ensuring that persons with mental health conditions fall within the protective scope of the Act. The Act provides for the rights of persons with disabilities and supports the freedom of persons with mental health conditions to live with dignity in the community. This includes the right to legal capacity, as recognised under [section 3K](#) of the Mental Health Act.

¹³⁰ F Mahomed “Stigma on the basis of psychosocial disability: a structural human rights violation” (2016) 32 South African Journal on Human Rights 490 at 491.

¹³¹ Juma P.O., Ngweni C., “Decolonizing African Mental Health Laws: A Case for Kenya”, *Journal of African Law*. 2024;68(1):73-88. doi:10.1017/S0021855323000311.

5. Historically, however, mental health law has often been used to control and exclude persons with mental health conditions. Mental health laws, including criminal justice laws with mental health-related provisions, tended to treat such persons as objects of care rather than as rights holders. The focus was often on exclusion, containment and protection of society, rather than protection¹³² of the individual's rights, dignity and autonomy. Persons with mental health conditions may face an increased risk of arrest and detention for petty offences due to stigma, bias or lack of awareness by law enforcement agencies. For example, a person with tactile sensitivity that causes them to remove clothing in public may be arrested and charged with indecent exposure, rather than being referred for appropriate health and psychosocial support.
6. The [Mental Health \(Amendment\) Act, 2022](#) introduced "human rights" language into the legal framework governing access to mental health care. The rights recognised under the Act include the right to participate fully in community affairs; the right to seek medical, social and legal services; protection from physical and mental abuse and all forms of discrimination; freedom from exploitation; and the right to reasonable care, assistance and protection from the family and the State. The Act also recognizes the legal capacity of persons with mental health conditions. However, it still retains aspects of the earlier custodial model, including provisions permitting involuntary treatment.

2.0 CONSTITUTIONAL FRAMEWORK FOR MENTAL HEALTH

7. The constitutional framework governing mental health in Kenya is primarily anchored in [Article 43\(1\)\(a\)](#) of the Constitution of Kenya, 2010, which guarantees every person the right to the highest attainable standard of health, including mental health. This provision transforms mental health care from a discretionary social service into a justiciable entitlement. It imposes a positive obligation on the State under [Article 21\(2\)](#) to take legislative, policy and other measures towards its progressive realization. [Article 28](#) further reinforces this obligation by guaranteeing human dignity, a principle that courts have increasingly used to shift the treatment of persons with mental health conditions from a custodial or "warehousing" model¹³³ to one that respects their inherent worth, autonomy and agency.

¹³² Juma PO, Ngwena C., "Decolonizing African Mental Health Laws: A Case for Kenya", *Journal of African Law*. 2024;68(1):73-88. doi:10.1017/S0021855323000311 (p.16).

¹³³ Juma P.O., Ngwena C. Decolonizing African Mental Health Laws: A Case for Kenya. *Journal of African Law*. 2024;68(1):73-88. doi:10.1017/S0021855323000311.

8. In addition to foundational health rights, the constitutional framework includes a broader structure of equality and safeguards for marginalized groups. [Article 27](#) prohibits direct and indirect discrimination on grounds that include health status and disability, thereby providing a constitutional shield against the historical stigmatization of persons with psychosocial disabilities.
9. This protection is complemented by [Article 54](#), which secures the rights of persons with disabilities to be treated with dignity and respect and to access educational and professional environments through reasonable accommodation. [Article 29](#), which protects the right to freedom and security of the person, serves as a critical safeguard against arbitrary or indefinite involuntary hospitalization. Any limitation of liberty for therapeutic purposes must therefore be lawful, strictly proportionate and consistent with the Bill of Rights.
10. The constitutional order further integrates global human rights norms through [Article 2\(6\)](#), which incorporates the [Convention on the Rights of Persons with Disabilities \(CRPD\)](#) into Kenyan law. This creates an interpretive framework for the Judiciary and requires a shift towards supported decision-making, as envisioned under [Article 12](#) of the Convention. This international human rights lens requires courts to scrutinize domestic statutes and traditional concepts such as “unsoundness of mind” to ensure that they do not result in blanket deprivation of legal capacity.
11. [Article 10](#) of the Constitution further mandates that national values and principles, including human dignity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of marginalized groups, guide judicial discretion in matters involving the intersection of mental health and the criminal justice system. These values require that the law serve as a tool for care, recovery, inclusion and accountability, rather than as a mechanism of punitive control.
12. [Article 159\(2\)](#) reinforces the obligation of the Judiciary to provide expeditious justice, particularly in matters involving involuntary admission, treatment, guardianship, legal capacity or management of the estates of persons with mental health conditions, where delay may directly undermine dignity, autonomy and access to justice. Read together, these provisions establish a transformative legal order in which mental health is treated

not as a matter of penal or social control,¹³⁴ but as a fundamental human rights issue essential to dignity, autonomy and full participation in society.

13. Finally, the framework is operationalized through devolution under the Fourth Schedule to the Constitution, which assigns delivery of health services to county governments while reserving health policy formulation to the National Government. This division of functions requires coordination between the two levels of government to ensure accessible, equitable and rights-based mental health services across the country.

3.0 RELEVANT INTERNATIONAL AND REGIONAL FRAMEWORK ON MENTAL HEALTH

14. The international normative framework governing the rights of persons with disabilities in Kenya is anchored in [Article 2\(6\)](#) of the Constitution of Kenya, 2010, which provides that any treaty or convention ratified by Kenya forms part of the law of Kenya. This constitutional provision reflects a shift towards a quasi-monist or coordinative approach, allowing for more direct incorporation of international human rights law into the domestic legal order.

15. By virtue of [Article 2\(6\)](#), key instruments such as the United Nations [Convention on the Rights of Persons with Disabilities \(CRPD\)](#) and [the African Disability Protocol \(ADP\)](#) form part of Kenyan law.

16. For judicial officers, this creates a substantive mandate to interpret domestic law, including the [Persons with Disabilities Act](#) and the Mental Health Act, through the prism of international disability rights norms. This requires courts to give due weight to the dignity, autonomy, agency, legal capacity and participation of persons with disabilities in all legal proceedings.

3.1 Universal Declaration of Human Rights (UDHR) (1948)

17. The Universal Declaration of Human Rights provides the moral and legal foundation for disability rights by affirming the inherent dignity and equal rights of all members of the human family. [Article 25](#) is particularly relevant, as it recognizes the right to a standard of living adequate for health and well-being, including social services and security in the event of disability or other loss of livelihood in circumstances beyond a person's control.

¹³⁴ Ambani, Osogo J. & Humphrey Sipalla (eds), *Mental Health and the Criminal Justice System* (Kabarak University Press, 2023) [available at <https://kabarak.ac.ke/mhcjs>].

3.2 United Nations Convention on the Rights of Persons with Disabilities (CRPD)

18. The United Nations Convention on the Rights of Persons with Disabilities, 2006, is the foundational international instrument specifically dedicated to the rights of persons with disabilities. Kenya's ratification of the Convention marked a paradigm shift from a medical or charity-based model of disability to a human rights-based model. Under [Article 4](#), the State is obligated to ensure and promote the full realization of all human rights for persons with disabilities without discrimination.
19. The Convention's guiding principles include respect for inherent dignity, individual autonomy, freedom to make one's own choices, non-discrimination, full and effective participation and inclusion in society, respect for difference, equality of opportunity, accessibility, equality between women and men, and respect for the evolving capacities of children with disabilities. These principles are reflected in [Article 54](#) of the Constitution of Kenya, 2010. Kenyan courts increasingly rely on the Convention to interpret reasonable accommodation and to scrutinize laws or practices that deny legal capacity to persons with mental health conditions, psychosocial disabilities or intellectual disabilities.

3.3 African Charter on Human and Peoples' Rights (ACHPR)

20. The African Charter on Human and Peoples' Rights is the primary human rights treaty for the African continent. [Article 18\(4\)](#), provides that older persons and persons with disabilities have the right to special measures of protection in keeping with their physical or moral needs. The Charter is distinctive in its emphasis on peoples' rights and individual duties, providing a communal context for the enforcement of rights that aligns with Kenya's socio-legal context.

3.4 The African Disability Protocol (ADP)

21. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted in 2018, is a legally binding regional instrument designed to address the specific socio-cultural realities of disability in Africa. Kenya ratified the Protocol in 2021, with formal processes concluded by June 2024.
22. For the Kenyan Judiciary, the Protocol provides a robust interpretive tool for harmonizing universal disability rights standards with the African socio-economic context. The Protocol prohibits discrimination and harmful practices against persons with disabilities, including

violence linked to stigma or harmful beliefs. It affirms equal legal capacity, including the capacity of persons with disabilities to own property and manage their affairs. It also promotes accessibility in infrastructure, transport, information and communication systems; safeguards sexual and reproductive health rights, particularly for women and girls with disabilities; and supports inclusion in education and employment through measures such as reasonable accommodation. In addition, it guarantees protection in emergencies and sets out the duties of persons with disabilities to society, alongside the obligation of States to provide the necessary support to enable them to fulfil those duties.

4.0 JURISDICTION IN MENTAL HEALTH CASES

23. The jurisdictional framework governing mental health matters in Kenya is anchored in the Constitution of Kenya and relevant statutory enactments. The High Court of Kenya has unlimited original jurisdiction in criminal and civil matters.¹³⁵ The Mental Health Act defines “court” to mean the High Court, thereby vesting jurisdiction under the Act in that Court.¹³⁶ However, the Chief Justice is empowered to make rules of procedure for the High Court or a magistrate, suggesting that certain procedural or ancillary matters may be handled by magistrates’ courts in accordance with such rules.¹³⁷
24. In addition to its original jurisdiction, the High Court exercises appellate jurisdiction in matters arising from health sector regulation. It has authority to hear appeals from decisions of the Kenya Health Professions Oversight Authority, established under [section 45](#) of the Health Act, particularly in relation to complaints concerning the manner in which a person was treated by a health professional.¹³⁸ The section also sets out the persons who may lodge such complaints and the applicable timelines for hearing and determination.
25. Appeals from the High Court lie to the Court of Appeal and thereafter to the Supreme Court of Kenya on matters involving constitutional interpretation or issues of general public importance, in accordance with the Constitution.¹³⁹

¹³⁵ Constitution of Kenya, Article 165.

¹³⁶ Mental Health Act, 2022, Section 2.

¹³⁷ Mental Health Act, 2022, Section 55.

¹³⁸ Mental Health Act, 2022, Section 46.

¹³⁹ Constitution of Kenya, Articles 163 and 164.

5.0 KEY CONCERNS ARISING UNDER THE MENTAL HEALTH ACT

26. This chapter is not intended to provide a topic-by-topic discussion of the law relating to mental health in Kenya. Instead, this section highlights key concerns that judicial officers and other stakeholders have flagged as requiring clarity. These concerns are:

1. applications under the [Mental Health Act](#), including procedure, documentation and notification of relevant parties;
2. evaluation of mental incapacity, including the standard and credibility of medical evidence;
3. the relationship between the [Persons with Disabilities Act](#) and the [Mental Health Act](#);
4. conditions for approval of special powers under [section 28\(2\)](#);
5. the duty of guardians and managers to account for the management of the estate and affairs of a person with a mental health condition;
6. grounds and process for revocation of guardianship and estate management orders;
7. routine review of orders based on mental health evaluation at the initiative of the court; and
8. safeguards against abuse of [Mental Health Act](#) processes.

5.1 Applications Filed Under the Mental Health Act: Procedure and Documentation

27. [Sections 26-31](#) of the [Mental Health Act](#) primarily address care and the administration of the property of persons with mental health conditions. [Section 26](#) provides for applications relating to care and management. [Section 27](#) sets out the orders that the court may issue. [Section 28](#) deals with the duties of an appointed manager, while [Section 29](#) addresses the filing and updating of an inventory of assets. [Section 30](#) provides penalties for mismanagement of the estate of a person with a mental health condition, while [Section 31](#) addresses removal of managers.

5.1.1 Legal and Factual Basis for Applications

28. **Personal welfare and guardianship:** Orders for guardianship are sought where a mental health condition impairs a person's functional autonomy, rendering the person unable to manage daily care, safety or living arrangements. Judicial intervention may be required

to mitigate risks of self-neglect, physical harm or social exploitation, while ensuring that the person resides in a secure environment consistent with human dignity.

29. **Medical treatment and medico-legal capacity:** Where a person lacks capacity to consent to clinical intervention, orders may be sought to authorize psychiatric treatment or rehabilitation. This framework ensures that necessary medical care is provided in the person's best interests, while ensuring judicial oversight to prevent arbitrary detention or non-consensual procedures that lack therapeutic justification.
30. **Maintenance of dependants:** The court may issue orders to secure the welfare of the person's family by authorizing use of the estate to meet the needs of legal dependants. This ensures that essential obligations, such as school fees, health care and upkeep for spouses and children, are fulfilled, thereby preventing economic destitution of the family during the person's incapacity.
31. **Procedural integrity:** During litigation, appointment of a guardian ad litem may be necessary to protect the person's constitutional right to a fair trial. This prevents procedural prejudice by ensuring that the person is competently represented and that no adverse judgment is entered because of inability to provide legal instructions or participate meaningfully in proceedings.
32. **Professional fitness and corporate governance:** Orders may be sought to determine a person's capacity to hold public or corporate office. Pursuant to the 2022 amendments, judicial oversight ensures that removals based on "mental infirmity" are supported by credible medical evidence. This protects the person from discriminatory removal while maintaining the integrity of fiduciary and professional roles.
33. The Act therefore establishes a structured legal mechanism for the care, administration and management of the estate and affairs of a person with a mental health condition.

5.1.2 Standing: Who May Apply

34. The Act establishes a structured framework for persons who may bring an application. There are two distinct categories of authorized persons: a supporter or, where no supporter has been appointed, the person's representative.¹⁴⁰

¹⁴⁰ Mental Health Act, 2022, Section 26.

35. A supporter is a person appointed by an individual with a mental health condition to make decisions on that individual's behalf, in accordance with the individual's will and preferences.¹⁴¹ Such appointment must be effected through a written supported decision-making agreement, which is valid only if the following statutory safeguards are met:

- a. at the time of execution, the person with a mental health condition was aware of their actions;
- b. the person signed or affixed their mark to the agreement in a manner demonstrating an intention to give effect to it;
- c. the agreement was attested by at least two competent witnesses, one of whom must be the person's doctor; and
- d. the person and the witnesses signed in each other's presence.¹⁴²

36. Eligibility for appointment as a supporter is limited to a person who has attained the age of majority, or a public trustee appointed under the [Public Trustee Act](#).¹⁴³

37. Where a person with a mental health condition is unable to appoint a supporter, the Act permits representation by a "representative" for purposes of treatment and care¹⁴⁴ and, as interpreted by the courts, estate management applications.

38. The Act introduces a hierarchical order of priority, starting with the spouse, an adult child, a parent, a relative or, where none of these persons is available or willing, a person under whose care or charge the individual is placed.¹⁴⁵

39. In the case of a child with a mental health condition, the Act contemplates that the parent or guardian shall act as representative. The term "guardian" is broadly defined to include parents, persons with parental responsibility, persons with legal custody, persons having care and control of the child or, in their absence, a person having actual custody of the child.¹⁴⁶

¹⁴¹ Mental Health Act, 2022, Section 3I.

¹⁴² Mental Health Act, 2022, section 3I (3).

¹⁴³ Public Trustee Act (Cap 168).

¹⁴⁴ Mental Health Act, 2022, Section 3I (5).

¹⁴⁵ Mental Health Act, 2022, Section 2 (definition of "representative").

¹⁴⁶ Mental Health Act, 2022, Section 2 (definition of "guardian" in relation to a minor with mental illness).

5.1.3 Judicial Checklist on Standing

40. In determining whether the applicant has standing, the court should satisfy itself that the applicant qualifies as:

- a. a supporter, through a valid written agreement signed by the person concerned and witnessed by two witnesses, one being the person's doctor; or
- b. a representative within the statutory hierarchy, namely spouse, adult child, parent, relative or caregiver.

41. Where the person concerned is a child, the court should confirm that the applicant is a parent or guardian within the statutory definition.

42. The court should also require proof of relationship, where applicable, through documents such as a birth certificate, marriage certificate, chief's letter or other credible evidence.

5.1.4 Form and Mode of Application

43. Courts have consistently held that the appropriate mode of instituting proceedings under [sections 26, 27, 28](#) and [31](#) of the Act is by petition, not originating summons.¹⁴⁷ The Act contemplates that the application be made by an interested person in the form of a petition, accompanied by a supporting affidavit setting out the facts and circumstances relied upon to show that the person is of unsound mind or otherwise incapable of managing their affairs. The petition may request both orders for management of the person's estate and orders for guardianship.

5.1.5 Standard Documents

44. The following documents should ordinarily be filed:

- a. **Petition:** Filed under [sections 26, 27, 28](#) and [31](#) of the Act. A certificate of urgency may be filed concurrently where immediate protective orders are sought before the full hearing.
- b. **Supporting affidavit:** Sworn by the petitioner and setting out in detail: the facts establishing the mental health condition or incapacity; the person's inability to manage their affairs; and the petitioner's relationship with the person and suitability for appointment.

¹⁴⁷ *Loghan Njenga Waweru v Teresia Nyokabi Karanu & another* (HCCC No. 242 of 2005) and *In the Matter of Eliud Maina Wanjohi* (HCCC No. 18 of 2013).

- c. **Medical report or psychiatric certificate:** This is critical. The report must be sufficiently detailed. The court's approach to medical evidence is addressed below.
- d. **Proof of relationship:** A birth certificate where the petitioner is a child of the person concerned, a marriage certificate where the petitioner is a spouse, or other credible evidence of relationship.
- e. **Consent of other relatives:** Written authority from other family members, where applicable, granting the petitioner authority to apply to be appointed as manager of the person's affairs.
- f. **Inventory of the person's estate:** Particulars of the property and assets whose management is sought, with supporting evidence where available.
- g. **Letter from the local chief:** Where available, setting out the relational details of the person concerned, the petitioner and other family members. Courts have treated such letters as useful supplements to the formal affidavit record. See [Re Application for Guardian Ad Litem of CNK \[2025\] KEHC 17632 \(KLR\)](#).

5.1.6 Judicial Checklist on Application and Documentation

45. The checklist below should guide courts dealing with applications under the Mental Health Act:

- a. Is the application properly brought before the High Court under [Sections 26–31](#) of the Act?
- b. Is the relief sought clearly identified?
- c. Is the application seeking guardianship in relation to personal welfare?
- d. Is the application seeking estate management orders?
- e. Is the application seeking medical or treatment-related orders, where applicable?
- f. Is the application initiated through a petition and not an originating summons?
- g. Has a supporting affidavit been filed, containing facts on the person's condition or incapacity and the suitability of the applicant?
- h. Has a certificate of urgency been filed, where interim orders are sought?
- i. Is the documentation complete, including a detailed and credible medical report or psychiatric certificate, inventory of the estate with supporting evidence, consents from family members where applicable, and a letter from the local chief where available?

5.1.7 Appointment Criteria: Suitability and Best Interests

46. For a guardianship or management order to be issued, four cumulative conditions must be satisfied, as held in [re LMM \(A Person Suffering from Mental Illness\) \[2025\] KEHC 5709 \(KLR\)](#). The first condition, relating to medical evidence, is addressed in the preceding section.

47. The other three conditions are:

- a. whether the person concerned is unable to manage their personal or financial affairs as a result of the mental health condition;
- b. whether the applicant has locus standi to bring the application; and
- c. whether the appointment is in the best interests of the person concerned.

5.1.8 Judicial Precedent on Safeguarding the Best Interests of the Person Concerned

48. In [re LMM \(A Person Suffering from Mental Illness\) \[2025\] KEHC 5709 \(KLR\)](#) the Court established several important principles governing applications for guardianship and estate management under the Mental Health Act.

49. On establishing incapacity, the Court confirmed that direct in-person observation of the person concerned by the court is an independent and legitimate basis for satisfying the functional test, supplementing the medical reports before it. Critically, the applicable test is functional rather than diagnostic. The question is not merely whether a diagnosis exists, but whether the person is actually unable to manage personal and financial affairs as a consequence of the condition.

50. On standing, the Court adopted a broad interpretive approach to the concept of “representative” under the Act. A person who has not been formally appointed as a supporter may nonetheless have standing to institute proceedings. A daughter qualifies as a representative by virtue of familial relationship alone, without need for any prior formal appointment. The Court indicated a willingness to read the statutory definition generously in favour of persons seeking to protect a vulnerable family member.

51. On the grant of orders, the Court affirmed that the paramount consideration throughout is the best interests of the person concerned. This principle encompasses three distinct dimensions: dignity, welfare and property protection. All three must be weighed cumulatively.

Where appointment of a manager is warranted, the order should include a specific prohibition against alienating immovable property without prior leave of court, as such protection does not arise automatically from the appointment itself.

52. Publication of the appointment in the Kenya Gazette under [Section 27\(4\)](#) was confirmed as a mandatory statutory obligation, not a discretionary one, and must be expressly directed in the order.
53. Finally, the Court treated the obligation to file an inventory and statement of accounts as a time-bound condition of appointment, to be complied with within six (6) months, rather than as a general administrative expectation left to the manager's discretion.
54. In [re AA \[2025\] KEHC 1175 \(KLR\)](#), [In re KOG \(Subject\) \[2025\] KEHC 2123 \(KLR\)](#), [In re LKN \[2026\] KEHC 390 \(KLR\)](#), among others, the courts held that a close relative who does not hold formal supporter status may have standing as a representative and may be appointed as guardian or manager of the person concerned. Courts have appointed sisters, brothers, spouses, aunts and nephews in that capacity.
55. In [re LKN \[2026\] KEHC 390 \(KLR\)](#) the Court held that a manager holds the person's property in trust and has a fiduciary duty to administer the estate strictly for the person's benefit. The petitioner, who was the person's spouse, was ordered, before exercising the [section 28](#) power of sale, to conduct valuation of the properties to ensure that they were not sold below market value.
56. In [re NMK \(Subject\) \(Miscellaneous Application 73 of 2017\) \[2017\] KEHC 921 \(KLR\)](#) the Court reiterated that appointment of a manager must serve the person's best interests, including dignity, welfare, medical care and property preservation. In making orders under the Act, the court must be satisfied that the proposed appointee will exercise powers in the person's interests, and not for personal gain.
57. [Steven Kariuki Kiriamburi & another v Jane Gaturi Kiriamburi & 4 others \[2020\] KEHC 1555 \(KLR\)](#) presented a different kind of challenge: competing claimants. The petitioners were the brother and nephew of the person concerned. The Court held that, in determining the most suitable guardian or manager, the court should consider which party had in practice been caring for and supporting the person, and whether there was credible evidence of adverse interest, such as a proposed sale of the person's property.

58. Upon such application, the court has wide discretionary powers to issue orders for management of the estate of a person with a mental health condition. These powers include authority to make provision for maintenance of the person concerned, maintenance of members of the person's immediate family who depend on that person, payment of the person's debts, and guardianship by a relative or other suitable person.¹⁴⁸ In effect, persons who properly bring such applications, either as supporters or representatives, may, upon appointment by the court, assume the role of guardian and manager of the person's affairs to the extent authorized by the court.

5.1.9 Judicial Checklist on Suitability

59. In determining suitability, the court should consider whether:

- a. the applicant is a fit and proper person;
- b. the applicant has no conflict of interest;
- c. there is evidence of prior care or support to the person concerned, especially where appointment is contested;
- d. the applicant has no adverse interest, including an intention to improperly dispose of assets; and
- e. the applicant will act in a fiduciary capacity, consistent with the trustee standard.

5.1.10 Notification of Appointment to Safeguard the Best Interests of the Person Concerned

60. [Section 27 \(4\)](#) of the Act provides for issuance of a notice in the Kenya Gazette to inform the public of the appointment of a person as manager of the estate of a person with a mental health condition. Within fourteen (14) days of the Gazette notice, any person may lodge an objection to the person appointed as manager.

61. Questions have been raised as to whether notification through the Kenya Gazette is timely, given that gazettment occurs after appointment, and whether it is sufficiently accessible to persons who may be interested in the welfare or estate of the person concerned.

62. [Section 69](#) of the [Interpretation and General Provisions Act \(Cap. 2\)](#) provides that the Kenya Gazette and its contents shall be prima facie evidence of any matter published therein. This provision establishes the Gazette as an official and authoritative medium

¹⁴⁸ The Mental Health Act, 2022, Section 27

of public communication. Courts have consistently treated publication in the Gazette as constructive notice, meaning that notice is imputed by law regardless of whether a particular person actually saw or read the publication.

63. This principle finds parallel expression in the [Law of Succession Act \(Cap 160\)](#), where [Section 45](#), read with the [Probate and Administration Rules](#),¹⁴⁹ requires Gazette publication of applications for grants of representation and additionally mandates conspicuous display of the notice at the courthouse. This is an implicit legislative acknowledgement that Gazette notice alone may not reach all affected parties. The gap between constructive notice, meaning what the law deems a person to know, and actual notice, meaning what a person genuinely comes to know, is well recognised. The Kenya Gazette has limited readership and is not widely accessed by ordinary members of the public, family members of a person with a mental health condition, or financial institutions holding that person's assets.
64. This tension is further underscored by [Article 47](#) of the Constitution of Kenya, 2010, which guarantees the right to fair administrative action, including the right to be heard before an adverse decision is made. This standard arguably demands more than a technical Gazette notice issued after an appointment under the Mental Health Act has already been confirmed.
65. Read together, these provisions support the conclusion that, while Gazette publication discharges the legal requirement of notice, courts should go further by directing actual personal notification of known interested parties before or at the time of appointment.

5.1.11 Judicial Precedent on Notification Beyond the Kenya Gazette as a Safeguard

66. In [re Application for Appointment as Guardian Ad Litem of CNK \(Miscellaneous Civil Application E121 of 2025\) \[2025\] KEHC 17632 \(KLR\)](#), the Court relied on a letter from the local chief identifying the children of the person concerned and confirming family consent before approving management orders. The decision demonstrates the value of moving beyond Gazette notification by requiring locally grounded evidence of family composition, notice and consent.

¹⁴⁹ Rule 7(4) of the Probate and Administration Rules (Legal Notice No. 104 of 1980).

67. In [Re Estate of AFO \[2024\] KEHC](#), the Court highlighted the importance of inter partes proceedings where relatives are informed and given an opportunity to contest the application, rather than relying solely on public notice issued after appointment.
68. In [re NMK \[2017\] KEHC 921 \(KLR\)](#) the Court's findings on notice are significant. Upon the filing of the petition, the Court directed that all living siblings of the person concerned be served before the matter could proceed. This direction proved decisive. It was only because the siblings were served and given an opportunity to be heard that the Court learned of the true motivation behind the application, namely the applicant's intention to transfer the person's land to her grandchildren rather than preserve it for the person's benefit. Had notice been confined to the Gazette or limited to family members supporting the petition, this adverse interest may not have surfaced.
69. The case therefore stands as practical authority for the proposition that notice to all known interested parties, particularly siblings and near relatives, is not a procedural courtesy but a substantive safeguard for the welfare of the person concerned. Proper notice and an inter partes hearing place the court in a position to interrogate the applicant's true intentions and assess whether the appointment genuinely serves the person's best interests, which remains the paramount consideration under the Act.

5.1.12 Notice to the Public Trustee

70. [Section 29](#) of the Mental Health Act requires a person appointed as manager of the estate of a person with a mental health condition, within six (6) months of appointment, to deliver to the court and to the Public Trustee an inventory of the property belonging to the person in respect of whose estate the manager has been appointed. The manager must also disclose all sums of money, goods and effects received on account of the estate, together with a statement of debts owed by or due to the person concerned.

5.1.13 Best Practice on Notification

71. A court making an appointment order should consider requiring the petitioner to explicitly list all immediate relatives, including the spouse, children and siblings of the person concerned. This list should, where possible, be corroborated by a letter from the local chief or another appropriate community authority setting out the family composition and relationships, to assist the court in identifying all interested parties.

72. The court should consider requiring the petition to be accompanied by written and signed consents from close family members, in addition to listing them, before the appointment of a manager is finalized.
73. The court should require service of the petition, not merely the final order, on all identified family members. This gives other family members an opportunity to contest unmerited appointments or disclose material information relevant to the welfare and estate of the person concerned.
74. In appropriate cases, especially where the person concerned may be able to express a view, the court may order service on that person and may require that they be presented before the court for an interview. This enables the person to participate, challenge the appointment where necessary, or express their will and preferences.¹⁵⁰
75. The court should require the petitioner to file proof of service on close relatives and, where appropriate, on the person concerned before the matter proceeds to hearing and determination.
76. The court should direct publication of the Gazette notice as required under [Section 27\(4\)](#) of the Act.
77. The court should consider directing early notice to the Public Trustee to enable monitoring of the estate from the date of appointment.
78. The court should require service of guardianship or management orders on financial institutions where the person concerned holds accounts. This prevents the manager from transferring funds without the institution knowing that the account is under court-supervised management.
79. The court should also require filing or registration of the order at the relevant land registry where the estate includes land, in order to prevent fraudulent alienation.

5.1.14 Judicial Checklist on Notification

80. In relation to notification and procedural safeguards, the court should consider whether:
- a. before or at the hearing, all known relatives have been identified in the petition, chief's letter or consent documents;

¹⁵⁰ <https://wamaeallen.com/dealing-with-property-held-by-persons-suffering-from-mental-illness-a-review-of-the-mental-health-act-of-kenya/#>

- b. the petition has been served on immediate family members, including the spouse, children, siblings and other close relatives where appropriate;
- c. the person concerned has been served, where appropriate, and proof of service filed;
- d. after appointment, Gazette notice has been issued as required under [s.27\(4\)](#) with an opportunity for objections within the statutory period; and
- e. enhanced safeguards have been adopted where necessary, including personal notice to interested parties beyond Gazette notice, an inter partes hearing, notification to the Public Trustee, and service of orders on financial institutions, the land registry and other relevant institutions.

5.1.15 Final Judicial Determination

81. Before issuing final orders, the court should be satisfied, on the basis of its own inquiry and cogent, credible evidence, that the person concerned has a mental health condition that affects their capacity to manage personal, financial or legal affairs.
82. The court should also be satisfied that the petitioner is fit and suitable for appointment, based on their relationship to the person concerned, evidence of actual care or support, absence of adverse interest, and ability to act in the best interests of the person concerned.
83. The court should further be satisfied that the orders sought are necessary and proportionate, and that they serve the best interests, dignity, welfare and property protection of the person concerned.

5.1.16 Scope and Content of Orders

84. Orders issued under the Act should clearly specify whether the court is appointing a guardian for personal care, a manager for estate or financial affairs, or both.
85. The orders should also specify any applicable restrictions, including that no sale, transfer, charge, lease or other alienation of immovable property may be undertaken without prior leave of court.
86. Where necessary, the orders should make provision for maintenance of the person concerned, maintenance of dependants, payment of debts, settlement of obligations, and any medical treatment orders that are justified, supervised and consistent with the person's dignity and best interests.

5.1.17 Post-appointment Statutory Duties

87. After appointment, the manager must comply with statutory and court-directed duties, including gazettment of the appointment and filing of an inventory and accounts within six (6) months.
88. The inventory and accounts should be filed with both the court and the Public Trustee, as required by section 29 of the Act.

5.2 Evaluating Mental Incapacity

5.2.1 The Court's Own Inquiry

89. Before making any finding on mental incapacity, the court is required to conduct its own independent inquiry. As established in [MMM vs AMK \[2016\] eKLR](#) and affirmed in [Re SMK \[2023\] KEHC 3734 \(KLR\)](#), the inquiry ordinarily consists of two components.
90. First, the judge should personally question the person concerned, either in open court or in chambers, to assess their mental state directly.
91. Secondly, where necessary, the court should refer the person concerned to a qualified medical practitioner for examination and observation before arriving at a conclusion.

5.2.2 The Two-stage Test for Mental Incapacity

92. The Supreme Court's decision in [MMG v Tribunal Appointed to Investigate the Conduct of Hon. Justice MMG \(Petition 10 \(E013\) of 2022\) \[2023\] KESC 73 \(KLR\)](#) represents the most authoritative statement of the test for mental incapacity in Kenyan law. Although that case arose in the context of removal from judicial office under [Article 168\(1\)\(a\)](#) of the Constitution of Kenya, 2010, the Supreme Court's analytical framework has broader normative significance for all proceedings in which mental incapacity is in issue.
93. This authority has since been expressly acknowledged in guardianship proceedings. In [re ENG \(Miscellaneous Civil Application E026 of 2026\) \[2026\] KEHC 4042 \(KLR\)](#) the High Court confirmed that the functional, fused clinical-legal test articulated by the Supreme Court in [MMG v Tribunal Appointed to Investigate the Conduct of Hon. Justice MMG \(Petition 10 \(E013\) of 2022\) \[2023\] KESC 73 \(KLR\)](#) has become the universal standard applicable to determinations of legal capacity under the Mental Health Act.
94. The two-stage inquiry formulated by the Supreme Court entails diagnosis and functional incapacity.

95. **Stage One - Diagnosis:** The court must be satisfied, on the basis of expert medical evidence, that the person concerned has a diagnosed condition affecting the functioning of the mind. The mere existence of a mental health diagnosis does not, however, automatically constitute a finding of incapacity. The Supreme Court expressly rejected the proposition that mental illness and mental incapacity are coextensive, a conflation that the petitioner argued the tribunal below had committed.
96. **Stage Two - Functional incapacity:** The court must further be satisfied that the diagnosed condition renders the person concerned functionally unable to perform the relevant duties or manage the relevant affairs. This stage requires an evaluative judgment that goes beyond clinical diagnosis. It demands an assessment of the nature, severity and consequences of the condition, including the frequency and character of relapses, the extent of cognitive impairment during such episodes, and the overall impact on the person's decision-making capacity.
97. Courts conducting guardianship proceedings under the Mental Health Act should apply the same two-stage analytical structure when evaluating medical evidence. The discipline it imposes in distinguishing the fact of illness from the functional consequence of incapacity is consistent with the Act's language, which requires that the person concerned be incapable of managing their affairs by reason of mental disorder. The two-stage analytical structure is also consistent with the best interests principle established in [re NMK \(Subject\) \(Miscellaneous Application 73 of 2017\) \[2017\] KEHC 921 \(KLR\)](#).

5.2.3 Credibility and Sufficiency of Medical Reports

98. Case law reveals that courts have had to address concerns over the credibility of medical reports relied upon to support findings of mental illness or incapacity. These concerns include who should issue such reports, what details are sufficient, and how the court should deal with conflicting medical reports.
99. Medical evidence is the cornerstone of any application under [section 26](#) and [27](#) of the Act.¹⁵¹ One of the key considerations in determining applications under the Act is that cogent medical evidence must be adduced to establish that the person concerned has a mental disorder, as reaffirmed in [re NMK \(Subject\) \(Miscellaneous Application 73 of 2017\) \[2017\] KEHC 921 \(KLR\)](#).

¹⁵¹ [In re RKAK \(Miscellaneous Application E009 of 2025\) \[2026\] KEHC 2497 \(KLR\)](#)

100. The medical evidence should be credible and sufficient to assist the court to make a finding. Where two or more medical reports are placed before the court and reach contradictory conclusions, the court must resolve the conflict by evaluating their probative value, rather than simply preferring the most recent or most voluminous report.

101. The following principles emerge from the authorities discussed below.

5.2.4 Judicial Precedent and Checklist on Medical Reports on Mental Incapacity

102. **Specialist evidence prevails over generalist evidence.** In [re MWW \(A Mentally Challenged Person\) \[2025\] KEHC 2277 \(KLR\)](#) report by a consultant psychiatrist was held to carry more weight than a report by a general practitioner or by a practitioner whose specialised expertise had not been established.

103. **Detail and reasoning prevail over brevity.** In [KM v Republic \[2025\] KEHC 442 \(KLR\)](#), a scanty report signed on behalf of a doctor by an unnamed and unidentifiable author, and containing no examination findings, was given less weight than two detailed reports by a named consultant psychiatrist. Those reports contained observations, assessment and treatment history. The Court reaffirmed that sufficiency requires detail, identifiable authorship and reasoned clinical findings.

104. **An independent assessment may be ordered where the report on record is inconclusive.** In [BN v Republic \[2019\] KEHC 4011 \(KLR\)](#), an inconclusive report was deemed insufficient. In ordering a second assessment, the Court noted that the person concerned had been assessed to ascertain mental status and the psychiatrist had concluded that the accused had a mental disorder, namely mild intellectual disability, arising from a severe illness suffered at the age of nine (9) years, and was of unsound mind and unfit to plead. The report did not, however, indicate whether the condition was treatable or capable of improvement, and was therefore deemed inconclusive.

105. **Independent assessment may also be necessary where conflicting reports cannot be resolved on the material before the court.** This approach was reaffirmed in [Dharmagha Patel & another v TA \(Minor suing through the mother and next friend HH\) \[2021\] KEHC 8891 \(KLR\)](#), where the Court was faced with two contradictory medical reports.

5.2.5 Persuasive Foreign Authorities on Expert Medical Evidence

106. Decisions from the United Kingdom and Australia are instructive on the principles governing conflicting expert evidence on capacity. They underscore that capacity

is decision-specific and time-sensitive, and that the law should make provision for resumption of capacity. This is discussed further under “Areas for Reform.”

107. In [Wye Valley NHS Trust v Mr B \[2015\] EWCOP 60](#), the Court held that a diagnosis of mental disorder does not automatically or permanently displace legal capacity. Where updated evidence resolves a conflict in favour of capacity, the court may decline to authorize deprivation of liberty. The case illustrates the principle that capacity is decision-specific and time-sensitive.
108. In the Australian case of [SBJ v The Public Guardian & Ors \[2022\] QCATA 117 \(2 August 2022\)](#), the Tribunal was called upon to resolve a conflict between specialist medical evidence of incapacity and evidence from non-specialist witnesses, including legal professionals who were present at the execution of an Enduring Power of Attorney. The Tribunal held that consistent and uncontradicted specialist medical evidence should prevail. It further held that cognitive testing, including MMSE and MoCA testing, was a proper evidential basis for capacity assessment.
109. Applying the presumption of capacity under [Section 7\(a\)](#) of the [Guardianship and Administration Act 2000 \(Queensland\)](#) and the definition of capacity in Schedule 4, the Tribunal held that the specialist medical evidence amply rebutted the presumption. It affirmed that capacity is assessed in relation to a specific decision and its particular demands, finding that the person concerned lacked the ability to understand, retain and use information relevant to a semi-complex investment strategy and to the decision to grant an Enduring Power of Attorney. The appeal was dismissed, the declaration of incapacity upheld, and the Enduring Power of Attorney confirmed invalid.

5.2.6 Judicial Checklist on Medical Evidence of Mental Incapacity

110. In considering medical evidence of mental incapacity, the court should ask whether it has conducted an independent inquiry, including personally examining or interviewing the person concerned, or ordering an independent medical evaluation where necessary.
111. The court should apply the mandatory two-stage test. First, it should determine whether a mental disorder has been proved by expert evidence. Secondly, it should determine whether the person is functionally unable to manage the relevant affairs because of that condition.

112. The court should consider the quality of medical evidence, including whether the report is prepared by a qualified specialist, preferably a psychiatrist, and whether it contains reasoned findings, observations and conclusions.
113. The report should be signed, and authorship should be identifiable.
114. Where conflicting reports are presented, the court should resolve the conflict by evaluating probative value or, where necessary, ordering an independent assessment.
115. The professional opinion should be unequivocal. It should provide cogent evidence that the person concerned has a mental disorder and a conclusive finding that, on account of that disorder, the person cannot manage personal, financial or legal affairs.

5.3 The Relationship Between the Persons with Disabilities Act and the Mental Health Act: Certification, Guardianship and the Standard of Proof

116. Certification under the Persons with Disabilities Act, No 14 of 2003, and judicial appointment of a guardian or manager under the [Mental Health Act](#) are distinct legal processes serving different purposes. Disability certification, primarily provided for under [14 of the PWD Act](#) as read with [Section 35 of the Act](#), is an administrative process administered by the National Council for Persons with Disabilities. It is primarily directed at securing social and economic entitlements for persons with disabilities, including access to tax exemptions, educational scholarships, reserved representation and opportunities under [sections 56-61 of the PWD Act](#). It does not, in itself, confer legal capacity on a third party to act on behalf of the certified person, nor does it constitute a finding of incapacity by a court of competent jurisdiction.
117. Proceedings under the Mental Health Act, by contrast, are judicial in character. The High Court is empowered under [sections 26, 27, and 28](#) of the Act to make orders for custody, management of estate and guardianship of a person found to have a mental health condition to the extent that the person is incapable of managing their own affairs.
118. While the two regimes are legally distinct, they are increasingly complementary in practice. A disability certificate may provide contextual background regarding the nature and history of a person's mental health condition, but it does not displace the court's independent obligation to receive and evaluate current medical evidence.

5.3.1 Can a Disability Certificate be Used in Court as Evidence of Mental Incapacity?

119. A disability certificate, on its own, is an insufficient basis for a guardianship or estate management order under the Mental Health Act. The court must be satisfied, on the basis of fresh and detailed expert medical evidence, that the person concerned meets the statutory threshold, namely that the person has a mental illness to such an extent as to be incapable of managing their affairs.

120. This principle has been firmly established in recent High Court decisions. In [re RKAK \(Miscellaneous Application E009 of 2025\) \[2026\] KEHC 2497 \(KLR\)](#), the Court declined to appoint a guardian despite the existence of a medical report. The Court held that an application under the Mental Health Act must be founded on cogent, reliable and properly particularized medical evidence, and that this is not a mere procedural technicality but a substantive requirement going to the court's jurisdiction to make orders. The Court further observed that a report which describes a condition in general clinical terms without applying those findings to the specific functional capacity of the person concerned does not satisfy the required standard.

5.3.2 Judicial Checklist on the Relationship Between the Persons with Disabilities Act and the Mental Health Act

121. The court should distinguish the purpose of each legal regime. Certification under the Persons with Disabilities Act is an administrative process administered by the National Council for Persons with Disabilities for purposes of social and economic entitlements. Proceedings under the Mental Health Act are judicial in character and relate to custody, guardianship and management of the person's estate.

122. The court should note that a disability certificate does not confer legal capacity on a third party to act on behalf of another person. It is also not a judicial finding of mental incapacity for purposes of the Mental Health Act.

123. The Persons with Disabilities Act and the Mental Health Act are legally distinct, though complementary in practice. Where a disability certificate is produced, the court should treat it only as contextual or background evidence.

124. Even where a disability certificate is produced, the court requires fresh and detailed expert medical evidence. The court must be satisfied that the person concerned has a mental illness and that the illness renders the person incapable of managing their affairs.

125. Medical evidence should go beyond general clinical description. It should address the person's specific functional capacity and should be cogent, reliable and properly particularized.
126. Where the evidentiary threshold is not met, the court should decline to appoint a guardian or manager notwithstanding the existence of a disability certificate or a general, insufficient or outdated medical report.
127. In making its final determination, the court should be satisfied that the decision is based on the statutory threshold under the Mental Health Act, not on disability certification. The court should also be satisfied that the disability certificate has been considered only as background or contextual evidence, and not as proof of incapacity under the Mental Health Act.

5.4 Conditions for Approval of an Application for Special Powers Under Section 28 (2) of the Mental Health Act

128. [Section 28](#) of the Mental Health Act provides for the duties of a manager in respect of the estate of a person with a mental health condition. These duties are, however, subject to the court's approval.
129. A manager appointed under the Mental Health Act has the same powers in relation to management of property as the person concerned would have exercised, but for the incapacity. Depending on the circumstances and the nature of the property, the court may grant the manager general or special powers for management of the estate.
130. The manager may execute an instrument relating to conveyance, sale, mortgage or any other disposition of the person's estate only after obtaining prior permission of the court. An instrument executed with the court's authority is valid and has the same legal effect as if it had been executed by the person concerned, but for the mental health condition.
131. Approval is generally granted where the person concerned has been legally found incapable of managing their own affairs. This requires medical evidence establishing mental incapacity and a valid court finding that the person cannot manage their personal or financial affairs.
132. Approval may also be granted where the transaction is necessary for the benefit of the person concerned. The court must be satisfied that the charge, lease, sale, investment

or other transaction is in the person's best interests and necessary for maintenance,

133. The court may also grant approval where the transaction will prevent loss or deterioration of the estate. Approval may be issued where property is wasting, accruing land rent or statutory penalties, subject to debts that threaten attachment, or where the estate may suffer financial loss if no action is taken.

134. The court should also consider the nature and value of the property, the specific transaction proposed and the safeguards necessary to protect the estate of the person concerned. Such safeguards may include valuation before approval of sale, investment of part of the proceeds for the person's long-term care and maintenance, and filing of accounts within a specified period.

5.4.1 Judicial Precedent on Conditions for Approval of an Application for Special Powers Under Section 28

135. The cases below address the conditions for the grant of special powers under [Section 28\(2\)](#) of the Mental Health Act and confirm the principles set out above.

136. In [re KWG \[2023\] KEHC 25495 \(KLR\)](#) the Court considered an application by court-appointed guardians and managers of KWG, a person with a mental health condition, seeking authority to sell two parcels of land registered in KWG's name and to utilize the proceeds for medical expenses, daily care and general upkeep.

137. The Court confirmed that, under [Section 28\(2\)\(a\)](#) of the Mental Health Act, a manager of the estate of a person with a mental health condition cannot transfer, mortgage, charge or otherwise dispose of immovable property without the prior approval of the court. On the facts, the Court was satisfied that KWG's extensive medical and care needs provided sufficient justification for the proposed disposal.

138. However, the Court declined to grant unconditional approval. It observed that the applicants had not demonstrated compliance with the mandatory publication requirement under [Sections 27\(4\)](#) and [\(5\)](#) of the Act, which requires publication of the appointment of a guardian or manager in the Kenya Gazette and affords a fourteen-day window for objections to that appointment.

139. The Court treated Gazette publication not as an administrative formality, but as a substantive procedural safeguard that must be satisfied before the court exercises its further jurisdiction to authorize dealings with the person's estate.

140. Accordingly, the application was allowed in principle but made conditional upon proof of compliance with the publication requirement. The decision establishes that the conditions for the grant of leave under [Section 28\(2\)](#) are twofold: first, demonstrated substantive necessity, such as urgent medical, care or maintenance needs, justifying disposal of immovable property; and secondly, strict procedural compliance with the statutory notification regime, without which the court will not proceed to authorize the transaction.
141. In [re LKN \[2026\] KEHC 390 \(KLR\)](#) the Court confirmed that [Section 28\(2\)](#) requires special permission before a manager may sell immovable property.
142. Although the Court was satisfied that the proceeds were needed to fund the person's medical care, it declined to grant unconditional approval in the absence of a valuation report by a registered valuer.
143. Leave to sell was therefore made conditional on the filing of a current valuation, a prohibition on sale below market value without further leave of court, and a direction that all proceeds be deposited into a designated estate account and applied solely for the benefit of the person concerned.
144. The Court further authorized the petitioner to execute documents necessary to transfer the property and to manage bank accounts, pensions and legal matters, subject to strict compliance with [Section 29](#), including the filing of an inventory within six (6) months and annual accounts thereafter.
145. The petition was therefore allowed, subject to protective conditions intended to ensure transparency, preserve the estate and promote the person's best interests.
146. In [re SMK \(Person Suffering from Mental Disability\) \[2025\] KEHC 3522 \(KLR\)](#) the petitioner sought orders declaring SMK a person with a mental disorder, appointing herself as legal guardian and manager of the estate, authorizing her to charge two properties to secure a KShs 6 million loan from KCB, authorizing sale of a jointly owned property to complete construction of their home, and granting her authority to represent the person concerned in legal proceedings.
147. In granting the orders sought in the petition for appointment as guardian and manager, the Court also authorized the petitioner to charge the specified properties to secure the KShs 6 million loan and to sell another property for not less than KShs 32 million. The



manager's powers were restricted to the stated properties only and did not include power to sell or transfer any other assets held by the person concerned.

5.4.2 Judicial Checklist on Duties and Special Powers of a Manager Under Section 28 of the Mental Health Act

148. In relation to the nature and scope of powers, the court should confirm that the manager exercises powers subject to court approval. These powers may include conveyance, sale, mortgage, charge or other disposition of property, and may be granted as general or special powers depending on the circumstances and nature of the estate.
149. The court should confirm that any instrument executed with court approval is valid as if it had been executed by the person concerned.
150. In relation to the substantive threshold for approval, the court should be satisfied that the person concerned has been legally found incapable of managing their affairs.
151. The court should also be satisfied that there is demonstrated substantive necessity to cater for medical needs, maintenance needs or preservation of the estate. The overarching requirement is that the proposed transaction must be in the best interests of the person concerned.
152. The court should be satisfied that there has been strict procedural compliance with statutory requirements, including gazetting where required.
153. The court should decline or condition approval where either substantive necessity or procedural compliance has not been demonstrated.
154. The court should further be satisfied that the proposed transaction will prevent loss, deterioration or financial prejudice to the estate.
155. In assessing the transaction and safeguards, the court should consider the nature and value of the property and the specific transaction proposed.
156. The court should impose necessary safeguards, including valuation of the property, prohibition of sale below market value without leave of court, restriction of authority to specified assets only, deposit of proceeds into a designated estate account, and application of proceeds solely for the benefit of the person concerned.
157. In relation to procedural compliance, the court should confirm compliance with Gazette publication under [Sections 27\(4\)](#) and [\(5\)](#); should confirm that the fourteen-day opportunity for objections has lapsed.

158. The court should treat Gazette publication as a substantive safeguard and not merely as a technical or administrative requirement.
159. In granting special powers, the court should specify the scope and limitation of the powers granted, identify the particular property or transaction to which approval applies, restrict powers to identified assets only, and confirm that the manager has no authority over assets not specified in the order.
160. In relation to post-approval obligations, the court should direct filing of an inventory within six (6) months and filing of accounts as required.
161. In its final determination, the court should be satisfied that the proposed transaction is necessary and in the best interests of the person concerned, that statutory and procedural requirements have been met, and that approval should be granted only subject to specific conditions and limitations.

5.5 Requirement on Guardians and Managers to Give Account

162. A person appointed as manager of the estate of a person with a mental health condition must, within six (6) months of appointment, deliver to the court and to the Public Trustee an inventory of the property belonging to the person in respect of whose estate the manager has been appointed. The manager must also disclose all sums of money, goods and effects received on account of the estate, together with a statement of debts owed by or due to such person with mental illness.¹⁵²
163. In various cases, courts have issued additional orders requiring managers to provide reports within specific timelines, depending on the facts and protective needs of the case.

5.5.1 Judicial Precedent on the Requirement to Give Account

164. The Mental Health Act appears to focus strongly on financial accountability and does not explicitly mandate routine reporting on the welfare of the person concerned unless such reporting is specifically ordered by the court. However, courts may impose welfare-related reporting obligations where the circumstances of the case require enhanced supervision.
165. In [In re ET \[2024\] KEHC 137 \(KLR\)](#) the applicants, who were the daughter and son of ET, filed an application seeking authority to manage their father's property and a declaration

¹⁵² Mental Health Act, 2022, Section 29



that he was unfit to manage his affairs due to mental illness. They contended that ET had been diagnosed with dementia, which significantly impaired his mental capacity and ability to make decisions. They further stated that they had assumed caregiving responsibilities and alleged that some of their siblings had improperly altered bank account signatories and withdrawn funds belonging to their father without proper authority.

166. Some siblings supported the applicants, affirming that ET's mental condition rendered him incapable of managing his affairs and expressing concern over alleged financial mismanagement by certain brothers. Others opposed the application, asserting that they had previously been authorized by their father to manage his property and businesses and claiming that they had been responsible for him. The opposing siblings also filed a parallel application seeking similar guardianship orders, which was later consolidated with the present matter.

167. Upon interrogating the evidence, the Court found that ET had a mental illness that affected his ability to manage his affairs.

168. Regarding management of ET's estate, the Court observed that there was significant family conflict and allegations of financial impropriety. While some transactions were suspect, the Court adopted a balanced approach intended to safeguard ET's interests.

169. The Court therefore ordered that each of the two opposing family factions nominate one representative to be jointly appointed as estate managers and guardians. The siblings who had previously managed ET's affairs were directed to file detailed affidavits within sixty (60) days, providing a full inventory of assets and liabilities and a comprehensive account of how they had managed his finances, supported by relevant documentation in line with the duty to account.

5.5.2 Judicial Checklist on the Requirement to Account Under Section 29 of the Mental Health Act

170. In relation to the statutory duty and scope of the inventory, the court should confirm that the manager is required, within six (6) months of appointment, to deliver an inventory to both the court and the Public Trustee.

171. The inventory should include property belonging to the person concerned, all sums of money, goods and effects received on account of the estate, and a statement of debts owed by or due to the person concerned.

172. In relation to the nature and scope of accountability, the court should recognise that the Act primarily requires financial accountability.
173. The court should also recognise that additional reporting obligations, including welfare reporting, may be imposed depending on the circumstances.
174. The court may require the filing of detailed affidavits, a full inventory of assets and liabilities, comprehensive accounts of financial management, and supporting documentation.
175. The court may prescribe timelines for compliance, including specific periods such as sixty (60) days.
176. In cases involving conflict or alleged mismanagement, the court should consider allegations of financial impropriety and may adopt measures to safeguard the estate.
177. Such measures may include appointment of joint managers from different family factions and requiring accounts from persons who previously managed the estate.
178. In its final determination, the court should be satisfied that appropriate mechanisms for financial accountability have been established, that the estate is safeguarded through inventory and reporting obligations, and that clear directions have been issued on filing of accounts, timelines and supporting documentation.

5.6 Grounds and Process for Revocation of Guardianship and Estate Management Orders

179. The court may, either on its own motion or upon application and for sufficient cause shown, remove any manager appointed under the Act and appoint another person to act as manager in their place.¹⁵³
180. In exercising this power, the court may issue such orders as are necessary to ensure that the outgoing manager transfers to the newly appointed manager all property previously under their care and management, and renders a full and proper account of all monies received or disbursed in connection with management of that property.
181. Courts have identified several common grounds that may constitute “sufficient cause” for removal.

¹⁵³ Mental Health Act, 2022 Section 31.

182. The first ground is mismanagement of the estate. Where the appointed manager or guardian fails to properly manage or preserve the person's property, the court may revoke the appointment. [Section 28 \(4\)](#) of the Act requires the manager to perform all duties in the best interests of the estate.
183. The second ground is failure to account. Since a manager acts in a fiduciary capacity, lack of transparency in financial dealings, inability to explain how funds were used, or failure to render accounts to the court may constitute sufficient cause for revocation.
184. The third ground is misappropriation of funds or fraud. Where the manager uses estate funds for personal benefit or deals with the person's property without court approval, the manager may be removed.
185. The fourth ground is neglect of the person's welfare. Where a guardian fails to provide for the person's maintenance or medical care, or acts in a manner detrimental to the person's wellbeing, the court may revoke the order.

5.6.1 Judicial Precedent on Revocation

186. Most decisions in this area concern failure to account, alleged neglect of the welfare of the person concerned, and failure to act in that person's best interests. In the cases discussed below, the court was moved by parties seeking review, variation or setting aside of earlier appointments.
187. In [re PIK \(A person Suffering from Mental Disorder\) \[2025\] KEHC 18948 \(KLR\)](#) the matter concerned an application for review of orders appointing NK as guardian and manager of the estate of PIK under the Mental Health Act. The application was brought by KWI, the biological son of the person concerned, who sought removal of NK and his own appointment as guardian and manager. The grounds advanced were that the respondent had failed to act in PIK's best interests by allowing him to live in poor conditions and by misusing compensation funds received on his behalf.
188. The respondent denied the allegations and maintained that he had acted properly and in the best interests of the person concerned. He also questioned the applicant's suitability, arguing that the applicant lacked sufficient familiarity with PIK's routine and care needs.
189. The Court noted that, at the time of the initial guardianship appointment, PIK was expected to receive compensation relating to the 1998 American Embassy bomb blast. The earlier judgment had directed that, once the compensation was received, the guardian was to

apply to the court for directions on its management and preservation. No such application had been made, and no accounts had been filed to explain how the funds had been utilized for PIK's benefit.

190. The Court emphasised that any removal or appointment of a guardian must be guided by the best interests, care and protection of the person with a mental health condition. It found that PIK remained incapable of managing his affairs and that the applicant, now an adult, had demonstrated willingness and capacity to assume responsibility for his father's care.
191. Relying on [Section 31](#) of the Mental Health Act, which empowers the court to remove a manager or guardian on sufficient cause and appoint another person, the Court allowed the application. NK's previous appointment was set aside, and KWI was appointed as the new guardian and manager. The former guardian was directed to file accounts within three (3) months detailing the management of the compensation and other funds, and the bank was ordered to supply relevant statements to the new guardian.
192. In [re AFO \(Subject\) \[2025\] KEHC 14841 \(KLR\)](#) the Court was seized of an application by one co-guardian seeking removal of the other under [Sections 27](#) to [31](#) of the Mental Health Act, following a breakdown in cooperation between two siblings who had been jointly appointed as guardians and managers of their father's estate.
193. The Court identified the central issue as whether the respondent's conduct justified removal. It then broadened its inquiry to examine whether either guardian had discharged the obligations imposed under the original appointment order. The Court found that neither guardian had complied with the mandatory requirements to file an inventory of the estate or submit bi-annual reports as directed, and that both had allowed their personal disagreements to displace their primary duty to the person concerned.
194. On the principles governing removal, the Court affirmed that the welfare and protection of the person concerned is the paramount and overriding consideration under the Act. This consideration supersedes the personal grievances or relational difficulties between co-guardians. The Court further confirmed that non-compliance with court orders, including failure to file inventories and reports, is not merely an administrative lapse but a substantive ground that may justify removal. Removal may extend to all guardians where their collective failure to act in the person's best interests warrants it.



Jurisdiction and power of the court:

- Grounds for revocation - sufficient cause:**

- Assessment of conduct and compliance:**

- a. Court evaluates whether the manager or guardian has complied with:
 - i. statutory duties;
 - ii. court orders, including filing of inventory and reports.
- b. Court considers evidence of:
 - i. misuse of funds;

- ii. failure to seek court directions where required;
- iii. conduct inconsistent with the best interests of the person concerned.

Best interests of the person concerned:

- a. Court treats the welfare, care and protection of the person concerned as the paramount consideration.
- b. Court ensures that removal and replacement serve the person's best interests.

Judicial approach to revocation:

- a. Court may direct third parties, including banks, to provide relevant financial records.
- b. Court may adopt a measured approach, including:
 - i. granting time to comply with outstanding obligations;
 - ii. issuing warnings prior to removal;
 - iii. removing one or all guardians where necessary.

Post-revocation orders:

- a. Court directs transfer of the estate and management responsibilities to the newly appointed manager.
- b. Court ensures continuity in management and protection of the estate.
- c. Court issues directions necessary to safeguard the interests of the person concerned.

Final judicial determination:

- a. Court satisfies itself that sufficient cause for revocation has been established or not established.
- b. Court satisfies itself that the decision - removal, retention or conditional continuation - serves the best interests of the person concerned.
- c. Court issues appropriate orders on removal, replacement, accounts and compliance.

5.7 Routine Periodic Review of Orders Based on Mental Health Evaluation at the Initiative of the Court

196. The Act provides that the mental health status of a person with a mental health condition shall be reviewed periodically by a qualified mental health practitioner. Such review should include an assessment of the nature of the illness, the necessity for care and treatment,

the type of care and treatment provided, the need for referral, transfer or discharge, and any other relevant matter affecting the person's mental health status.¹⁵⁴

197. Such a review may be initiated by the person with a mental health condition, the practitioner responsible for their care, a supporter or representative, the person in charge of the facility, any other person demonstrating sufficient interest, or the Board.¹⁵⁵ [Section 20 A \(3\)](#) mandates the Cabinet Secretary, in consultation with the Board and the Council of County Governors, to prescribe regulations on the procedure for review under the Act. The envisaged regulations are yet to be developed.

198. Kenya does not have an automatic court-driven system of routine periodic review of mental health orders. Kenyan law does not appear to expressly anticipate a situation where a person with a mental health condition recovers and guardianship or management orders are set aside on account of restored capacity. However, in some cases, courts have ordered routine reviews of persons admitted as patients under the Mental Health Act.

199. [Section 36 of the 1989 Act \(repealed\)](#), provided as follows:

"Where any person has been found under this Act to be suffering from mental disorder, and it is subsequently shown to the court that there is reason to believe that he has recovered from the mental disorder, the court may, after receiving evidence by affidavit or otherwise, make such order as in the circumstances it deems just and expedient."

200. The repealed Act therefore anticipated recovery, but review was only triggered when the court was shown that it was warranted. There was no proactive role for the court, just as there is none under the current law.

201. The current law makes no express provision for setting aside orders on account of recovery or restoration of capacity. However, it may be argued that, upon recovery, a person who was previously the subject of guardianship or management orders may apply for review and setting aside of those orders on account of resumption of capacity. In such circumstances, the court, in exercise of its inherent jurisdiction, would be required to hear and determine the application.

¹⁵⁴ Mental Health Act, 2022, Section 20A

¹⁵⁵ Section 20A(2) of the Mental Health Act, 2022.

5.7.1 Judicial Checklist on Routine Periodic Review of Mental Health Orders (Court-Initiated Review Framework)

Statutory basis and scope of review:

- a. Court recognizes that the mental health status of a person with a mental health condition shall be subject to periodic review by a qualified mental health practitioner.
- b. Court recognizes that such review includes assessment of:
 - i. nature of illness;
 - ii. necessity for care and treatment;
 - iii. type of care and treatment provided;
 - iv. need for referral, transfer or discharge;
 - v. any other relevant matter affecting mental health status.

Initiation of review process:

- a. Court recognizes that review may be initiated by:
 - i. the person concerned;
 - ii. the medical practitioner responsible for treatment;
 - iii. a supporter or representative;
 - iv. the person in charge of a mental health facility;
 - v. any other person demonstrating sufficient interest;
 - vi. the Board.
- b. Court notes that regulations prescribing the formal review procedure under [section 20A\(3\)](#) are yet to be developed.

Judicial role and inherent jurisdiction:

- a. Court recognizes that there is no automatic court-driven system of periodic review of orders under the Act.
- b. Court recognizes that the Act does not expressly provide for discharge of orders upon recovery or resumption of capacity.
- c. Court recognizes that it may exercise inherent jurisdiction to hear applications for review based on recovery or resumption of capacity.

Principle of non-permanence of incapacity:

- a. Court recognizes that mental illness does not necessarily imply permanent incapacity.
- b. Court recognizes that recovery or improvement may justify setting aside or varying existing orders.

5.8.1 Judicial Precedent on the Requirement to File Welfare Reports

205. There is limited case law in this area. In [re Guardianship of BOM \(2025\)](#), the High Court emphasised that guardians must act in the best interests of the person's health and property, and closely scrutinized their capabilities. However, the judgment did not go so far as to require the filing of welfare reports.
206. In [re AWM \(2025\)](#), the Court reiterated that guardianship powers must be exercised for the benefit of the person concerned, implying a duty to keep the court informed on all material matters, including welfare, where necessary.
207. In [DK v Republic \[2025\] KEHC 2346 \(KLR\)](#) the applicant sought orders to postpone criminal proceedings against him on account of mental illness, release him under the care of his father, and provide that the trial would resume only if he became fit to plead. The application was grounded on [sections 162](#) and [163](#) of the Criminal Procedure Code, relevant constitutional provisions on dignity, equality, fair trial, and the rights of persons with disabilities, and medical evidence indicating that the applicant had acute schizophrenia and hypertension.
208. The applicant contended that he did not understand the nature of the murder charge facing him and was therefore unfit to stand trial. The prosecution argued that the applicant would benefit more from institutional treatment, that there was no medical evidence suggesting he would not benefit from hospitalization, and that outpatient care under his father had not resulted in sufficient improvement. The respondent therefore urged the court to dismiss the application and order committal to a mental health institution.
209. The central issue for determination was whether the applicant's request for release into his father's care, instead of institutional treatment, was justified. The Court emphasised that the right to the highest attainable standard of health under [Article 43](#) of the Constitution and [section 3A](#) of the Mental Health Act includes access to appropriate mental health services. Institutional treatment was therefore viewed not as punitive detention, but as necessary medical intervention aimed at restoring the applicant's health and enabling the criminal trial to proceed when possible.
210. Ultimately, the Court dismissed the application as lacking merit and ordered that the applicant be admitted to Mathare Mental Hospital for treatment. It further directed that periodic medical reports be filed every ninety (90) days to monitor his condition.

5.8.2 Judicial Checklist: Fiduciary Duty and Periodic Welfare/Medical Reporting

Nature of reporting obligations:

- a. Court recognizes that there is no express statutory requirement for regular welfare or medical reports by supporters or representatives.
- b. Court recognizes that the Act imposes a strong fiduciary duty of care.
- c. Court recognizes that reporting duties are implied through court orders, property management duties, and care responsibilities.

Statutory and implied reporting framework:

- a. Court recognizes that [section 33](#) requires filing of inventory and annual accounts, which relate primarily to financial reporting.
- b. Court recognizes that [sections 26](#) and [28](#) allow the court to impose conditions for guardianship and care.
- c. Court recognizes that [section 3E](#) implies an ongoing duty to report abuse of persons with mental health conditions.
- d. Court recognizes that it has inherent jurisdiction to order welfare reporting in appropriate cases.

Judicial discretion on welfare reporting:

- a. Court may order welfare or medical reports where circumstances require ongoing supervision.
- b. Court may prescribe reporting intervals in addition to statutory financial reporting obligations.

Judicial precedent on monitoring and reporting:

- a. Courts emphasize that guardians must act in the best interests of the person's health and welfare.
- b. Courts recognise an implied duty to keep the court informed on the person's condition where necessary.

Application in practice:

- a. Court may order institutional treatment where appropriate for the person's health.
- b. Court may require periodic medical reports to monitor progress and capacity.
- c. Court has discretion to set reporting intervals such as ninety-day medical updates where necessary.

Final judicial determination:

- a. Court notes that fiduciary duties may justify additional welfare reporting beyond statutory financial reporting requirements.
- b. Court notes that welfare reporting may be ordered where necessary for protection and supervision of the person concerned.
- c. Court may impose periodic reporting obligations to ensure proper care, treatment and oversight of the person concerned.

5.9 Safeguarding Against Abuse of Mental Health Orders in Matters Before Other Courts

211. In some cases, commercial courts have had to identify and flag issues of concern where family members in a family-owned business approach the court to have a shareholder, often a parent, founder or majority shareholder, declared unfit or mentally unstable. Such applications may raise suspicion of an attempt to take over the business. These scenarios reveal potential overlap between commercial jurisdiction and family jurisdiction.

212. In [re EKK alias EK \(A Person Suffering from Mental Disorder\) \[2025\] KEHC 338 \(KLR\)](#) the issue was flagged where two rival wives attempted to control the property of the person concerned without appearing to have his best interests at heart. The Court stated:

“Before I pen off, I get the feeling that this action, being the latest among various others that the parties have filed against each other, was not motivated by good faith on the part of the parties or by a genuine desire to honestly assist the subject to manage his affairs. The same appears to be an attempt by the parties, said to be rival wives of the polygamous subject, to assume control of the subject’s wealth and also use the Court to position themselves at vantage points early enough in preparation for an anticipated Court Succession battle. I hope I am wrong but if I am right then it is a very sad state of affairs initiated while the subject is still very much alive. I will however say no more about this observation, other than leave it to the parties’ conscience and personal conviction.”

213. The Court of Appeal in [Patel & another v MJC & another \(Suing as the guardians of PJP\) \[2022\] KECA 364 \(KLR\)](#) also sounded a warning on abuse of the Mental Health Act. Although there was a court-appointed guardian, a transaction was allegedly concluded by a person who had been declared mentally unfit. The Court took judicial notice of this



and stressed that the guardian could not subsequently move the court to vitiate the transaction on allegations of fraud, coercion or undue influence on account of mental incapacity.

5.9.1 Judicial Checklist: Safeguarding Against Abuse of Mental Health Orders in Other Court Proceedings

Risk of abuse of mental health proceedings:

- a. Court recognizes that mental health proceedings may be used in parallel litigation to gain control of property or business interests.
- b. Court recognizes that disputes may arise where a person is of sound mind but parties seek declarations of mental instability for strategic advantage.
- c. Court notes the need for vigilance where there is overlap between commercial and family disputes involving control of assets.

Assessment of good faith in applications:

- a. Court considers whether applications are genuinely aimed at assisting the person concerned or are motivated by competing interests over property or control.
- b. Court may take judicial notice of possible ulterior motives in intra-family disputes involving alleged mental incapacity.
- c. Court evaluates whether proceedings are being used as a tool in anticipated succession, property or business-control disputes.

Judicial caution in rival claims:

- a. Court is alert to competing claims by family members, including spouses, seeking control of the person's estate.
- b. Court considers whether such rival claims undermine the best interests of the person concerned.
- c. Court emphasizes that proceedings must remain focused on the welfare and protection of the person concerned.

Effect of mental incapacity findings on subsequent litigation:

- a. Court recognizes that where a person engages in transactions after having been declared mentally unfit, subsequent challenges alleging fraud, coercion or undue influence may be constrained.
- b. Court cautions litigants on the limitations faced by guardians in contesting transactions

entered into by the person concerned before or during incapacity findings.

Final judicial determination:

- a. Court satisfies itself that mental health proceedings are not being used as instruments of strategic control over property or business interests.
- b. Court satisfies itself that applications are made in good faith and are motivated by the best interests of the person concerned.
- c. Court exercises caution to prevent abuse of jurisdiction and ensure that proceedings remain protective of the person concerned rather than opportunistic.

6.0 AREAS FOR REFORM AND LESSONS FROM OTHER JURISDICTIONS

6.1 Use of Derogatory Language in Relation to Mental Health in Other Laws

214. Despite the amendments to the Mental Health Act, derogatory language in relation to persons with mental health conditions remains embedded in several statutes and continues to contribute to stigma.¹⁵⁶ The Criminal Procedure Code, for instance, uses terms such as “imbeciles” and “idiots”¹⁵⁷ when referring to persons with mental health conditions. It also uses terms such as “lunacy” and “insane.”¹⁵⁸ The Constitution of Kenya, 2010, although widely acclaimed as progressive, uses the term “unsound mind,”¹⁵⁹ a formulation also reflected in the Penal Code,¹⁶⁰ while the Evidence Act uses the term “lunatic.”¹⁶¹

215. Scholars and human rights bodies have called for repeal of the offending provisions,¹⁶² decolonization of mental health laws, and adoption of neutral, rights-based terminology such as “persons with psychosocial disabilities”, “persons with intellectual disabilities,” or “persons with mental health conditions,”¹⁶³ as appropriate. In the meantime, courts

¹⁵⁶ Ambani, Osogo J. & Humphrey Sipalla (eds), *Mental Health and the Criminal Justice System* (Kabarak University Press, 2023) [available at <https://kabarak.ac.ke/mhcjs>]

¹⁵⁷ Criminal Procedure Code, First Schedule, Offences under the Act (146)

¹⁵⁸ Criminal Procedure Code, Sections 166 and 167

¹⁵⁹ Constitution of Kenya, 2010, Articles 83 (1) (b), 99 (2) (e) and 193 (2) (d)

¹⁶⁰ Penal Code, Sections 126 and 255.

¹⁶¹ Evidence Act, section 125 (2)

¹⁶² COVAW. (2025). Advocacy Brief: Challenging the Constitutionality of Discriminative Clauses in the Penal Code and Evidence Act

¹⁶³ Juma, P. O., & Ngwena, C. (2023). "Decolonizing African Mental Health Laws: A Case for Kenya." *Journal of African Law*.

should use their powers of constitutional interpretation to avoid reproducing derogatory terms from older statutes, including the Criminal Procedure Code, and, where necessary, read those provisions in a manner that conforms to the right to human dignity under [Article 28](#) of the Constitution. This interpretive approach is illustrated in [Republic v JWK \(Criminal Case 57 of 2009\) \[2013\] KEHC 6001 \(KLR\)](#).

6.2 Coercive Methods Sanctioned by the Mental Health Act

216. Despite adopting human rights terminology, the [Mental Health \(Amendment\) Act of 2022](#) does not yet adequately protect the rights of persons with mental health conditions. In addition to involuntary treatment under [section 14 the Act](#) permits other coercive measures, including restraints and seclusion under [section 9E of the Act](#). These measures sit uneasily with contemporary rights-based frameworks that emphasize dignity, autonomy, informed consent, least restrictive care, and respect for the rights of persons with psychosocial disabilities.

6.3 The Emerging Shift: From Substituted to Supported Decision-Making

217. Current Kenyan law still operates largely within a substituted decision-making framework, where a guardian or manager makes decisions on behalf of and in the name of the person concerned. Although this model is protective in design, it has attracted significant scholarly¹⁶⁴ and human rights¹⁶⁵ critique on the ground that it may wholly displace the legal agency of the person with disability rather than support that agency. Commentators and human rights bodies have highlighted the global transition toward supported decision-making frameworks, which Kenya should progressively adopt in line with [Article 12 of the United Nations Convention on the Rights of Persons with Disabilities \(CRPD\)](#) ratified by Kenya and forming part of Kenyan law by virtue of [Articles 2\(5\) and \(6\)](#) of the Constitution.

218. Under supported decision-making frameworks, a disability certificate should not be treated as evidence justifying total displacement of a person's legal capacity. Rather, it should be understood as formal recognition that the person may require decision-making support while retaining their underlying legal agency.

¹⁶⁴ Nkonge, Paula Mukami. [Supported Decision-Making: Assessing Kenya's Legal Framework against the Benchmark of Article 12 of The Convention on the Rights of Persons with Disabilities](#), 2021; Kamundia, Elizabeth & Plessis, Dr. (2021). [Supported Decision-Making and Legal Capacity in Kenya](#). 10.1017/9781108979016.016.

¹⁶⁵ <https://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rights.pdf>

219. Courts conducting guardianship proceedings are therefore encouraged, consistent with [Article 20\(3\)\(b\)](#) of the Constitution, to interpret the Mental Health Act in the manner that most favours enforcement of the rights of the person concerned.¹⁶⁶ Before resorting to a full substituted decision-making order, courts should consider whether a supported decision-making arrangement would adequately protect the person's interests, dignity, welfare and property.

6.4 Automatic Periodic Review: Lessons from Comparative Jurisprudence

220. Despite [20A of the Mental Health Act](#), Kenya does not have an automatic court-driven system for routine periodic review of mental health orders.

221. The current legal framework appears to assume continuing incapacity and does not contain a provision equivalent to [Section 36 in the 1989](#) version of the Act, which allowed review and setting aside of orders where a person had recovered from a mental disorder. While the best interests principle may be invoked in appropriate cases, there is need for an express statutory provision on review, variation and discharge of orders upon recovery or restoration of capacity. Such reform should be accompanied by a requirement for regular welfare reports and periodic medical reviews.

222. Other jurisdictions, including the United Kingdom and Australia, have mental health tribunals, guardianship boards or supervisory bodies with authority to initiate reviews and monitor cases. In England and Wales, periodic review is premised on the following principles:

- a. a person is presumed to have capacity at all times under ([Section 1\(2\) Mental Capacity Act \(MCA\) 2005](#)),
- b. incapacity is time-specific and decision-specific under ([Section 2\(1\) MCA 2005](#)) of the Mental Capacity Act, 2005;
- c. loss of capacity may be temporary or fluctuating under [Section 2\(2\) MCA 2005; MCA](#),
- d. a deputy cannot act when the person can act for themselves under s ([Section 16\(5\) MCA 2005](#)) of the Mental Capacity Act, 2005;
- e. recovery of capacity ends a deputy's authority under [Section 16 MCA](#),

¹⁶⁶ COVAW. (2025). [Advocacy Brief: Challenging the Constitutionality of Discriminative Clauses in the Penal Code and Evidence Act](#).

- f. courts may make anticipatory declarations for predictable episodes of lost capacity under [Section 15\(1\)\(c\) MCA 2005](#); [Leicestershire County Council v P \[2024\] EWCOP 53](#)
- g. competing assessments must be resolved by reference to the most current and probative evidence, as illustrated in [Leicestershire Partnership NHS Trust v PQ \[2024\] EWCOP 73](#);
- h. diagnosis alone cannot establish permanent incapacity under [Sections 2–3 MCA 2005](#), and fluctuating capacity should not be treated as total permanent incapacity, as illustrated in incapacity [A Local Authority v AW \[2020\] EWCOP 24](#)

223. Guardianship boards and specialised courts actively monitor legal agency to ensure that authority exercised over a person with a psychosocial disability remains neither absolute nor indefinite. This oversight is primarily achieved through mandatory periodic reviews, where orders are subjected to statutory cycles to ensure that they remain necessary, proportionate and the least restrictive option available.¹⁶⁷

224. In Australia, for instance, guardianship orders are typically time-limited, often for a period of one to three years, requiring tribunals to conduct a formal reassessment before an order is renewed.

225. Similarly, in the United Kingdom, deputies appointed under the [Mental Capacity Act 2005](#) are subject to continuous supervision by the Office of the Public Guardian, which has authority to trigger a judicial review where the necessity for the deputyship or the deputy's conduct is called into question [MCA Code of Practice, 2022](#).

226. The monitoring framework is further supported by a strict fiduciary duty requiring guardians and deputies to submit detailed annual reports to independent state bodies. These reports provide oversight of significant life decisions, including financial expenditure, medical treatment and changes in residence. Where the reports indicate that a guardian is exceeding their authority or failing to respect the person's wishes and preferences, monitoring bodies such as the Office of the Public Guardian or the Public Advocate may initiate emergency reviews or apply for removal of the guardian.¹⁶⁸

¹⁶⁷ Maylea C, Ryan CJ (2018) Decision-making capacity and the Victorian Mental Health Tribunal. *International Journal of Mental Health and Capacity Law*. Epub ahead of print 14 March.

¹⁶⁸ <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/828-opa-annual-report-2024-2025> accessed on 27th April, 2026

227. This administrative oversight ensures a continuous flow of information between the private decision-maker and the State, thereby maintaining the integrity of the person's legal agency.
228. These legal systems also provide a safety net through the right of any interested person to initiate review on reasonable grounds at any time. Much like referral powers found in mental health detention statutes, this allows the person concerned, a next friend, a concerned family member or another interested party to apply for variation or revocation of an order if it is no longer necessary or is being poorly executed.
229. By exercising inherent jurisdiction to intervene in cases of conflict of interest, neglect, abuse or guardian inaction, courts ensure that legal representatives remain strictly accountable to the welfare and changing circumstances of the person concerned. This helps prevent a vacuum in protection and guards against erosion of the person's rights.
230. In Kenya, the Kenya Board of Mental Health has advisory, regulatory, operational, research and administrative functions. The Board advises the national and county governments on mental health policies, strategies and programmes, and collaborates with the education sector to integrate mental health instruction into school curricula. It sets standards for mental health units, approves establishment of units in national referral hospitals, inspects facilities for compliance, and develops guidelines for emergency treatment of persons with mental health conditions. It also prepares reports on the prevalence and types of mental health conditions across the country to inform policy and planning.
231. The Board's functions further include performing duties conferred by legislation, with administrative oversight provided through the Director of Mental Health and Board staff appointed through the Public Service Commission.¹⁶⁹ The Board also plays a role in approving treatment abroad for persons with mental health conditions,¹⁷⁰ while the Cabinet Secretary, in consultation with the Council of County Governors and the Board, is responsible for formulating regulations under the Act.¹⁷¹
232. Review of patients is largely left to individual practitioners, without mandatory supervised reporting¹⁷² comparable to the approach in the United Kingdom. In [Kracke v Mental Health Review Board & Ors \(General\) \[2009\] VCAT 646](#), the Mental Health Review Board was

¹⁶⁹ Mental Health Act, 2022, Sections 4-5

¹⁷⁰ Mental Health Act, 2022, Section 24

¹⁷¹ Mental Health Act, 2022, Section 54

¹⁷² Mental Health Act, 2022, Section 20A.

accused of failing to conduct timely reviews. Bell J addressed the statutory obligations

“Must means must. The time limits are not guidelines or aspirational. Conducting these reviews within the specified time is not optional. Doing so is mandatory and what the legislation expects to happen.”

233. The judge clarified that all persons involved in making, administering and reviewing involuntary treatment orders are required to operate within the statutory framework, and that medical practitioners and other professionals must facilitate the Board's ability to fulfil its legislative responsibilities. Bell J underscored that the Board alone bears responsibility to commence, conduct and complete reviews within the prescribed time limits, and that adherence to those limits is essential both for compliance with the law and for protection of the human rights of persons with mental health conditions.

234. The court concluded that the Mental Health Review Board had breached Mr Kracke's human right to a fair hearing under section 24(1) of the Human Rights Charter by failing to conduct the reviews of his involuntary and community treatment orders within a reasonable time. In making a declaration, Bell J observed:

“When a human right is breached, the individual is injured. Because of the broader role of human rights, society is injured as well. Human rights protect interests and values which society in Parliament considers to be fundamental, both to the individual and to the maintenance of democratic society based on the rule of law.”

6.5 International Best Practice: Additional Safeguards on Notification

235. **Electronic registries:** Some jurisdictions, including the United Kingdom,¹⁷³ use publicly accessible or searchable online systems for guardianship, deputyship or related protective orders. Such systems enable creditors, medical professionals, legal practitioners and other relevant actors to verify the existence and scope of protective orders before dealing with the person concerned or the person's estate.

¹⁷³ <https://www.gov.uk/government/publications/search-public-guardian-registers>

236. **Appointment of a next friend:** Where a conflict of interest exists between a person with a mental health condition and their court-appointed guardian, or where the guardian is a proposed defendant or otherwise fails to protect the person or estate, the court may exercise its inherent discretion to appoint a next friend to act on behalf of the person concerned. Such appointment is usually limited to specific litigation or a defined legal need, functioning as a guardian ad litem rather than assuming general administration of the person's affairs.

237. Guided by the overarching principle of the welfare and dignity of the person concerned, courts may override the exclusivity of a formal manager to prevent a vacuum in representation, particularly where the existing guardian is deceased, incapacitated, unavailable, conflicted, or where continued involvement would be detrimental to the person's interests.

6.6 The Implementation Gap in Kenya's Mental Health Framework

238. To ensure effective implementation of the Mental Health (Amendment) Act, 2022, the Cabinet Secretary is mandated under [Section 54](#) to develop comprehensive regulations in consultation with the Board and the Council of County Governors. These regulations are intended to formalize supported decision-making agreements and provide general oversight for the equipping, administration and management of mental health units.

239. The Cabinet Secretary is also tasked with establishing standards for the care, treatment and rehabilitation of persons with mental health conditions, together with procedures for admission of outpatients and any other measures necessary for implementation of the Act.

240. Complementing these administrative guidelines, [Section 55](#) empowers the Chief Justice to formulate rules of court to govern judicial proceedings and the conduct of magistrates in matters arising under the Act.

241. Despite the progressive nature of the 2022 amendment, the regulations and rules envisaged under the Act are yet to be formulated. This failure has created a significant implementation gap that compromises the rights-based intent of the Act. Without formalized supported decision-making agreements and predictable court procedures, persons with mental health conditions remain vulnerable to involuntary detention, inconsistent practice and due process violations, thereby slowing the legal transition away from substituted decision-making. In addition, the absence of standardized protocols for care and rehabilitation allows outdated inpatient-heavy medical models to persist

at the expense of modern, community-based rehabilitation. These systemic delays are compounded by a priority and capacity gap within the Ministry of Health, including resource shortages, workforce constraints and limited accountability for operationalizing the Act's progressive protections.

242. To ensure full realization of the Act's objectives and maintain the integrity of judicial proceedings, completion of the statutory framework is essential. It is therefore imperative for the Cabinet Secretary to formulate the necessary regulations and for the Chief Justice to develop Rules of Court to provide the procedural clarity required by judicial officers adjudicating mental health matters. Promulgation of these instruments is a prerequisite for consistent application of the law and for effective protection of the constitutional rights of persons with mental health conditions within the justice system.

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8.0 REFERENCES FOR FURTHER READING

1. Ambani, Osogo J. & Humphrey Sipalla (eds), *Mental Health and the Criminal Justice System* (Kabarak University Press, 2023) [available at <https://kabarak.ac.ke/mhcjs/>].
2. <http://www.kenyalaw.org/kl/index.php?id=398>
3. COVAW. (2025). *Advocacy Brief: Challenging the Constitutionality of Discriminative Clauses in the Penal Code and Evidence Act*.
4. Ibrahim, Mohamed, 'Mental Health in Kenya: Not yet Uhuru' - [dgs-01-02-12.pdf](#)
5. International Commission of Jurists (ICJ-Kenya), 'Access to Justice: Responding to Justice Needs for Persons with Mental Disabilities' [<https://icj-kenya.org/news/access-to-justice-responding-to-justice-needs-for-persons-with-mental-disabilities/>].
6. Juma, P.O. & C. Ngweni, "Decolonizing African Mental Health Laws: A Case for Kenya", 68(1) *Journal of African Law* (2024) 73-88 [[doi:10.1017/S0021855323000311](https://doi.org/10.1017/S0021855323000311)].

7. Kamundia, Elizabeth & Plessis, I.G. (2021). Supported Decision-Making and Legal Capacity in Kenya. [[doi:10.1017/9781108979016.016](https://doi.org/10.1017/9781108979016.016)].
8. KNCHR, *Mental health and the criminal justice system*.
9. Mahomed F., "Stigma on the Basis of Psychosocial Disability: A Structural Human Rights Violation" 32 *South African Journal on Human Rights* (2016) 490.
10. Maylea C, Ryan CJ Decision-making capacity and the Victorian Mental Health Tribunal. *International Journal of Mental Health and Capacity Law* (2018).
11. [Mental health and the criminal justice system08_06_2023FINAL.pdf](#).
12. Ministry of Health (Kenya), [KENYA MENTAL HEALTH ACTION PLAN 2021 - 2025 - Mental Health \(MoH Kenya\)](#).
13. Nkonge, Paula Mukami. Supported Decision-Making: Assessing Kenya's Legal Framework against the Benchmark of Article 12 of The Convention on the Rights of Persons with Disabilities (2021).

CHAPTER 7: BURIAL DISPUTES

1.0 INTRODUCTION

1. Despite the Court of Appeal's call in the celebrated S M Otieno case of 1987 for Parliament to legislate on burial matters, thirty-eight (38) years have elapsed without a legislative response. The Court urged Parliament to enact legislation that would enable courts to deal expeditiously with burial disputes. This legislative gap is particularly notable given the broad family law reforms that followed the promulgation of the [Constitution of Kenya, 2010](#), including the enactment of the [Matrimonial Property Act, 2013](#), the [Marriage Act, 2014](#) and the [Protection Against Domestic Violence Act, 2015](#).
2. This legislative gap may be attributed, at least in part, to Kenya's pluralistic legal framework, itself a legacy of British colonialism. Legal pluralism, which refers to the co-existence of two or more distinct legal systems within the same political community, means that state law is not the only operative legal order in people's lives.
3. While Kenyan law contains no single comprehensive code on burial disputes, several statutory provisions regulate the handling, burial and exhumation of human remains. [Section 137](#) of the [Penal Code](#) criminalizes interference with burial. It is an offence to unlawfully hinder burial, interfere with human remains, including through disinterment or mutilation without lawful authority, or fail to discharge a legal duty to bury.
4. Under the [Public Health Act section 2](#) defines "burial" broadly to include interment, cremation, or any other lawful mode of disposal of a body. [Section 69](#) imposes a duty on the master of a vessel to ensure burial of a body found on board, with recovery of expenses from liable parties. [Sections 144–145](#) provide that burial must take place in designated or authorized cemeteries where such cemeteries exist, and in accordance with applicable regulations. Burial outside such frameworks may attract penal consequences. [Sections 146-148](#) regulate exhumation, which requires a permit issued by the Cabinet Secretary, typically to the legal personal representative or next of kin. Exhumation may also be ordered by a court, for instance where it is necessary for an inquiry into the cause of death.

5. The law prescribes conditions, record-keeping obligations and penalties for unlawful exhumation. [Section 147](#) provides for removal of human remains for public purposes, subject to notice requirements and re-interment at public expense. [Section 149](#) provides for closure of cemeteries and makes it an offence to bury a body in a closed cemetery.
6. These provisions regulate how human remains are disposed of and protected from interference. They do not, however, determine who has the right to bury a deceased person or the place of burial. Those questions remain governed by common law, customary law and judicial precedent.
7. In burial disputes, two key questions ordinarily arise: who has the right to bury the deceased person, and where the deceased person should be buried.¹⁷⁴ Other questions that frequently arise include whether burial may be stopped to secure tissue samples for DNA testing to determine paternity, whether burial may be restrained for non-payment of dowry, and whether cremation may be challenged on the ground that it is culturally unacceptable.
8. Four key principles have emerged from case law on burial disputes:
 1. There is no comprehensive legislation governing burial disputes. The paucity of legislation has been decried by courts and scholars since the *1987 S M Otieno case*.¹⁷⁵ The Kenya Law Reform Commission has also issued a concept paper on the need for legislation in this area.¹⁷⁶
 2. There is no property in human remains and, therefore, a person cannot dispose of their body by will. However, where the deceased person left directions on the disposal of their remains, those wishes, though not legally binding, should be given effect as far as possible, provided they are not contrary to custom, general law or public policy. This position was affirmed in [Apeli v Buluku \[1980\] KECA 39 \(KLR\)](#), [Samuel Mungai Mucheru & 3 Others vs. Ann Nyathira \[2014\] e KRL](#), [Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others \[2018\] KEHC 1077 \(KLR\)](#). The court will decline to enforce the deceased person's wishes only where they are clearly offensive, illegal or unenforceable, as held in [Jacob Blasto Okumu & 4 Others v Claris Auma \[2014\] KEHC 7058 \(KLR\)](#).

¹⁷⁴ [SAN v GW \[2020\] KECA 46 \(KLR\)](#)

¹⁷⁵ J. B. Mugambi J. N. K & Aduwo G.O, 1989, pp 116 'The S.M Otieno Case: Death and Burial in Modern Kenya' <https://erepository.uonbi.ac.ke/handle/11295/48161>; Abdullahi A.M, 1999, pp 171 'Burial Disputes in Modern Kenya; Customary Law in a Judicial Conundrum', Faculty of Law, University of Nairobi; <https://erepository.uonbi.ac.ke/handle/11295/87979>.

¹⁷⁶ <https://klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?>

3. The law recognizes the persons closest to the deceased person as having the right to bury. Those persons have been identified as the spouse, children, parents and siblings, in that order: [*Ongola & 6 others v Odhiambo & 7 others* \(Civil Appeal E328 & E393 of 2025 \(Consolidated\)\) \[2026\] KECA 260 \(KLR\)](#), [*R L A v F O & another* \[2015\] eKLR \[2015\] KEHC 3948 \(KLR\)](#). However, a person's conduct may extinguish their right to bury, as held in [*Samuel Onindo Wambi v C O O & another* \[2015\] KECA 620 \(KLR\)](#).
4. In the absence of clear and ascertainable wishes of the deceased person, courts will rely on the customary law of the deceased person, provided that the custom passes the repugnancy and constitutional consistency tests. See [*Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another* \[2018\] KEHC 4587 \(KLR\)](#), [*Florence Maweu & another v Bernard Mutinda Maweu & 2 others* \[2019\] KEHC 11649 \(KLR\)](#), among others. Such custom may be displaced by the deceased person's lived realities, including long-term settlement away from the ancestral home or estrangement from the family: [*SAN v GW* \[2020\] KECA 46 \(KLR\)](#), [*Mburu & 4 others v Mburu & 3 others: AIC Kijabe Hospital \(Interested Party\)* \(Civil Appeal E094 of 2025\) \[2025\] KEHC 12574 \(KLR\)](#), [*Ontweka & 3 others v Ondieki* \[2024\] KECA 11 \(KLR\)](#).
9. The absence of legislation in this area means that burial disputes have largely been resolved through judicial discretion, applied to the particular facts and circumstances of each case. While this approach has allowed courts flexibility to do justice in individual cases, it has inevitably produced a body of decisions that does not always speak with one voice. This reflects the inherent difficulty of resolving deeply personal and culturally sensitive disputes within a general legal framework.
10. This chapter seeks to map the emerging judicial landscape in this area and to distil, from decided cases, principles that may guide the bench in determining burial disputes in the absence of comprehensive legislation. It also adds its voice to the growing call for Parliament to consider enacting legislation on burial disputes, a task that falls squarely within its constitutional mandate as the law-making arm of government.
11. The chapter is, however, alive to the complexity that any such legislative endeavour would face. The plurality of legal systems governing personal law in Kenya, and the enduring diversity of customs and traditions surrounding burial, present formidable challenges to codification. It may well be that, notwithstanding any future legislative framework, the particular circumstances of each case will continue to demand a measure of judicial flexibility in this most human of disputes.

2.0 CONSTITUTIONAL FRAMEWORK FOR BURIAL DISPUTES

12. The constitutional framework governing burial disputes in Kenya is anchored in [Article 28](#) of the Constitution of Kenya, 2010, which guarantees human dignity. [Article 28](#) has been interpreted by courts as extending to deceased persons, requiring respectful treatment of human remains and prohibiting degrading or inhumane handling. [Article 159\(2\)\(b\)](#) reinforces the obligation of expeditious justice, reflecting the urgency inherent in burial disputes, where delay may directly undermine dignity, family relations and public health considerations. These provisions are reinforced by [Article 10](#) on national values and principles of governance, including human dignity, equity, social justice and protection of human rights, which guide judicial discretion in resolving competing burial claims.
13. Beyond these core provisions, burial disputes engage a broader constitutional architecture that recognizes legal pluralism and cultural norms. [Article 44](#) guarantees every person the right to participate in the cultural life of their choice, while prohibiting compulsion to perform, observe or undergo any cultural practice or rite. [Article 11](#) recognizes culture as the foundation of the nation and obliges the State to promote cultural expression, including traditional celebrations and heritage. In the family context, [Article 45](#) recognizes the family as the natural and fundamental unit of society and supports legal recognition of marriage systems, including customary marriages, subject to consistency with the Constitution. [Article 2\(4\)](#) and [Article 21\(1\)](#) further confirm that customary law is valid only to the extent that it is consistent with the Constitution and the Bill of Rights.
14. [Article 159\(2\)\(c\)](#) expressly promotes traditional dispute resolution mechanisms as part of the exercise of judicial authority, including in family and burial disputes, provided that such mechanisms do not contravene the Bill of Rights, are not repugnant to justice or morality, and do not conflict with written law or the Constitution.
15. Read together, these provisions establish a pluralistic constitutional order in which courts must balance dignity, family rights, cultural and customary norms, and the need for expeditious resolution. Courts must ensure that no cultural or customary practice overrides constitutional guarantees or results in unjust, discriminatory or inhumane outcomes.

3.0 RELEVANT INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

16. Burial matters sit at the intersection of human dignity, religious freedom, family rights and cultural identity. They are therefore addressed, directly or indirectly, in a broad range of international and regional legal frameworks. These instruments, spanning universal human rights treaties, international humanitarian law, regional human rights conventions and specialist declarations, do not regulate burial as a stand-alone subject. Rather, they protect burial as an expression of deeper rights: the right to dignity in death, the right of families to grieve and memorialize, the freedom to observe religious and cultural practices, and the right to truth about the fate of the deceased. Together, they establish a body of norms applicable during peacetime and armed conflict, to individuals and communities, and across diverse legal systems and regions.
17. The following instruments are among the most relevant sources of international and regional obligations in this area.

3.1 International Covenant on Civil and Political Rights (ICCPR)

18. [Article 7](#) of the ICCPR prohibits cruel, inhuman or degrading treatment. This has been interpreted by the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as extending to desecration of remains and denial of burial information to families.¹⁷⁷ [Article 17](#) protects family and privacy rights, which may include family participation in burial arrangements. [Article 18](#) protects freedom of religion, including the right to perform religious burial rites.

6.4 3.2 Universal Declaration of Human Rights (UDHR)

19. The UDHR, while non-binding, provides foundational norms relevant to burial disputes. [Article 5](#) protects dignity by prohibiting cruel, inhuman or degrading treatment, while [Article 12](#) protects family and privacy interests that may be implicated in burial-related disputes.

¹⁷⁷ See UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Protection of the Dead* (A/HRC/56/56), 2024 (available at <https://docs.un.org/en/A/HRC/56/56>).

6.5 3.3 Convention on the Rights of the Child (CRC)

20. The CRC provides protections specific to children. [Article 30](#) protects the child's right to identity, which may be relevant to burial records and the identification of deceased children. [Article 30](#) protects the right of children belonging to indigenous, religious, linguistic or minority communities to enjoy their culture and practise their religion, which may include participation in their communities' burial practices.

3.4 International Humanitarian Law: The 1949 Geneva Conventions

21. International humanitarian law contains some of the most detailed international provisions on burial. [Geneva Conventions \(GC\) I](#) and [II](#), [Articles 15](#), [17](#) and [20](#), require parties to armed conflict to search for, collect and bury the dead with dignity and to establish graves registration services. [Geneva Convention IV](#), [Article 130](#), extends similar protections to civilians in occupied territories. The 1977 Additional Protocols reinforce these obligations. [Protocol I \(Article 34\)](#) and [Protocol II \(Article 8\)](#), require parties to a conflict to search for the dead, prevent despoilment or pillage of bodies, and ensure that the dead are disposed of in a decent and respectful manner.

3.5 African Charter on Human and Peoples' Rights (ACHPR)

22. The African Charter does not address burial directly. Its orientation toward balancing individual and collective rights, however, creates scope for addressing the tension between individual autonomy and community burial customs in burial disputes. Relevant provisions include Article 5 on dignity, Article 17 on cultural rights, and Article 18, which calls for protection of the rights of women and children while also recognising the role of the family in promoting traditional values and community morals.

3.6 Maputo Protocol (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa)

23. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) does not address burial directly. It addresses widows' rights and inheritance rights in detail in [Articles 20](#) and [21](#) respectively, but does not expressly address the right of a widow to participate in decisions concerning the burial of her deceased spouse.

3.7 Specialist and Soft Law Instruments

3.7.1 [UN Declaration on the Rights of Indigenous Peoples \(UNDRIP, 2007\)](#),

24. Article 12 of UNDRIP is the strongest international statement specifically addressing burial sites. It requires states to enable indigenous peoples to maintain, protect and have access to their burial places and ceremonial objects.

3.7.2 [International Convention for the Protection of All Persons from Enforced Disappearances \(ICED, 2006\)](#)

25. Article 24 of ICED provides the clearest right to know the fate and burial location of a disappeared person. It also imposes obligations on states to return remains to families.

26. Similarly, [Customary International Humanitarian Law \(Rules 112–116\)](#), obliges parties to search for, collect and evacuate the dead, record identifying information before disposal, and facilitate the return of remains to the next of kin. These rules emphasize dignity, respect and accountability in all circumstances.

27. [Principle 16](#) of the [Guiding Principles on Internal Displacement](#) underscores the international recognition of the need to protect the dignity of the dead and ensure respectful burial practices. It obliges authorities to collect and identify the mortal remains of those who have died, prevent their despoliation or mutilation, and facilitate either the return of the remains to the next of kin or their proper disposal. The principle also requires that grave sites of internally displaced persons be protected and respected in all circumstances, and that displaced persons retain the right of access to the graves of their deceased relatives. At its core, [Principle 16](#) emphasizes the dignity of the dead, non-discrimination in the treatment of remains, and cultural and religious sensitivity in burial practices.

28. These frameworks operate in an overlapping and mutually reinforcing manner. A single burial dispute may engage international human rights law, regional human rights law and indigenous peoples' rights simultaneously, depending on the factual context.

4.0 JURISDICTION IN BURIAL DISPUTES

29. Since there is no dedicated statute governing burial disputes, jurisdiction must be discerned from constitutional and statutory provisions that relate indirectly to the subject. [Article 165\(3\)\(a\)](#) of the Constitution vests the High Court with unlimited original jurisdiction in

criminal and civil matters.¹⁷⁸ There is, therefore, no contest or serious question as to the High Court's jurisdiction to hear and determine burial disputes.

30. With respect to the jurisdiction of magistrates' courts over burial disputes, two conflicting positions have emerged. The first position is that magistrates' courts have no jurisdiction because burial disputes are not expressly listed in the [Magistrates Courts Act](#), including under "claims under customary law". This is relevant because burial disputes are frequently, though not invariably, founded on customary law.
31. The Magistrates' [Magistrates' Courts Act 2015](#) defines the scope of a "claim under customary law" for purposes of the Act,¹⁷⁹ subject to the overarching supremacy of the Constitution and written law. Unless the context otherwise requires, a claim under customary law refers to a claim concerning specified matters governed by African customary law. These include disputes relating to land held under customary tenure; matters of marriage, divorce, maintenance and dowry; claims arising from seduction or pregnancy of an unmarried woman or girl; and disputes concerning the enticement of, or adultery with, a married woman. The definition further extends to matters affecting personal status, particularly the status of women, widows and children, including guardianship, custody, adoption and legitimacy. It also covers intestate succession and the administration of intestate estates, insofar as such matters are not governed by written law.
32. The second position favours a broad and purposive interpretation of the [Magistrates' Court Act 2015](#) and the [Judicature Act, Section 3 \(2\)](#) of the Judicature Act, so as to recognise jurisdiction over burial disputes. This position rests on two arguments. First, burial disputes are not expressly excluded from the jurisdiction of magistrates' courts, and there is therefore nothing in the statute that prevents a magistrate's court from hearing a burial dispute. Secondly, where a burial dispute concerns customary law, as such disputes often do, a magistrate's court may exercise jurisdiction provided the applicable customary law passes both the repugnancy test and the constitutional consistency test. Cases in these conflicting schools of thought are discussed below.

¹⁷⁸ Constitution of Kenya, Article 165

¹⁷⁹ The Magistrates Act, 2015 Section 7 (3) (identical to Section 2 of the repealed pre-2015 Magistrates Courts Act).

4.1 Judicial Precedent on the Jurisdiction of Magistrates' Courts in Burial Disputes

33. In [Kiplangat Korir -v- Dennis Kipngeno Mutai \[2006\] KEHC 2760 \(KLR\)](#), the High Court held that magistrates' courts did not have jurisdiction over burial disputes. The Court reasoned that a Resident Magistrate's Court could only hear customary law disputes as specified in [section 2](#) of the [Magistrates' Courts Act \(Section 7\(3\)\)](#), now reflected in [Section 7\(3\)](#) of the Magistrates' Courts Act, 2015, and could not extend its jurisdiction to matters not specifically provided for.
34. In [Martha Wanjiru Kimata & another v Dorcas Wanjiru & another \[2015\] KEHC 7090 \(KLR\)](#), the High Court reached a different conclusion. In holding that the magistrates' court had acted within its jurisdiction, the Court observed that [section 2](#) of the [repealed](#) Magistrates' Courts Act ought not to be construed in isolation but must be read together with [section 9](#) of that Act. Upon a holistic reading of the two provisions, the Court held that the Act did not oust the jurisdiction of magistrates' courts to determine burial disputes.
35. In [Beatrice Wanjugu Mwaniki v Josephine Wanjiku Mwaniki \[2015\] eKLR](#), the Court similarly took the view that Resident Magistrates' Courts have jurisdiction to adjudicate burial disputes under customary law, provided the parties are subject to or affected by customary law.
36. In [PZG & 2 others v TMT \[2019\] KEHC 4212 \(KLR\)](#), the Court reviewed the then existing persuasive jurisprudence from the High Court. It considered [Kiplangat Korir -v- Dennis Kipngeno Mutai \[2006\] KEHC 2760 \(KLR\)](#), where the Court had ruled against jurisdiction. It also considered [Wilfred Mongare Orina v Askah Mocheche Momanyi \[2019\] eKLR](#), [James Odhiambo Nyawade v Philip Otieno & Another \[2017\] eKLR](#), [Beatrice Wanjugu Mwaniki v Josephine Wanjiku Mwaniki \[2015\] eKLR](#), where courts had ruled in favour of jurisdiction on the basis that [Section 7\(3\)](#) of the Magistrates' Courts Act, 2015 did not expressly exclude burial claims. The Court held that magistrates' courts do have jurisdiction to handle burial disputes.
37. In [Hesborn Lumadede, Aggrey Agushoma & Mary Lovega v Kenneth Kamaliki Shaban \[2021\] KEHC 4572 \(KLR\)](#), the Court considered whether a magistrate's court had jurisdiction to hear burial disputes. It noted that [section 7\(3\) of the Magistrates' Courts Act, 2015](#) does not specifically include burial disputes among the customary law claims within the jurisdiction of magistrates' courts. However, the Court observed that [section 3\(2\) of the](#)

[Judicature Act](#) provides a sufficiently broad framework to permit magistrates' courts to adjudicate burial disputes involving African parties, guided by African customary law, provided the applicable law is not repugnant to justice or morality and is not inconsistent with written law.

38. In reaching its conclusion, the Court adopted the reasoning in [Martha Wanjiru Kimata & another v Dorcas Wanjiru & another \[2015\] KEHC 7090 \(KLR\)](#) and [Beatrice Wanjugu Mwaniki v Josephine Wanjiku Mwaniki \[2015\] eKLR](#), holding that the magistrate's court was properly seized of the matter.
39. In [Wilfred Mongare Orina v Askah Mocheche Momanyi \[2019\] KEHC 8829 \(KLR\)](#), the Court clarified that, contrary to the holding in [Kiplangat Korir -v- Denny Kipngeno Mutai \[2006\] KEHC 2760 \(KLR\)](#), [Section 2](#) of the repealed Magistrates' Courts Act, read together with [Magistrates' Courts Act \(Cap 10\)](#), did not oust the jurisdiction of magistrates' courts over burial disputes. The Court observed that burials in Kenyan communities are generally communal affairs conducted according to customary rites and that, while burial disputes were not listed among claims under customary law, they were also not expressly excluded.
40. In conclusion, the weight of judicial precedent appears to favour the position that magistrates' courts have jurisdiction over burial disputes, particularly where the dispute is anchored in customary law and the applicable custom meets the constitutional and statutory validity tests.

5.0 BURIAL UNDER ISLAMIC LAW: JURISDICTION, GENERAL PRINCIPLES AND CORE AREAS OF DISPUTE¹⁸⁰

5.1 Jurisdiction of Kadhis' Courts in Burial Disputes

41. [Article 170\(5\)](#) of the Constitution of Kenya, 2010 provides for the jurisdiction of Kadhis' Courts as subordinate courts. It restricts their jurisdiction to civil cases involving questions of Muslim law relating to personal status, marriage, divorce or inheritance, where all the parties profess the Muslim faith and submit to the jurisdiction of the Kadhi's Court. This jurisdictional scope is reproduced in [section 5](#) of the [Kadhis' Courts Act](#). The wording does not expressly include burial disputes and therefore raises the question whether

¹⁸⁰ This section is based on a research paper prepared by Hon. Ishaq Abduljabar Hussein, Deputy Registrar/Senior Principal Kadhi, Office of the Registrar, Magistrates' Court.

jurisdiction should be interpreted narrowly or expansively. This issue has not yet been conclusively determined by the courts.

42. The Court of Appeal in [Genevieve Bertrand v Mohamed Athman Maawiya \[2014\] eKLR](#) held that three factors determine the jurisdiction of the Kadhi's Court: first, the subject matter must relate to personal status, marriage, divorce or inheritance of a Muslim; secondly, all parties must profess the Muslim faith; and thirdly, all parties must submit to the court's jurisdiction. Where any of these factors is absent, particularly where a non-Muslim party is involved, the matter must be determined by a court of general jurisdiction. Burial disputes involving parties of different faiths therefore fall outside the jurisdiction of the Kadhi's Court.
43. For courts dealing with burial disputes involving parties who profess Islam, the overriding considerations include the dignity of the deceased person, the priority of Islamic personal law where the deceased person is confirmed to have been Muslim, the rights of the nearest relatives, compliance with public health legislation, respect for the deceased person's wishes where those wishes are consistent with Islamic law, and due process for all parties. Where the deceased person's religious identity is itself in dispute, that threshold question must first be resolved by a competent court before burial rites can be determined.

5.2 General Principles and Core Dispute Areas

44. Disputes over the burial of a deceased Muslim typically revolve around questions of religious identity, proximity, custom versus personal law, and exhumation. The following general principles from classical Islamic jurisprudence, together with core dispute areas drawn from emerging case law, provide a framework to guide courts.

5.2.1 Burial as a Communal Obligation

45. Burying a deceased Muslim is a communal obligation (*fard kifayah*) rooted in the Qur'an (5:31). A Muslim cemetery (*maqbarah*) is the preferred place of burial. The closest male relatives generally have priority in burial arrangements. For a deceased woman, her male *mahrams*¹⁸¹ have priority, although the Shafi'i school gives priority to the husband. For a deceased man, priority to bury is accorded to the person who washed the body and led

¹⁸¹ *Mahram*' refers to persons permanently forbidden from marrying each other on account of a blood relationship (such as siblings, parents, children)



the funeral prayers, followed by the agnatic relatives. A person responsible for the death of the deceased has no right to participate in the burial. The general Islamic rule is that the deceased person should be buried promptly, ordinarily where they died, and without unnecessary delay.

5.2.2 Core Areas Where Burial Disputes Arise

46. **Religious identity of the deceased person.** The most complex burial disputes tend to arise where the deceased person's religious identity is contested. In such instances, one party may assert that the deceased person converted to Islam, while others may maintain that the deceased person did not. These disagreements go not only to the form of burial rites, but also to the question of jurisdiction in determining the burial dispute.

In [Kazungu v Ratili \[2025\] KEHC 10264 \(KLR\)](#), the deceased person's father objected to burial under Islamic rites, disputing the assertion that the deceased person was Muslim. The High Court held that the Kadhi's Court lacked jurisdiction to determine the dispute because not all parties professed the Muslim faith. The burial orders issued by that court were consequently declared a nullity, and exhumation was directed pending proper determination of the deceased person's religious status. This decision underscores that, where religious identity is genuinely in dispute, it constitutes a threshold issue because it determines the applicable legal regime. It must therefore be determined by a court of competent jurisdiction, preferably the High Court, whose jurisdiction is undisputed.

47. **Person entitled to bury the deceased person.** Under Islamic law, priority in burial arrangements is generally accorded to the closest male relatives. In practice, however, disputes frequently arise between the surviving spouse, in-laws and members of the extended family, each asserting a superior claim to control the burial. In such instances, Kadhis' Courts may be guided, where appropriate, by the order of preference under [section 66 of the Law of Succession Act](#), which was affirmed in the Court of Appeal decision in [Ontweka & 3 Others v Ondieki \[2024\] KECA 11](#), although that case did not involve Muslim parties. The Court of Appeal recognised the widow as the person with the primary right to bury the deceased person. At the same time, the Court affirmed that the deceased person's brothers retained a legitimate interest in participating in the burial and were entitled to perform rites in accordance with their custom. The decision illustrates the Court's effort to balance competing familial claims by upholding the primacy of the surviving spouse while accommodating the broader family's cultural and customary interests in the burial process.

48. **Place of burial.** Muslim cemeteries are generally regarded as *waqf* endowments, meaning property permanently dedicated to a religious purpose. As such, they are impressed with a trust-like character, and those who administer them act as custodians under a duty to preserve their use for burial. In the ***Mowbray Muslim Cemetery case (Western Cape High Court, South Africa, 2026)*** case, decided by the Western Cape High Court in South Africa in 2026, the Court affirmed this position, holding that a Muslim cemetery constitutes a *waqf* and that any use inconsistent with its burial purpose is impermissible.

Disputes nonetheless arise as to the appropriate place of interment, particularly where competing claims are made for burial at the deceased person's ancestral home, place of death, or within a designated Muslim cemetery. Such disagreements often require the court to balance religious norms, family preferences, the deceased person's wishes where ascertainable, and the legal status of burial sites.

49. **Timing of burial.** Islamic law requires prompt burial, ideally on the same day of death. This religious urgency may collide with legal processes. In ***Addenbrooke v Senior Coroner for Inner North London [2018] EWHC 969 (Admin) (England)***,¹⁸² the High Court in England recognised that prompt burial is a core requirement of the Muslim and Jewish faiths and that many believers expect burial on the same day. Courts must therefore balance religious urgency against the right of all parties to be heard.

In the *Kazungu* case, the decision of the Kadhi's Court was reversed by the High Court because the proceedings were rushed and were followed by a secretive night burial, thereby denying the deceased person's father an opportunity to be heard.

50. **Competing marriages or family relationships.** Where a deceased Muslim man had more than one wife, or where the validity of a marriage is contested, disputes may arise over which family controls the burial. Under Islamic law, a Muslim man may have up to four wives, and the hierarchy of proximity in burial follows the rules of male *mahrms* and agnatic relatives rather than marital seniority.

51. **Conflict between custom and religion.** This is the classic Kenyan burial dispute. In the landmark case of [*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another \[1987\]*](#)

¹⁸² <https://ukhumanrightsblog.com/2018/05/01/coroner-defeated-over-controversial-cab-rank-burial-policy/> accessed on 25.04.2026

[KECA 63 \(KLR\)](#), commonly referred to as the S M Otieno case, the Court upheld Luo customary law. Had the deceased person been Muslim, Islamic personal law would have been relevant in determining whether it prevailed over ethnic custom.¹⁸³ This principle is a foundational aspect of Islamic jurisprudence and is legally recognised in many jurisdictions with plural legal systems, including Kenya.

52. **Exhumation or reburial.** Islamic law strongly discourages exhumation. The grave has sanctity (*hurmah*) and becomes, in effect, dedicated to the deceased. In [Kazungu v Ratili \[2025\] KEHC 10264 \(KLR\)](#) the Chief Kadhi stated that it is not permissible to exhume a deceased Muslim unless it is extremely necessary in the deceased person's or public interest, citing scholarly consensus on the general impermissibility of exhumation. Exhumation is permitted only in exceptional circumstances, such as where the body was buried on usurped land, where a Muslim was mistakenly buried in a non-Muslim cemetery, where the body was not washed or was not placed facing the *Qibla*, or where there is a compelling legal necessity, such as forensic examination.
53. **Compliance with public health laws.** In Kenya, section 146 of the Public Health Act requires a permit from the Cabinet Secretary for any exhumation, regardless of the applicable religious law position. [Section 137](#) of the Penal Code makes it an offence to unlawfully hinder the burial of a body, exhume human remains without authority, or fail to perform a duty to bury. Any court ordering exhumation should therefore make the order conditional upon compliance with the Public Health Act, including issuance of the requisite permit.
54. **Wishes of the deceased person.** Where the deceased person expressed a wish that conforms with Islamic law, for example, to be buried in a particular Muslim cemetery or next to a particular relative, that wish should be respected as far as possible. However, in [Sakina Sote Kaityany & another v Mary Wamaitha 1995 KECA 2 \(KLR\)](#), the Court held that there can be no property in a dead body and that testamentary directions as to burial are not absolutely binding. Under Islamic jurisprudence, the wishes of the deceased person carry moral weight, provided they do not contravene Shari'a, but the nearest relatives retain the ultimate decision-making responsibility.

¹⁸³ Datumula, Sarpika. (2025). "Islamic and Customary Inheritance Law: Addressing Differences and Similarities in the Distribution of Property," 2 *Journal of Nafaqah*, 10-16. [10.62872/a22mze83].

5.3 Judicial Precedent on Kadhis' Courts' Jurisdiction over Burial Disputes

5.3.1 Kazungu v Ratili (Civil Appeal E034 of 2025) [2025] KEHC 10264 (KLR) (11 July 2025) (Ruling)

55. The deceased, Samuel Charo Kirao, died on 1 April 2025. A dispute arose between his father, the applicant, who was Christian, and a person who claimed to have converted the deceased to Islam, the respondent. The respondent moved the Kadhi's Court seeking orders that the deceased be buried under Islamic rites. The Kadhi issued orders to that effect, and the respondent proceeded to bury the deceased at Takaungu Muslim Cemetery at night, without the knowledge or involvement of the deceased person's family. The applicant sought orders for exhumation and reburial under Christian rites, contending that the Kadhi's Court had no jurisdiction because he and his family were not Muslims.
56. The High Court held that the Kadhi's Court had acted without jurisdiction. Under [Article 170\(5\)](#) of the Constitution, the jurisdiction of the Kadhi's Court is limited to matters of Muslim personal law where all parties profess the Muslim faith and submit to the court's jurisdiction. These conditions were not met because the applicant and his family were Christians. Proceedings conducted without jurisdiction are null and void *ab initio*, and every act taken pursuant to them, including the burial, was equally a nullity.
57. On the question of exhumation, the Court sought and obtained the opinion of the Hon. Chief Kadhi, who advised that while exhumation is generally impermissible under Islamic law, it may be permitted where there is an extremely necessary reason in the deceased person's or public interest, or another legally acceptable reason. The Court found that enforcing the rule of law and correcting a burial carried out pursuant to a void order constituted such a reason. It therefore ordered exhumation of the body for preservation pending determination of the burial dispute by a court of competent jurisdiction.

5.3.2 Judicial Checklist on Jurisdiction of Kadhis' Courts in Burial Disputes

58. In determining whether the Kadhi's Court has jurisdiction over a burial dispute, the following questions should guide the court:
- Does the subject matter relate to personal status, marriage, divorce or inheritance of a Muslim?
 - Do all parties profess the Islamic faith?

- Do all parties submit to the jurisdiction of the Kadhi's Court?
- Is the deceased person's religious identity itself disputed?

59. The answer to the first three questions must be "yes" for the Kadhi's Court to exercise jurisdiction. If any one of the conditions is absent, particularly where a non-Muslim party is involved, the matter must proceed before a court of general jurisdiction.

60. If the answer to the fourth question is in the affirmative, the deceased person's religious identity must first be resolved by a court of competent jurisdiction, preferably the High Court, before burial rites and burial rights can be determined.

6.0 KEY CONCERNS IN BURIAL DISPUTES

61. The area of burial disputes has not attracted extensive legal scholarship. One recent academic article usefully reviews the jurisprudence that has emerged from Kenyan courts.¹⁸⁴ In addition to the crucial issue of jurisdiction discussed above, a review of judicial precedent reveals that, in the absence of dedicated statutory law, courts have generally determined burial disputes through three principal approaches:¹⁸⁵

1. application of the deceased person's customary law;
2. giving effect to the deceased person's ascertainable wishes, where such wishes are clear, lawful and enforceable; and
3. applying the English common law principle of legal proximity.

62. In addition to discussing these judicial approaches, this section addresses other recurring concerns in burial disputes. These include:

1. the misconception that burial rights have a bearing on inheritance rights;
2. deterring frivolous applications by requiring the posting of bond or security to cover burial expenses;
3. emerging trends around cremation;
4. the use of court-annexed mediation and other Alternative Justice Systems (AJS)

¹⁸⁴ Mercy M. Deche, 'Burial Rights and Rites: Safeguarding a Kenyan African Widow's Position Upon Termination of a Christian Marriage by Death' *East African Law Journal [Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya]* (2025), 237

¹⁸⁵ *Wambua v Mutave & another* [2024] KEMC 7 (KLR)

- mechanisms in burial disputes;
- 5. retention of bodies by hospitals as security for unpaid hospital bills;
- 6. exhumation of bodies; and
- 7. stopping burials on account of non-payment of dowry.

6.1 Application of the Deceased Person's Customary Law

63. [Article 11](#) of the Constitution of Kenya and [section 3\(2\)](#) of the Judicature Act empower courts to apply customary law where one or more of the parties is subject to it or affected by it, provided the applicable custom is not inconsistent with the Constitution, repugnant to justice and morality, or inconsistent with written law. Courts have applied customary law to determine both the person entitled to bury the deceased and the place of burial. In a claim anchored on customary law, opinion evidence is ordinarily required. [Section 51](#) of the Evidence Act provides that:

“(1) When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.

(2) For the purposes of subsection (1) of this section the expression ‘general custom or right’ includes customs or rights common to any considerable class of persons.”

64. The absence of expert evidence may lead to dismissal of a claim founded on customary law. There are, however, exceptions to the general rule that a customary practice must be proved through expert evidence. Where there is existing judicial precedent on a particular community's customary burial practice, or where the customary law is set out in a recognised book or reference document, the court may take judicial notice of that customary law.¹⁸⁶

6.1.1 Judicial Precedent on the Application of Customary Law in Burial Disputes

65. The cases discussed below highlight the interplay between personal wishes, family claims and customary law in burial disputes. In several of these decisions, courts ultimately gave effect to custom, though for different factual and legal reasons.

¹⁸⁶ [Sakina Sote Kaityany & another v Mary Wamaitha \[1995\] KECA 2 \(KLR\)](#) & [Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another \[2018\] KEHC 4587 \(KLR\)](#)

66. In the landmark case of [*Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* \[1987\] KECA 63 \(KLR\)](#), commonly referred to as the S M Otieno case, the key issues were whether the widow or the deceased person's clan had the primary right and duty to bury him, and whether the deceased person's personal wishes were binding on the family or the court. Initially, the widow obtained an injunction from the High Court preventing the clan from burying S M Otieno. The injunction was granted by Shields J. On appeal, the Court of Appeal allowed the appeal, quashed the injunction and ordered a retrial before another High Court judge.
67. During the retrial, Bosire J ruled in favour of the clan, recognising its right to bury S M Otieno according to Luo customary law. The widow appealed to the Court of Appeal, which dismissed her claim. The Court held that there could be no property in a dead body and, therefore, that the deceased person's wishes did not have the status of a will and were not legally binding in the same way as testamentary dispositions. The Court emphasised that, as a Kenyan of African descent, S M Otieno could not divest himself of his culture and that his burial was governed by Luo customary law, which accorded the clan primary authority in burial matters.
68. In [*Edwin Otieno Ombajo v Martin Odera Okumu* \[1996\] KECA 158 \(KLR\)](#), the principal issue was whether, under [section 3\(2\)](#) of the Judicature Act, courts are bound to enforce burial rights arising under customary law or whether they retain discretion to decline enforcement where doing so would be unjust in light of the claimant's conduct. Specifically, the Court considered whether a husband's right under Luo customary law to bury his wife is absolute or may be displaced by evidence of desertion, neglect and failure to fulfil marital obligations during her lifetime. The Court of Appeal also considered whether the High Court had erred in treating the mere existence of a valid marriage as conferring burial rights.
69. The Court of Appeal allowed the appeal and set aside the High Court's decision. It held that, although Luo customary law ordinarily grants a husband the right to bury his wife, that right is not absolute and must be exercised in a manner consistent with justice and equity. Customary law, like all law, is dynamic, and its application depends on the circumstances of each case.
70. The Court found that the respondent had effectively deserted the deceased person, failed to maintain her and their children, neglected her during illness and demonstrated no genuine commitment to the marital relationship. In those circumstances, he was undeserving of the burial right. The Court concluded that the trial judge had misdirected himself by focusing

solely on the existence of marriage and failing to exercise the discretion afforded under [section 3\(2\)](#) of the Judicature Act. Accordingly, the father's claim to bury his daughter was upheld over the husband's customary claim.

71. In [Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another \[2004\] KEHC 2617 \(KLR\)](#), the Court considered whether the deceased person's alleged oral wishes to be buried in Kitengela, a peri-urban area outside Nairobi, were enforceable. The Court also considered whether those alleged wishes complied with the requirements for oral wills under the Law of Succession Act and whether they could override established customary burial practices.
72. The Court further examined whether the plaintiff, who claimed to be a second wife, had a valid claim to the deceased person's body for burial under Kikuyu customary law, which generally places burial responsibility on the eldest son or brothers of the deceased person, and whether her claim conflicted with those customary norms.
73. The Court held that the person legally closest to the deceased person has the primary duty and right to arrange burial. While marital unions are generally the closest legal relationships, such a relationship must be established through credible evidence. The plaintiff failed to establish a prima facie case, as the defendants demonstrated a stronger claim under customary law. Her evidence of a customary marriage was undermined by fraudulent documentation, including a forged 1981 affidavit. The Court concluded that she had not discharged the burden of proving a valid customary marriage and therefore had no enforceable right to the deceased person's body for burial.
74. The key principles established by the Court were as follows:
- a. burial rights are governed by customary law where applicable;
 - b. the right to bury rests with the person legally closest to the deceased person;
 - c. claims based on customary marriage must be substantiated by credible evidence; and
 - d. unsubstantiated oral wishes or forged documents cannot override customary or legal burial rights.
75. In [Kandie & 2 others v Beatrice Jepkemoi Cherogony \[2002\] KEHC 1175 \(KLR\)](#), the dispute arose when the respondent widow made arrangements to bury her deceased husband in Molo, where he owned land. The deceased person's father and two brothers opposed the plan, asserting that under Tugen customary law the deceased ought to be buried at his

ancestral home in Baringo District. The widow filed suit in the Chief Magistrate's Court, which ruled in her favour and restrained the appellants from interfering with the funeral and burial arrangements. The appellants appealed, arguing that both the deceased person and the respondent were Tugen and that the applicable law governing burial was Tugen customary law, which required burial at the rural ancestral home.

76. On appeal, the Court found that both parties subscribed to Tugen customs regarding burial. Evidence showed that, during his lifetime, the deceased person had maintained regular contact with his ancestral home in Baringo and had even buried his son there, despite owning a substantial farm in Molo. The Court affirmed that under Tugen customary law, a man is buried by his father and family members at his ancestral home. It was not suggested that this custom was inconsistent with written law, and the Court relied on the reasoning in the *S M Otieno* decision that such customary practices are not repugnant to justice or morality.
77. The appellate Court held that the trial magistrate had misdirected herself by placing undue weight on the fact that the deceased person owned land in Molo. Ownership of land, the Court observed, was not decisive in determining the place of burial, particularly where the deceased person also owned land in Baringo. In the circumstances, the proper place of burial was the deceased person's rural ancestral home in Baringo District, and not Molo.
78. In [Nyaribo Nyankomba V Mary Bonareri Munge \[2010\] KEHC 933 \(KLR\)](#), the Court underlined that, in cases resting purely on customary law, it is necessary for persons versed in the relevant customs to be called as witnesses to assist the court to reach a fair determination, since the court may not itself be sufficiently conversant with those customs and traditions.
79. The decision in [PZG & 2 others v TMT \[2019\] KEHC 4212 \(KLR\)](#) concerned a dispute over the burial of an unmarried adult who had no independent home and no ascertainable burial wishes. The deceased person's parents presented rival claims asserting the right to bury the deceased, each citing care and close contact during the deceased person's lifetime. The Court found that neither parent's claim of care was sufficient to outweigh the other's, noting that the deceased person had related well to both parents. Both parents were adherents of Giriama customary law. Applying that customary law, the Court held that burial rights in those circumstances belonged to the father once the *kadzama* ceremony, involving the payment of palm wine (*pombe ya mtoto*), had been observed. The High Court upheld the trial court's decision in favour of the father, emphasizing that the customary

rule was not repugnant to justice or morality and was therefore valid for determining the burial of the deceased person.

80. In [*Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another* \[2018\] KEHC 4587 \(KLR\)](#), the High Court overturned the decision of the magistrate's court, which had relied on alleged burial wishes of the deceased person. The High Court found that the alleged wishes were contradictory and inconclusive. It instead applied Akamba customary law, which dictated that burial be undertaken at the ancestral home. Dissatisfied with that decision, the appellants moved to the Court of Appeal, arguing that the trial court ought to have given effect to the deceased person's wishes unless they were illegal or unenforceable.
81. The Court of Appeal dismissed the appeal and upheld the High Court's decision. It found that the alleged burial wishes had not been proved with clarity and certainty and therefore could not override customary law. The Court reiterated that, in the absence of a valid will or clear and cogent evidence of the deceased person's wishes, burial disputes are to be resolved in accordance with the applicable customary law, provided that such law is not repugnant to justice, morality or the Constitution. The Court emphasised that Akamba customary law mandates burial at the ancestral home where the deceased person's wishes are ambiguous or unproven. Accordingly, it affirmed that burial on ancestral land was appropriate, as it aligned with the deceased person's cultural identity and clan ties and was accessible to all family members.
82. In [*Salina Soote Rotich V Caroline Cheptoo & 2 Others* \[2010\] KEHC 4110 \(KLR\)](#), the central issue on appeal was whether the deceased person, who had practised Christianity and married under Christian rites, remained subject to Keiyo patrilineal customary law for purposes of burial, particularly in light of his prior adherence to customary engagement rites and his return to his mother's care before his death. The appellate Court held that the appellant had successfully pleaded and proved that the deceased person was governed by Keiyo customary law. The Court found that, despite his Christian faith and marriage under Christian rites, the deceased person had not divested himself of his cultural identity or customary obligations. It was established that under Keiyo custom, a man is buried by his clan among his ancestral people, and daughters do not assume primary burial responsibilities. The Court further held that these customary rules were not repugnant to justice or morality and were not inconsistent with written law. The appeal therefore succeeded, and the Court affirmed that the deceased person ought to be buried in accordance with Keiyo customary law.

83. In [*Kamau v Muchiri; Matiru \(Interested Party\)* \[2022\] KEHC 16997 \(KLR\)](#), the High Court considered a dispute over the burial of the late Kamau Gachoka. The appellant sought to have the deceased person buried at his ancestral and matrimonial home in Ndumberi, Kiambu, while the respondent, a second wife, wished to bury him at her matrimonial home in Muruaki, Nyandarua. The Court reaffirmed that, in the absence of legislation specifically governing burial disputes, courts must be guided by the customary law applicable to the parties, in line with [Section 3\(2\)](#) of the Judicature Act, provided that the custom is not repugnant to justice or morality.
84. In [*Florence Maweu & another v Bernard Mutinda Maweu & 2 others* \[2019\] KEHC 11649 \(KLR\)](#) the case arose following the death of Joseph Maweu Wambua on 20 June 2019. The appellants were the deceased person's third wife and one of his sons, while the respondents comprised the first and second wives and other children. The appellants sought to restrain the respondents from interfering with burial arrangements at Muuo Village, Kavutha Location, where the deceased person had lived with the third wife for several years before his death. They contended that the deceased person had expressly and repeatedly stated his wish to be buried at Kavutha and that they had been solely responsible for his care during his illness. The respondents opposed the claim and counterclaimed, asserting that under Kamba customary law a polygamous man ought to be buried at the homestead of the first wife, namely Ngaku Village, Mutyambua Location, which was also the deceased person's ancestral home and the burial site of other family members. The trial court dismissed the appellants' suit and ordered burial at the ancestral home, prompting the appeal.
85. On appeal, the High Court considered whether the trial magistrate had erred in rejecting the alleged burial wishes of the deceased person, treating those wishes as unproven, declining to give them precedence over customary law, applying Kamba customary law without sufficient proof, and concluding that the respondents had established the proper place of burial on a balance of probabilities.
86. The High Court upheld the trial court's decision and dismissed the appeal. It found that the appellants had failed to prove, with clarity and credibility, that the deceased person had made a definite and reliable expression of his burial wishes. The evidence was found to be vague and inconsistent, lacking particulars as to timing, circumstances and the deceased person's mental capacity at the material time. In the absence of clearly established wishes, the Court held that Kamba customary law governed the matter.

Under that custom, a polygamous man is buried at the homestead of the first wife or at the ancestral home. Accordingly, the Court affirmed the order directing burial at Ngaku Village, Mutyambua Location, Makueni County, and found no basis to interfere with the trial court's exercise of discretion.

6.2 Reliance on the Deceased Person's Ascertainable Burial Wishes

87. [Articles 44 \(1\)](#) of the Constitution provides that every person has the right to participate in the cultural life of their choice. It is on the basis of this constitutional provision, among others, that courts have placed reliance on a deceased person's burial wishes where those wishes are proved by cogent evidence, such as a will, written instructions, oral statements supported by reliable testimony, or by implication from the manner in which the deceased person organised their life and affairs. This is so even though it is legally established that there is no property in a dead body and, therefore, that a deceased person's burial wishes are not binding in the same way as testamentary dispositions.¹⁸⁷ Such wishes, although not paramount, should be given priority as far as is practically possible, provided they are not contrary to the general law, public policy, or any applicable and constitutionally compliant custom.

88. A review of the case law in this area shows the following principles:

- a. The deceased person's wishes must be clearly and reliably proved. Courts require cogent, specific and consistent evidence, including details of when, how and in what circumstances the wishes were expressed, as well as the deceased person's mental capacity at the time.
- b. In some cases, courts have inferred burial wishes from the deceased person's lived realities, including the place where they settled, established a home, raised a family, maintained social ties, or organised their personal affairs.
- c. The burden of proof lies on the party asserting the wishes. A person relying on the deceased person's wishes must establish them on a balance of probabilities.
- d. Customary law operates as the default framework where the deceased person's wishes are not clearly proved. In [Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another \[1987\] KECA 63 \(KLR\)](#), commonly referred to as the S M Otieno case, the

¹⁸⁷ SM Otieno Case [Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another \[1987\] KECA 63 \(KLR\)](#)

Court of Appeal observed that it is only through legislation that matters such as the deceased person's burial wishes may be given a permanent and settled place in law.

6.2.1 Judicial Precedent on Reliance on the Deceased Person's Ascertainable Burial Wishes

89. Courts have examined both express and implied burial wishes. The cases discussed below illustrate the evidentiary burden required to prove such wishes and the extent to which courts have balanced them against customary law, family claims, religious considerations and legal proximity.
90. In [Dinah Adhiambo Oyier v Hellen Achieng & 3 others \[2017\] KEHC 6276 \(KLR\)](#), the dispute arose after the death of Alex Odhiambo Oyieyo, who had four wives, two of whom were deceased, leaving the appellant, his second wife, and the first respondent, his fourth wife, as surviving spouses. The appellant claimed that she had lived with the deceased person since 1983, that he had established a home at Ojola on land registered in her name, and that he had expressed in a written will his wish to be buried there. Her witnesses, including the advocate who prepared the will, supported this claim. The first respondent, who married the deceased person later, maintained that he also lived and had family ties at Dago Nyalenda, where his first wife was buried. Relatives testified that he should be buried there according to custom. The trial court dismissed the appellant's claim and ordered burial at Dago, prompting the appeal.
91. The appellate court held that although burial disputes may be guided by customary law, the deceased person's clearly expressed wishes, particularly in a valid will, should as far as possible be given effect unless they conflict with personal law or are impracticable. The Court found that the trial magistrate had erred in disregarding the deceased person's will on irrelevant succession grounds, emphasising that the matter was a burial dispute and not a dispute over distribution of the estate. Noting that the position regarding wills as to burial sites had been developed in *Eunice Moraa Mabeche and another v Grace Akinyi* High Court Civil Case No 2777 of 1994 (unreported), the Court reaffirmed that a person's directions on the disposal of their body, while not strictly binding, carry significant weight and ought to be respected where feasible. In that case, there was no evidence that the deceased person's wish to be buried at Ojola conflicted with any applicable law or custom, and the evidence showed that he had established a home there. The Court therefore upheld and enforced his testamentary wish regarding his burial site.

92. In [C O O & another v S O W \[2010\] KEHC 4140 \(KLR\)](#), the dispute concerned the burial of Veronica, a married Luo woman who died in 2009. Her brother and adopted son sought to have her buried on her own land in Kakamega, relying on evidence that she had repeatedly expressed that wish, including in a recorded speech shortly before her death. They also described a long history of mistreatment, estrangement and separation between Veronica and her husband's family, who had taken her incapacitated husband away and excluded her from the matrimonial home. The defendant, her father-in-law, insisted that under Luo customary law, a married woman must be buried at her husband's home and claimed the right to conduct the burial. There had also been prior arbitration, but it was later set aside by consent of the parties.
93. The Court found that Veronica had clearly and unequivocally expressed her wish to be buried in Kakamega and that such wishes, while not strictly binding, should be respected as far as possible. Although Luo customary law generally grants burial rights to the husband's family, the Court held that this right is not absolute and may be denied where its exercise would be unjust. Given the evidence of prolonged separation, mistreatment and neglect by the defendant's family, the Court concluded that they were undeserving of exercising the burial right. It therefore ordered that Veronica be buried on her Kakamega property in accordance with her wishes and Catholic faith, with both parties allowed to participate, and each side bearing its own costs.
94. [SAN v GW \[2020\] KECA 46 \(KLR\)](#) concerned a deceased Luo man who was married to two wives, the first in Nyalenda, Kisumu, and the second in Bungoma. He had been separated from his first wife for over 26 years and lived with the second wife in Bungoma, where he established a matrimonial home. Before his death, he expressed a clear wish to be buried at the Bungoma home and specified the burial spot. The first wife challenged this, claiming that he should be buried at her home according to Luo customary law, while the second wife, supported by the deceased person's children and clan members, sought to honour his wish.
95. Both the trial court and the Court of Appeal found that the Bungoma home had been established in accordance with Luo custom and that the deceased person's burial wish did not contradict customary law, general law or public policy. The courts considered the deceased person's long-term residence in Bungoma, his estrangement from the first wife, and her lack of involvement during his illness. They held that the deceased person's

expressed desire reflected his lived realities and should be honoured, concluding that it was lawful and just for him to be buried at his Bungoma home.

96. In [Martha Wanjiru Kimata & another v Dorcas Wanjiru & another \[2015\] KEHC 7090 \(KLR\)](#), the case arose on appeal following a lower court judgment concerning the burial of the late David Mwangi Mwarangu. The appellants, Martha Wanjiru and Jacinta Hito Grishon, sought to bury the deceased person in Laikipia County and participate in the burial arrangements, while the respondent, Dorcas Wanjiru, claimed the right to inter him at Lang'ata Cemetery. The main issues were whether the deceased person's expressed wish to be buried at Lang'ata Cemetery should override customary law obligations under Kikuyu traditions to bury him at his ancestral home, and whether the second appellant's long cohabitation and child with the deceased person were sufficient to establish marital status for customary law purposes.
97. The Court found in favour of the respondent, holding that her prolonged cohabitation with the deceased person and the fact that they had a daughter together established a presumed marital relationship under customary law. The deceased person's expressed wish to be cremated, later modified to burial at Lang'ata Cemetery, was taken into account but did not displace the respondent's customary burial rights. The Court applied the principle that marriage may be presumed where the facts and circumstances demonstrate that the parties lived together as husband and wife, relying on [Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another \[2004\] KEHC 2617 \(KLR\)](#).
98. The Court noted that the appellants had not established any customary, habitual or reputational connection to the deceased person's family life that would grant them legitimate burial rights. Although the first appellant had a child with the deceased person, there was no evidence of continuous cohabitation or integration into the deceased person's extended family. The Court also recognised the deceased person's mother as having a right to participate alongside the respondent in burial arrangements. Consequently, the appeal was dismissed, the lower court's decision was upheld, and the body was ordered to be released to the respondent for burial at Lang'ata Cemetery in accordance with the deceased person's expressed wishes.
99. Implied burial wishes were considered in [Morris Morris Odawa v Samuel Ochieng Auma \[2019\] KEHC 6034 \(KLR\)](#). The dispute concerned the burial of Sella Auma Odawa and arose between her sons from different fathers over where she should be buried. The appellant, her first-born son from one father, argued that under Luo customary law the deceased

person, as a married woman, ought to be buried at her husband's home and that, since dowry had not been returned, she remained legally married to him. The respondent, her other son, contended that the deceased person had lived for decades at Kibos and that it was her wish to be buried there.

100. The Court held that while Luo customary law ordinarily vests burial rights in the husband and may allow a first-born son to bury the deceased person where the husband is unwilling, such rights are not absolute and must yield to justice, morality and the deceased person's implied or expressed wishes.

101. Considering that the deceased person had lived at Kibos for over 50 years, had established a permanent home there and had severed ties with her matrimonial home, the Court found that her settled life constituted an implied burial wish. The Court also noted that the husband had shown no interest in burying her and that the appellant had failed to prove any contrary wish. Relying on [Samuel Onindo Wambi v C O O & another \[2015\] KECA 620 \(KLR\)](#), the Court affirmed that a deceased person's burial wishes are akin to a will and should generally be followed, and that a person's conduct towards the deceased person during their lifetime may extinguish their customary burial rights. Consequently, the Court dismissed the appeal, upheld the trial court's decision and ordered that the deceased person be buried at Kibos, while allowing the appellant to participate in the burial to avoid conflict.

102. In [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \(Civil Appeal E094 of 2025\) \[2025\] KEHC 12574 \(KLR\)](#), the deceased person had lived for over four decades in Gilgil, where he raised a family and buried his second wife, while remaining estranged from his first family. The dispute arose over where he should be buried. Evidence showed a complete breakdown of relations with the first family and close, supportive ties with the second family. The deceased person's explicit burial wishes were not ascertainable with sufficient certainty, requiring the Court to consider customary law and principles of legal proximity.

103. The High Court held that, in the absence of clear ascertainable wishes, customary law serves only as a starting point. The Court proceeded to undertake a holistic assessment of the deceased person's life, considering legal, geographical, familial and emotional proximity. Applying this "fundamental proximity" doctrine, the Court found that the deceased person's long-term residence, family life and estrangement from the first family overwhelmingly pointed to Gilgil as the appropriate burial location. The Court emphasised that rigid adherence to customary rules would have undermined the deceased person's

autonomy and lived choices. It therefore held that the Gilgil home, reflecting his true life circumstances, was the lawful and just burial site.

104. In [Ontweka & 3 others v Ondieki \[2024\] KECA 11 \(KLR\)](#), the Court held that the deceased person's long-term residence and family life at the Kamulu home, in contrast to an abandoned home in Kisii, constituted an organised and deliberate life from which a burial wish for the Kamulu location could be implied. Even in the absence of explicit instructions, the structure and reality of his life - where he lived, maintained his family and organised his affairs - provided a strong indication of his preferred burial site.

6.3 Common Law Principle of Legal Proximity

105. The common law principle of legal proximity has been applied to determine the person entitled to bury a deceased person, including where there are opposing claims over the place of burial. Under this principle, the right lies with the person who is closest to the deceased person in legal terms. For instance, where there is a valid marital union, the surviving spouse ordinarily ranks highest, unless there are compelling reasons to depart from that position.¹⁸⁸

106. It follows from the principle of legal proximity that, unless compelling reasons justify departure from the general rule, the person with the first-ranking right to bury a deceased spouse is the surviving spouse, and not the children of the deceased person. In [Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others \[2018\] KEHC 1077 \(KLR\)](#), the Court held that proof of a valid and subsisting marriage at the time of death confers primary burial rights upon the surviving spouse, which ordinarily override competing claims by relatives, including adult children or former spouses. In some cases, however, courts have declined to follow this order in favour of factual closeness.¹⁸⁹ For instance, a husband's right to bury his deceased wife may be displaced where his mistreatment, neglect or estrangement rendered him undeserving of exercising that right.¹⁹⁰

6.3.1 Judicial Precedent on Application of the Principle of Legal Proximity

107. Judicial precedent in this area shows that courts often resolve burial disputes by reference to a hierarchy similar to that provided under [section 66](#) of the Law of Succession Act, except where compelling circumstances justify departure.

¹⁸⁸ Ruth Wanjiru Njoroge vs. Jemimah Njeri Njoroge & Anor [2004] eKLR, by J.B. Ojwang, J.

¹⁸⁹ R.L.A vs. F.O & another [2015] eKLR

¹⁹⁰ In Edwin Otieno Ombajo vs. Martin Odera Okumu [1996]eKLR

108. In [MO v MAO \[2024\] KEHC 13558 \(KLR\)](#), the case concerned the burial of JOO, a polygamous Luo man, whose widows, MO and MAO, disagreed on the funeral arrangements following his death. MO, asserting her position as the first wife, claimed the right under Luo customary law to bury the deceased person at her homestead, while MAO had obtained a burial permit and made preparations without MO's consent. The parties negotiated a comprehensive consent, which was adopted as an order of the court, detailing the burial date, burial site, preservation and transport of the body, participation of both widows and their families, and allocation of expenses. After the consent was entered, the elders of the deceased person's clan sought to intervene, arguing that under Luo customary law it is the prerogative of clan elders to determine the burial site. They applied for joinder as interested parties and for leave to give evidence, but their application was not determined. Subsequent applications for contempt and variation of the consent were dismissed by the High Court, which upheld the validity of the consent order and refused to set it aside.

109. On appeal in [Ongola & 6 others v Odhiambo & 7 others \(Civil Appeal E328 & E393 of 2025 \(Consolidated\)\) \[2026\] KECA 260 \(KLR\)](#), the Court of Appeal held that in burial disputes, legal recognition is given to those closest to the deceased person, namely spouses, children, parents and siblings, as having primary rights to bury, and that parties may amicably resolve such disputes through a consent. While the elders contested the consent, the Court observed that the dispute had already been comprehensively resolved between the widows, who were the persons closest to the deceased person, and that the elders had sought to intervene too late. Since the consent order had been fully executed and provided for participation of all relevant parties, including the elders indirectly, the appeals were dismissed as having been overtaken by events, with each party bearing its own costs.

110. In [Gathogo & another v Ng'ang'a; Kenyatta National Hospital \(Interested Party\) \[2025\] KEHC 10959 \(KLR\) \(Family\)](#), a dispute arose over the burial of Mary Wambui Gathogo between her stepmother and stepbrother, and the man claiming to be her husband. He had cohabited with the deceased person for 17 years, had a child with her, and had performed customary rites towards formalization of their union under Kikuyu custom. The appellants, acting as administrators of the deceased person's father's estate, claimed priority in burial rights. The trial magistrate found in favour of the respondent by applying the doctrine of presumption of marriage, a decision the appellants challenged on the basis that the [Marriage Act, 2014](#) had abolished the doctrine.

111. The Court dismissed the appeal, holding that the doctrine of presumption of marriage was not abolished by the Marriage Act, 2014 but remains available as an exception, subject to the strict parameters laid down by the Supreme Court in [MNK v POM \[2023\] KESC 2 \(KLR\)](#). The Court further reaffirmed the doctrine of legal proximity, namely that the right to bury a deceased person vests in the person legally closest to them, with a spouse ranking first. The Court held that the appellants' claim, premised on their role as estate administrators, was legally untenable because there is no property in a dead body.
112. In [R L A v F O & another \[2015\] eKLR \[2015\] KEHC 3948 \(KLR\)](#), the principle of legal proximity to the deceased person was also applied. The Court concluded that the deceased person and the plaintiff were close friends, but that during her time of need, it was the deceased person's mother and siblings who were closest to her. The evidence showed that she called her sibling to collect her from under a tree after visiting Coptic Hospital, and when she became seriously ill, she called her mother, who sent another daughter to nurse her at the hour of her greatest need. During her final moments, the deceased person's mother and sibling were beside her, while the plaintiff was away in Eldoret doing business. The Court found that there was no marriage by cohabitation and that the relationship was one of friendship or convenience. The Court therefore accepted the evidence of the deceased person's mother and siblings and found that they were the persons closest to her for purposes of burial.

6.3.2 Judicial Precedent in Dealing with Conflicting Spousal Claims to Legal Proximity

113. In a polygamous marriage where each spouse claims the right to bury, courts have resolved the dispute by determining which spouse is legally recognised under the applicable personal or customary law. In the absence of a clear hierarchy among spouses, courts have considered which spouse cohabited with the deceased person closest to the time of death, which spouse was the primary caregiver during illness, and which spouse's claim aligns with the deceased person's expressed or implied wishes. Further, spouses with competing claims may amicably settle burial arrangements by consent and have that consent recorded as an order of the court.
114. In [Kamau v Muchiri; Matiru \(Interested Party\) \[2022\] KEHC 16997 \(KLR\)](#), the question of who had the right to bury the deceased person arose between the two houses of the deceased person. The Court applied the principle that the persons closest to the

deceased person - spouse, children, parents and siblings, in that order - have the primary right to bury. The Court also considered customary law, particularly Kikuyu practices, which generally entrust the burial of a man to his eldest son or brothers.

115. Evidence showed that the deceased person had been estranged from the appellant, the first wife, and her household for over 20 years, having relocated and lived with the respondent in Muruaki until his death. The Court found that, given the deceased person's long residence and family ties at Muruaki, the respondent was his closest spouse and therefore had the primary right to organize the burial. The Court further directed that the deceased person's body be released to the respondent, who was required to involve the deceased person's other family members in the funeral arrangements.

116. In *SAN v GW* [2020] KECA 46 (KLR), the case concerned a burial dispute between the first wife, SN, and the second wife, GW, of a deceased man who had married the appellant in 1986 and established a home in Nyalenda, Kisumu County, and later married the respondent in 1990, establishing a home in Bungoma County. Upon the deceased person's death, the respondent arranged for burial in Bungoma, prompting the appellant to claim legal entitlement to bury him at the Nyalenda home. The central issue was which spouse had priority to bury the deceased person, with the Court focusing on legal proximity.

117. The Court of Appeal emphasised that legal proximity is determined not merely by formal status but also by factual closeness and involvement in the deceased person's life. Priority is generally accorded to those closest in law - spouse, children, parents and siblings - but this is assessed in light of the claimant's actual relationship with the deceased person.¹⁹¹ A person's conduct towards the deceased person while alive may extinguish their burial rights, as previously established in [Samuel Onindo Wambi v C O O & another](#) [2015] KECA 620 (KLR).

118. Applying these principles, the Court found that the appellant had been estranged from the deceased person for 26 years, had played no meaningful role during his illness and lacked demonstrable closeness. By contrast, the respondent had been the deceased person's primary companion and caregiver. Accordingly, the Court held that the respondent's claim, which aligned with the deceased person's expressed wishes, took precedence, and the appellant's appeal was dismissed.

¹⁹¹ *Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party)* (Civil Appeal E094 of 2025) [2025] KEHC 12574 (KLR)

119. Please undertake a detailed editing to ensure gender language using UN Women editorial guidelines and language style guidelines but keeping to legal language and framing of the judiciary of Kenya-keep the numbers sequential;
120. Legal basis: [Samuel Onindo Wambi v C O O & another \[2015\] KECA 620 \(KLR\)](#); [SAN v GW \[2020\] KECA 46 \(KLR\)](#); [Oyier v Achieng & 3 others \[2017\] KEHC 6276 \(KLR\)](#); [Florence Maweu & another v Bernard Mutinda Maweu & 2 others \[2019\] KEHC 11649 \(KLR\)](#); [Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another \[2018\] KEHC 4587 \(KLR\)](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#).

6.4 Tension between Deceased's Ascertainable Wishes, Legal Proximity and Customary Law

121. Customary law on burial, the principle of legal proximity, and the deceased's ascertainable wishes are often in tension. This is a complex issue in Kenyan burial law, often described as reflecting the tension between modern lifestyle choices and traditional community obligations. Courts in diverse cases have given emphasis to one over the other two. It is correct to observe that there has emerged an implied hierarchy that places the deceased's ascertainable wishes at the top, but the principle of legal proximity and customary law continue to contend for second position.
122. In [Samuel Onindo Wambi v C O O & another \[2015\] KECA 620 \(KLR\)](#) the Court of Appeal established that a deceased person's burial wishes are akin to a will. Save for a compelling reason, they supersede customary law and should be followed. In [Ontweka & 3 others v Ondieki \[2024\] KECA 11 \(KLR\)](#) the Court of Appeal emphasized that the legal and familial proximity of the claimant to the deceased is paramount. While customs and religious practices are relevant, they do not automatically outweigh the rights of those with the closest familial bonds, particularly the nuclear family, which the Constitution recognizes as the fundamental unit of society.
123. In the more recent decision, [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \(Civil Appeal E094 of 2025\) \[2025\] KEHC 12574 \(KLR\)](#) the High Court attempted to resolve the conflict between ascertainable wishes, the principle of legal proximity and customary law. The court adopted a sequential inquiry, beginning with the ascertainability of the deceased's wishes. It found that the deceased's wishes were not ascertainable, and, therefore, could not govern the outcome. In the absence

of ascertainable wishes, the court turned to customary law as the default framework, pursuant to [section 3\(2\)](#) of the Judicature Act. It, however, noted that this is not a rigid rule and that custom must be tested against the repugnancy clause and read in light of constitutional values, including dignity, autonomy, and freedom of association. The court then applied a holistic doctrine of “fundamental” or “holistic” proximity, moving beyond a narrow focus on formal legal status.

124. The court assessed proximity as a confluence of factors, including:

- i. legal proximity (e.g., statutory marriage),
- ii. geographical proximity (place of long-term residence),
- iii. familial proximity (the family unit with whom the deceased lived and was cared for), and
- iv. emotional proximity (the quality of relationships, including evidence of estrangement).
- v. The decisive inquiry is which location and which claim best reflect the deceased’s entire life narrative.

125. The court found that where this holistic proximity strongly points away from the dictates of customary law, the custom will be displaced. This approach marks a significant departure from earlier authorities such as [Apeli v Buluku \[1980\] KECA 39 \(KLR\)](#) and [Martha Wanjiru Kimata & another v Dorcas Wanjiru & another \[2015\] KEHC 7090 \(KLR\)](#) where courts treated customary law as the primary and often decisive rule in the absence of express wishes. Similarly, [Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge & another \[2004\] KEHC 2617 \(KLR\)](#) framed burial rights largely in terms of legal proximity within the marital unit, without a fully developed inquiry into the deceased’s lived experience.

126. By contrast, the current approach adjusts the traditional hierarchy. If the deceased’s burial wishes cannot be clearly established, the court first looks to the deceased’s customary law; but only as a starting point. The decision then considers the deceased’s life in context, including where they lived, their family relationships, and their personal choices, rather than relying solely on formal rules or social status.

127. In this case, the court found that the deceased had, for over four decades, established his permanent home and life in Gilgil, where he resided, raised a family, and buried his second wife. This long-term residence was not incidental but reflected a deliberate and sustained choice to live away from his ancestral land, a choice which the court held must be respected. Further, documentary evidence demonstrated a complete and

irreversible breakdown of relations with the first family, including mutual decisions to separate and prolonged estrangement. In contrast, the second family maintained a close and supportive relationship with the deceased in his later years, underscoring where his true familial attachments lay.

128. The court also held that the repugnancy clause must be interpreted in light of constitutional values, particularly dignity, autonomy, and freedom of association. Applying a rigid customary rule requiring burial at the ancestral home would, in these circumstances, undermine the deceased's lived choices and personal autonomy, and was therefore repugnant to justice. Consequently, the trial court erred in prioritising customary law over the deceased's actual life.

129. On this basis, the court concluded that fundamental proximity was overwhelmingly in favour of the Gilgil home, as established through a holistic assessment of the deceased's life, encompassing legal proximity (statutory marriage), geographical proximity (long residence), familial proximity (care and cohabitation), and emotional proximity (estrangement from the first family). This holistic evaluation, rather than rigid adherence to custom, was held to be the proper basis for determining the place of burial.

6.4.1 Comparative Jurisprudence on Resolving the Tension between Deceased's Ascertained Wishes, Legal Proximity and Custom

130. Cases in common law jurisdictions show reliance on all three approaches discussed by Kenyan courts, as well as practical concern toward ensuring internment that minimizes logistical burdens and avoids unreasonable delay.¹⁹² In England and Wales, burial law is highly institutionalized and anchored in statute and common law. Rather than a unified code, the law comprises overlapping statutory provisions, local government regulations (such as the [Local Authorities' Cemeteries Order 1977](#)), and [ecclesiastical rules applicable to consecrated \(church\) ground](#).

131. Courts take a largely pragmatic and administrative approach: the right and duty to dispose of a body fall primarily on the personal representatives of the deceased. As was established in *Williams v Williams* (1882) 20 Ch D 659,¹⁹³ the deceased's wishes are persuasive but not legally binding. Disputes are resolved pragmatically by the courts,

¹⁹² <https://www.lawreform.vic.gov.au/publication/funeral-and-burial-instructions-consultation-paper/3-funeral-and-burial-instructions-in-the-common-law/>

¹⁹³ https://www.academia.edu/66532189/Williams_v_Williams_1882_Succession_Law_Rules_and_the_Fate_of_the_Dead accessed on 24.04.2026

as in *Hartshorne v Gardner* [2008], with emphasis on timely and appropriate disposal of remains. Burial disputes are treated as inherently time-sensitive matters, and courts explicitly structure their intervention to avoid delay. The jurisprudence shows a consistent reluctance to allow procedural complexity or evidential disputes to delay burial unnecessarily ([Anstey v Mundle \[2016\] EWHC 1073 \(CH\)](#) and [Patel v Patel \[2025\] EWHC 560 \(Ch\)](#)).

132. Cultural or religious considerations are acknowledged but do not override the legal framework.
133. Questions of where burial may take place are governed not by any individual entitlement to a particular location, but rather, indirectly through regulation of burial grounds. Religious or cultural considerations, while not recognised as a separate system of “personal law”, are often taken into account in practice where consistent with legal and public health requirements.
134. The position of Australian, Canadian and English courts in relation to a person’s wishes concerning disposal of their body is that such wishes are not legally binding. The person with the right to dispose of the body is the executor or personal representative or, in the absence of such appointment, the person appearing to be legally entitled to such appointment. They may do so in any manner they choose, provided it is not unlawful, unreasonable or exercised in a way that prevents family and friends from reasonably and appropriately expressing affection for the deceased. However, in some cases, a person’s wishes regarding the disposal of their body have been taken into account when deciding competing claims to the right to dispose of remains, effectively ensuring the deceased’s wishes were carried out.
135. In contrast, New Zealand courts require the person with the right to dispose of the body to take into account the views of the deceased, the views of family members and the deceased’s cultural or religious background before making appropriate funeral and burial arrangements.
136. Courts in the United States have taken a different approach altogether, upholding the primacy of the wishes of the deceased against all others.
137. South Africa, like Kenya, has no legislation on who should have the responsibility of burying the deceased. Burial rights are determined by common law. The possessor of those rights has the right to decide what form the disposition of the corpse should take. In [P.N and Others v P.N \(104659/2022\) \[2024\] ZAGPJHC 924 \(18 September 2024\)](#) the court held as follows:

“Flowing from the rested intestate legal principles, the surviving spouse enjoys stronger rights than that of children and parents of the deceased. Since the legal position is clear, it is unnecessary to issue any declaration of rights. In seeking to dispose of the body through cremation method, the surviving spouse is not acting unlawfully and an interdict as a special remedy is unavailable.”¹⁹⁴

138. The case of *Gabavana & another v Mbete & others* [2000] 3 All SA 554 (THC) sums up South African jurisprudence on resolving competing claims to the right to bury. In essence, the heir of the deceased's estate is the person who decides on disposal of the body. Where a deceased leaves a will, but without explicit indication as to who shall be responsible for the burial arrangements, courts infer an implicit intention that such arrangements be effected by those who inherit his earthly goods.¹⁹⁵

139. What about instances where there are multiple potential heirs who disagree? The court dealt with this scenario in *Titi Gladys Mahala v Nolili Nkombombini and Another* [Case No: 10861/2005 H C (Southeastern Cape Local Division)]. The applicant sought an order declaring that she is entitled to bury the body of the deceased. The application was opposed by the first respondent, the mother of the deceased. The applicant stated that she and the deceased were married to each other by way of customary union, which marriage relationship subsisted until the deceased's death. Three children were born of this relationship. She stated that the deceased was very close to the children and saw them on a regular basis. She further stated that during his lifetime the deceased and his mother did not have a close relationship. She claimed, for these reasons, to have a clear right to arrange the funeral of the deceased and to decide where and when the body should be buried.

140. The court stated that where the deceased dies intestate, there can be little problem where there is a single heir. Problems however arise where there is a multiplicity of heirs. In such circumstances there should be no hard and fast rules. Each case is to be decided on its own particular circumstances. Common sense shall largely dictate the decision of the court. The court shall have regard to the family relationships of the deceased, as

¹⁹⁴ [PN and Others v PN \(104659/2022\) \[2024\] ZAGPJHC 924 \(18 September 2024\)](#)

¹⁹⁵ <https://kmkadvocates.co.ke/the-law-on-burial-disputes-in-kenya/>

well as all other relevant circumstances. The court shall take account of the practical considerations. Having regard to all the circumstances, the court granted the application.

141. Uganda follows a hybrid framework combining customary law, common law principles of equity and justice, and judicial precedent that increasingly prioritizes the nuclear family unit over broader kinship. While cultural norms often dictate burial location, Ugandan courts increasingly prioritize the deceased's ascertained wishes and the rights of the surviving spouse.¹⁹⁶

142. In [Namusoke v Amuge and Others \(Miscellaneous Cause No. 4 of 2023\) \[2023\]](#) UGHCFD 5 (20 March 2023) the case concerned the burial of the late Isaac Omaset Ekwaro, who died in Canada in November 2022. Upon repatriation of his body to Uganda, a dispute arose between two women over his place of burial, each claiming to be the deceased's lawful wife. The applicant argued that the deceased had established a matrimonial home in Luweero District and had expressly indicated, in the presence of family members, that he wished to be buried there. The respondents contended that, in accordance with Itesot customary law, the deceased should be buried at his ancestral home.

143. The court was asked to determine where the deceased should be buried, who had the authority as next of kin to control the burial arrangements, and whether Itesot customary law should govern the burial. The court held that the deceased should be buried at his home in Luweero District, in line with his clearly expressed wishes. It emphasized that, while not legally binding, the wishes of the deceased are a paramount consideration in burial disputes unless there are compelling reasons to depart from them. The court highlighted factors to guide such decisions, including the deceased's wishes, the reasonable expectations of family and friends, the place with which the deceased was most closely associated, and ensuring that burial is conducted respectfully and without undue delay.

144. The court further determined that the deceased's mother was the next of kin best placed to enforce his wishes, including deciding the extent to which Itesot customary practices would be observed. Both the applicant and respondents failed to establish their status as next of kin, as they could not produce proof of marriage. Consequently, the court held

¹⁹⁶ <https://africanlii.org/en/articles/2021-12-11/>



that customary law could not override the deceased's expressed preference, restrained the respondents from interfering, and ordered that the body be released for burial in Luweero.

145. The principles emerging from Ugandan precedent are:

1. the expressed wishes of the deceased are a primary consideration in burial disputes, even over customary law;
2. burial decisions should balance the deceased's wishes with the interests of grieving family and the community;
3. next of kin with legal or demonstrable authority take priority, and claims by unproven spouses are insufficient; and
4. customary law does not automatically override the deceased's clearly expressed preferences

146. In the Australian case of [Jones v Dodd \[1999\] SASC 125 \(1 April 1999\)](#) the dispute arose following the death of a man of Aboriginal descent, whose father sought to bury him in accordance with Aboriginal traditions. The deceased's spouse, who was also the mother of his minor children, opposed this position and preferred a different form of burial, influenced by Christian beliefs. The court was therefore required to determine who had the legal right to possession of the deceased's body for purposes of arranging the funeral and burial, particularly in circumstances where family members were in disagreement and where there was uncertainty as to whether the deceased had abandoned his traditional Aboriginal beliefs.

147. Although there was conflicting evidence regarding whether the deceased had renounced his Aboriginal culture and converted to Christianity, the court ultimately ordered that the body be released to the deceased's father in accordance with Aboriginal tradition. In reaching this decision, the court emphasized that burial disputes require sensitivity to spiritual and cultural values. Justice Perry, with whom the other members of the bench agreed, observed that proper respect and decency compel courts to have regard to spiritual and cultural considerations, even where the evidence concerning their relevance may be contested.

148. In another Australian case, [Calma v Sesar and anor \[1992\] NTSC 17 \(24 April 1992\)](#) the court chose to disregard spiritual or cultural considerations and focused only on practical necessity. The case concerned a burial dispute between separated parents following the

death of their son. The mother, who resided in Darwin, arranged for a Catholic burial in a local cemetery. The father, however, sought to bury his son in a family plot near Port Hedland in Western Australia, approximately 2,000 kilometres away. Both parents were of Aboriginal descent, and there were conflicting views regarding the appropriate burial location within that cultural context.

149. In determining the dispute, Martin J declined to be influenced by religious considerations, cultural factors, or other “imponderables,” emphasizing instead that burial disputes must be resolved in a practical manner and without unreasonable delay. The court focused on logistical realities, noting that the body was already in Darwin and that there was no good reason in law to prefer burial in Port Hedland, which was a considerable distance away. Custody of the body was therefore granted to the mother. The decision established the principle that in burial disputes among family members, courts act as arbiters guided primarily by practical and logistical considerations rather than emotional, religious, or cultural preferences. The emphasis is placed on the duty to ensure timely and dignified burial, rather than on asserting an abstract “right” to bury.

6.4.2 Judicial Checklist on Criteria for Deciding Burial Disputes

150. **Step 1-Establish the Deceased’s Ascertainable Wishes**

Express wishes (written): Is there a valid will containing directions on disposal of the deceased’s remains? Is there some other document indicating the deceased’s wishes as to interment? If yes, note that testamentary burial directions are not legally binding but carry significant weight and should be given effect unless contrary to law or public policy.

Express wishes (oral): Has the party relying on the deceased’s oral wishes established them with clarity, specificity, and consistency? The court should require evidence of: (i) when and how the wish was expressed; (ii) the circumstances of expression; (iii) the deceased’s mental capacity at the time; (iv) corroboration where possible.

Implied wishes: Can the deceased’s buried wishes be inferred from the pattern of their life e.g. long-term residence away from the ancestral home, deliberate establishment of a matrimonial home, estrangement from the extended family, sustained care by specific family members?

151. Burden of proof: The party asserting the wishes bears the burden of proving them on a balance of probabilities with cogent, credible evidence.

152. Effect if proved: Clearly established wishes should be given priority so far as they are practicable and are not contrary to the general law or public policy.

153. Legal basis: [Samuel Onindo Wambi v C O O & another \[2015\] KECA 620 \(KLR\)](#); [SAN v GW \[2020\] KECA 46 \(KLR\)](#); [Oyier v Achieng & 3 others \[2017\] KEHC 6276 \(KLR\)](#); [Florence Maweu & another v Bernard Mutinda Maweu & 2 others \[2019\] KEHC 11649 \(KLR\)](#); [Johnstone Kassim Mumbo & 2 others v Mwinzi Muumbo & another \[2018\] KEHC 4587 \(KLR\)](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#).

154. **Step 2 - Determine who has the duty and right to bury by applying the doctrine of legal proximity**

Where there are no ascertainable burial wishes of the deceased, the court should consider the wishes of those closest to the deceased by applying the doctrine of legal proximity. The hierarchy is:

- a. Spouse - Is there proof of a valid and subsisting marriage at the date of death?
- b. Children;
- c. Parents; and
- d. Siblings.

155. Where there are conflicting spousal claims, the court should consider the following:

- a. If the deceased was in a polygamous marriage, which spouse is legally recognised under the applicable personal or customary law?
- b. In the absence of a clear hierarchy among spouses in a polygamous family, which spouse cohabited with the deceased nearest to the time of death?
- c. Which spouse was the primary caregiver during illness?
- d. Which spouse's claim aligns with the deceased's expressed or implied wishes?
- e. Parties may amicably settle burial arrangements by consent and record the consent as an order of the court.

156. Legal basis: [MO v MAO \[2024\] KEHC 13558 \(KLR\)](#); [Ongola & 6 others v Odhiambo & 7 others \[2026\] KECA 260 \(KLR\)](#)

157. **Step 3 - Determine who has the duty and right to bury by applying the holistic doctrine of fundamental proximity**

The court should apply the holistic doctrine of “fundamental proximity” by assessing the following:

- a. **Legal proximity:** Is there a statutory or customary marriage? Which spouse is the legally recognised one?
- b. **Geographical proximity:** Where did the deceased reside for an extended period before death?
- c. **Familial proximity:** Where there are two or more families with competing claims, with which family unit did the deceased live, raise children, and establish a home?
- d. **Emotional proximity:** Was there evidence of estrangement, abandonment, or neglect by one claimant?
- e. **Conduct:** Has a claimant’s behaviour during the deceased’s lifetime extinguished their burial right? Desertion, neglect, failure to maintain, and absence during illness are relevant factors.

158. Legal basis: [Section 66](#) Law of Succession Act; [Ongola & 6 others v Odhiambo & 7 others \[2026\] KECA 260 \(KLR\)](#); [Ontweka & 3 others v Ondieki \[2024\] KECA 11 \(KLR\)](#); [SAN v GW \[2020\] KECA 46 \(KLR\)](#); [Edwin Otieno Ombajo v Martin Odera Okumu \[1996\] KECA 158](#); [Gathogo & another v Ng’ang’a; Kenyatta National Hospital \(Interested Party\) \[2025\] KEHC 10959 \(KLR\)](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#)

159. **Step 4 - Apply customary law as the default framework**

Where the deceased’s wishes are not ascertainable or clearly proved, the court should apply the customary law of the deceased as a starting framework, subject to the following checks:

- a. **Applicability:** Is one or more of the parties to the dispute subject to, or affected by, the customary law in question?
- b. Does the customary law or practice pass the repugnancy test?
- c. Is the customary law or practice consistent with the Constitution and relevant written law?
- d. Is there expert witness evidence proving the custom? Section 51 of the Evidence Act is mandatory unless judicial notice applies, whether from prior precedent or a reference book.

- e. Is there evidence that the deceased's lived experience displaced the custom? Long-term residence away from the ancestral home, estrangement from the family of origin, or sustained life choices inconsistent with customary obligations may displace strict customary rules.

160. Legal basis: ([Section 3\(2\)](#), Judicature Act), [Virginia Edith Wamboi Otieno v Joash Ochieng Ougo \[1987\] KECA 63](#); [Kandie v Beatrice Jepkemoi Cherogony \[2002\] KEHC 1175](#); [Kamau v Muchiri \[2022\] KEHC 16997](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#).

6.4.3 Judicial Checklist on Determining Place of Burial

161. The following factors emerge from the cases and provide a useful checklist in determining the appropriate place of burial:

- a. Where did the deceased establish their primary and most recent residence or matrimonial home? Ownership of land, by itself, is not decisive, especially where the deceased owned land in multiple places.
- b. Where did the deceased reside for a sustained period immediately before death?
- c. Did the deceased express any preference, expressly or implicitly, as to the place of burial?
- d. What does the applicable customary law prescribe, subject to the repugnancy test and the supremacy of the Constitution?
- e. Where are other family members and close relatives of the deceased buried?
- f. Is the proposed burial site accessible to all relevant family members?
- g. Is the proposed burial site consistent with the deceased's religious faith?

162. Legal basis: [Kandie v Cherogony \[2002\] KEHC 1175](#); [SAN v GW \[2020\] KECA 46](#); [Ontweka v Ondieki \[2024\] KECA 11](#); [Kamau v Muchiri \[2022\] KEHC 16997](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#)

6.4.4 Judicial Checklist on Expeditious yet Therapeutic Management of Burial Disputes

163. In managing burial disputes, courts should be guided by the following considerations:

- a. Treat all burial disputes as urgent matters, and prioritise their listing and disposal.
- b. Avoid extended factual inquiries into peripheral family disputes. The court should

focus on the legally decisive questions, namely the deceased's wishes, entitlement to bury, and place of burial.

- c. Issue interim orders to preserve the status quo, such as restraining burial pending determination, while affording all parties an opportunity to be heard.
- d. Order the extraction of DNA samples, where necessary, before interment to avoid a subsequent application for exhumation.
- e. In determining whether to grant injunctive relief, apply the three-part test: whether there is a prima facie case; where the balance of convenience lies; and whether damages would be an adequate remedy. In burial disputes, damages are rarely an adequate remedy.
- f. The overriding imperative is dignified and timely burial. Delay compounds grief and may also raise public health concerns.
- g. Bear in mind that burial disputes are among the most emotionally charged matters courts hear. Language and tone matter. Courts should use sensitive, measured and humane language throughout the proceedings, rulings and orders.
- h. Avoid adversarial framing that may exacerbate conflict. The law should strive to serve a therapeutic function.
- i. Where possible, structure orders in a manner that allows all relevant parties to participate in burial rites, even where one party has primary decision-making authority.
- j. Ensure that all parties, including those who do not succeed on the primary claim, retain the right to attend and participate in the funeral and burial proceedings.

164. Legal basis: [Ontweka v Ondieki \[2024\] KECA 11 \(Gachoka J.A., obiter\)](#); [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\) \[2025\] KEHC 12574 \(KLR\)](#)

6.5 Misconception that Burial Rights Have a Bearing on Inheritance Rights

165. The intensity of emotion in burial disputes is partly driven by the misconception that the person who buries the deceased acquires a superior right to inherit the estate.¹⁹⁷

166. In [Samuel Onindo Wambi v C O O & another \[2015\] KECA 620 \(KLR\)](#), Kwach JA, in a dissenting opinion, found it necessary to address this misconception:

¹⁹⁷ <https://kmkadvocates.co.ke/the-law-on-burial-disputes-in-kenya/>

“This case is not about inheritance. It is simply a dispute over the disposal of the remains of the deceased. It is important to point this out because the impression that I have formed, from reading the record of proceedings in the superior court and listening to the submissions of counsel in this appeal, is that there is some material benefit to be gained by the widow who is ultimately given the right to bury the deceased. That is a total misconception.”

167. In *Anne Nyathira v Samuel Mungai Mucheru, Diana Gathoni Mucheru, Obadiah Mburu Mucheru & David Njuguna Mucheru* [2016] KECA 758 (KLR), the Court of Appeal, in determining the burial dispute on the appropriate burial site, also cited [Sakina Sote Kaittany & another v Mary Wamaitha \[1995\] KECA 2 \(KLR\)](#), and underlined that there is no property in a dead body. Burying a deceased person does not give any party priority or advantage in relation to inheritance of the deceased's estate.

6.6 Deterring Frivolous Applications by Requiring Bonds to Cover Burial Expenses

168. A review of precedent shows that Kenyan courts, in very few and exceptional cases, impose financial conditions when granting injunctive relief in burial disputes, especially in applications for stay pending appeal. Such conditions are imposed in recognition of the fact that stopping a burial invariably creates financial burdens, including mortuary and preservation costs. On the other hand, burial disputes implicate fundamental rights of a highly personal nature, are culturally sensitive and emotionally charged. Imposing financial conditions may limit a party's access to justice and violate constitutional rights. Courts must therefore balance these competing concerns carefully.

169. In [In Janet Ngubia Githieya v Wairimu Gitau \[2004\] eKLR](#), the court ordered the plaintiff to pay all mortuary fees and all other charges incidental to maintaining the deceased's body from 23 June 2004, when she obtained orders stopping the cremation of the body, until the body was disposed of or the main suit was heard, whichever occurred first. This followed the court's ruling that the plaintiff, a daughter of the deceased, lacked the legal right to bury him under both the common law principle of legal proximity and Kikuyu customary law.

170. In [Daudi v Abdulrahman Hussein \[2008\] KEHC 2672 \(KLR\)](#), where the appellant sought to stay an order granting burial rights to the deceased's husband, the court stated that an order for security for the due performance of the decree had to be considered. After

considering the arguments on this requirement, the court held that, in the circumstances of the case, it was necessary to direct the appellant to deposit money to meet mortuary fees in the event that the appellant lost the appeal. The court considered it fair to fix the estimated amount at KSh 10,000.

171. Consequently, an order of stay of execution pending appeal was granted on condition that the appellant deposited the sum with the Deputy Registrar of the court within 30 days from the date of the order. The court also stated that the costs of the motion would abide the outcome of the appeal, and that in default of compliance with the condition, the application would stand dismissed.

172. In [Evereso v Amba \[2025\] KEHC 14803 \(KLR\)](#), the plaintiff, who was the deceased's husband under Tiriki customary law, claimed that the defendant, the deceased's stepbrother, unlawfully removed and buried her body in Cheptulu without his consent or a valid burial permit. The plaintiff had cohabited with the deceased for 19 years, had four children with her, and had made burial arrangements at their matrimonial home in Koibarak, Nandi County.

173. The High Court held that the plaintiff, as the spouse, had the primary right to bury the deceased. The court ordered exhumation and reburial at Koibarak under Tiriki customs, with the involvement of the police and elders, and directed the defendant to pay all costs of exhumation and reburial due to the unlawful initial burial. Although this was an order as to costs at the conclusion of the matter, it is indicative of the fact that courts may be disposed to ordering a deposit or bond to cover burial costs in appropriate cases.

174. Requiring a bond raises the question whether such a measure would promote the therapeutic approach needed in dealing with the emotive nature of burial disputes. In underlining the emotive nature of burial disputes, Gachoka JA, in *Ontweka & 3 others v Ondieki* [2024] KECA 11 (KLR), commented extensively on the need for judicial officers to inculcate therapeutic jurisprudence in determining burial disputes by ensuring that the words and phrases used in resolving the dispute are sensitive to the mental and physical health of the parties involved. This approach aims to minimize the anti-therapeutic consequences of legal processes while maximizing psychological benefits without abandoning due process.

175. Similarly, in [Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital \(Interested Party\)](#)

[\(Civil Appeal E094 of 2025\) \[2025\] KEHC 12574 \(KLR\)](#), the court, noting the emotive nature of burial disputes, stated as follows on the role of the law:

“This appeal concerns the question of where to lay the deceased to rest when his life choices seem to diverge from the customs of his ancestors. Such disputes, which pit family against family, are among the most difficult that the Court is called upon to adjudicate, as they invariably leave one faction grieving not only their loss but also the outcome of the litigation. In these emotive contests, the law must strive to be a therapeutic agent, providing a just resolution in grounded established principles”.

176. Imposing financial conditions on litigants may sabotage, rather than facilitate, the law’s role as a therapeutic agent.

177. A review of comparative jurisprudence appears not to favour the imposition of financial conditions. The focus is instead on facilitating all parties to be heard before a determination is made.

6.6.1 Judicial Checklist on Requiring Security / Bond in Frivolous Applications

- a. Courts should generally be cautious about imposing financial conditions that may restrict a party’s access to justice in burial disputes, given the constitutional rights implicated and the culturally sensitive nature of such disputes.
- b. However, where a party appears remotely connected to the matter and causes unnecessary delay through frivolous proceedings, the court may order that party to bear all mortuary and preservation costs incurred during the period of unjustified delay.
- c. Where a stay pending appeal is sought, the court may impose a condition requiring the applicant to deposit a sum to meet mortuary fees pending the outcome of the appeal.

178. Legal basis: [Janet Ngubia Githieya v Wairimu Gitau \[2004\] KEHC 2620 \(KLR\)](#); [DAUDI v ABDULRAHMAN HUSSEIN \[2008\] KEHC 2672 \(KLR\)](#)

6.7 Emerging Trends Around Cremation

179. Cremation is an alternative to burial. It is the process of reducing human remains to basic chemical compounds in the form of gases and bone fragments. It is most often performed in a crematorium, although some cultures, such as Hindu communities, practise open-air cremation.

180. Emerging trends in Kenyan jurisprudence on cremation show a willingness to defer to the deceased's expressed wishes over objections based on traditional customs.

6.7.1 Judicial Precedent on Cremation

181. In [*Lee Funeral Services Limited v County Executive Committee Member for Health, Wellness and Nutrition in Nairobi City County Government & another* \(Family Miscellaneous Application E061 of 2026\) \[2026\] KEHC 3613 \(KLR\)](#), the applicant sought orders permitting the exhumation of the remains of Sarah Anne, who had been interred at Lang'ata Cemetery following her death on 15 October 1996, and authorisation to cremate the body in accordance with the wishes of the deceased and her family. The court allowed the application, noting that the request was made by the deceased's widower, who had lawful standing to make decisions relating to the remains of his spouse. Secondly, the deceased's brothers attended court and consented to the proposed exhumation and cremation, meaning that there were no family objections. Thirdly, the applicant demonstrated that it had obtained all necessary statutory approvals from the Nairobi City County Government and the Ministry of Health. The applicant had satisfactorily established the capacity to fulfil the requested orders. Finally, the application was intended to honour the wishes of the deceased and to facilitate cremation.

182. In [*Janet Ngubia Githieya v Wairimu Gitau* \[2004\] eKLR](#), the plaintiff, Janet Ngubia Githieya, being the eldest daughter of the deceased, sought a temporary injunction to prevent the defendant, the deceased's second wife, from proceeding with cremation, arguing that it violated Kikuyu customs. The defendant countered that the deceased had expressly wished to be cremated and that the eldest son, James Njenga Gitau, supported the cremation arrangements. In dismissing the suit against cremation as the mode of disposal of the body, the court held as follows:

"I have not been persuaded that the practice of cremation, which is well recognised worldwide, and which appears to be a hygienic and an environmentally, wholesome mode of disposal of the dead, cannot in these modern times be accommodated under the evolving Kikuyu customary law."

6.7.2 Judicial Checklist on Cremation

183. Although there have not been many cases on cremation, the list below summarises the insights emerging from them:

- a. Cremation is a legally recognised and valid form of disposal of a body under Kenyan law.
- b. Courts increasingly uphold cremation where the deceased clearly expressed that wish, even against objections based on custom.
- c. The dynamic nature of customary law means that cremation may, in contemporary times, be accommodated as consistent with customary practice.
- d. Where a surviving spouse or personal representative with lawful standing seeks cremation with family consent and the requisite statutory approvals, the court should facilitate the application.

184. Legal basis: [In Janet Ngubia Githieya v Wairimu Gitau \[2004\] eKLR](#) ; [Lee Funeral Services Limited v County Executive Committee Member for Health, Wellness and Nutrition in Nairobi City County Government & another \(Family Miscellaneous Application E061 of 2026\) \[2026\] KEHC 3613 \(KLR\)](#).

6.8 Use of Alternative Dispute Resolution (ADR) in Burial Disputes

185. [Article 159\(2\)\(c\)](#) of the Constitution of Kenya mandates courts and tribunals to promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This constitutional principle is discussed in detail in Chapter 1 of this bench book, on constitutional principles undergirding the administration of justice in family matters.

186. Burial disputes are well suited for resolution through ADR mechanisms, which aim to be restorative and culturally appropriate, in place of adversarial, lengthy litigation that may undermine family harmony. Reported cases give a partial and biased picture, as they do not capture disputes that were settled through ADR. Chapter 1 underlined the need for the judiciary to harness its own data to analyze the extent of the use of ADR and to make visible its success. Such data could be disaggregated to show the use of ADR in burial disputes.

187. There are reported cases that illustrate the successful use of ADR in burial disputes. In [MO v MAO \[2024\] KEHC 13558 \(KLR\)](#), the High Court recorded an elaborate consent between two widows of the deceased, which consent was upheld by the Court of Appeal as finally disposing of the burial dispute. ADR also proved successful in [Ongola & 6 others](#)

[v Odhiambo & 7 others \(Civil Appeal E328 & E393 of 2025 \(Consolidated\)\) \[2026\] KECA 260 \(KLR\)](#), and [R L A v F O & another \[2015\] eKLR \[2015\] KEHC 3948 \(KLR\)](#).

188. In some cases, ADR is not considered at all, as the court lamented in [Wanjala v Malaba: Nyukuri \(Interested Party\) \(Civil Appeal E064 of 2025\) \[2025\] KEHC 12020 \(KLR\)](#):

“The term ‘rest in peace’ in burial terminology imply that once a deceased person joins the afterlife, his or her remains are interred as soon as practically possible subject to religious and/or customary burial rites in the hope that departed soul finds peace after death. However, for one Richard Wanjala Malaba, the main character in this burial dispute, the moment of resting in peace has been sadly procrastinated by the litigation instituted by the appellant herein. Whereas this is a family matter, the combatants herein have not deemed it fit to adopt alternative dispute resolution mechanism.”

189. In some cases, ADR attempts fail, as in [Ambiyo v Muhinja \[2023\] KEHC 21865 \(KLR\)](#), where the court had referred the parties to court-annexed mediation but the mediation was unsuccessful.

190. Practice in other jurisdictions, such as England and Wales, underlines the benefits of increasing the use of ADR. Courts in England encourage early legal advice, mediation and negotiated settlement, which can resolve disputes before formal proceedings or, at the very least, focus the issues for urgent determination.

6.8.1 Judicial Checklist on Use of ADR in Burial Disputes

- a. [Article 159\(2\)\(c\)](#) of the Constitution of Kenya, 2010 mandates courts to promote ADR, including mediation and traditional dispute resolution.
- b. Consider referring burial disputes to court-annexed mediation or encouraging family elders to mediate before formal determination. Such ADR interventions should be subject to strict timelines.
- c. Where parties reach a mediated agreement, record and adopt it as a consent order of the court.
- d. Where ADR fails, proceed to determination without unnecessary further delay.

191. Legal basis: [Article 159\(2\)\(c\)](#), Constitution of Kenya 2010; [Wanjala v Malaba; Nyukuri](#)

[\(Interested Party\) \[2025\] KEHC 12020 \(KLR\)](#); [Ambiyo v Muhinja \[2023\] KEHC 21865 \(KLR\)](#); [MO v MAO \[2024\] KEHC 13558 \(KLR\)](#).

6.9 Retention of Bodies by Hospitals on Account of Unpaid Medical Expenses

192. Kenyan case law has established that the detention of a deceased person's body by a hospital or mortuary on account of unpaid medical bills is unlawful, unconstitutional and a violation of human dignity. Courts have held that a dead body is not a merchantable product or asset capable of being used as security or as a lien for a debt. Courts have therefore not hesitated, in appropriate cases, to grant mandatory injunctions for the release of bodies at the interlocutory stage. Courts have also rejected locus standi objections founded on failure to obtain letters of administration, noting that there is no property in a dead body and that interment is not part of the work of a personal representative or executor.

6.9.1 Judicial Precedent on Retention of Bodies by Hospitals over Unpaid Bills

193. In [Mutua v Westlands Specialist Hospital \(Civil Case E010 of 2025\) \[2025\] KEHC 17568 \(KLR\)](#), the applicant sought a mandatory injunction compelling Westlands Specialist Hospital to release the body of his deceased wife, Kanini Mwikali, who had died at the facility on 9 June 2025, leaving an outstanding medical bill of KSh 3,100,000. The hospital refused to release the body without a payment commitment or security, resulting in the body remaining in the mortuary for more than five months. The applicant, a domestic worker of modest means, had paid KSh 740,000 towards the bill but declined to sign a formal repayment agreement. The hospital contended that it had a right to retain the body as leverage for payment and asked the court to compel the applicant to provide a settlement plan backed by security.

194. The court held that there is no property in a dead body and, consequently, no right of lien over human remains, however large the outstanding medical bill may be. The detention of a body to compel payment of a debt is oppressive, unconscionable and repugnant to justice and morality. Importantly, the court clarified that release of a body does not extinguish the hospital's right to recover the outstanding bill through civil litigation; the two obligations are independent of each other. Balancing the rights of both parties, the court issued a mandatory injunction directing release of the body upon payment of half

the outstanding mortuary fees, and further directed the applicant to furnish the hospital with a written commitment to settle the medical bill.

195. This position was reiterated in [*Mutua -vs- Mater Misericordiae Hospital \(2025\) KEHC 13266 \(KLR\)*](#).

196. In that case, the applicants, two college students who were the biological sons of the deceased, Caroline Nthangu Tito, sought release of their mother's body from Mater Misericordiae Hospital. The hospital had detained the body pending payment of an outstanding medical bill of KSh 3,345,784. The deceased had been admitted at the facility for approximately two and a half months before her death on 2 August 2025. The hospital refused to release the body without full settlement of the bill, with mortuary charges continuing to accumulate at KSh 2,000 per day. The applicants, who had been financially dependent on their late mother, were unable to meet the demand and sought the court's intervention.

197. The court held that there is no legal basis in Kenya for a hospital to exercise a right of lien over a deceased patient's remains. While the practice had become widespread, it lacked legal backing and was oppressive, unconscionable and repugnant to justice and morality. The court further held that outstanding medical bills are recoverable as ordinary civil debts through litigation, and that detention of a body does not advance such recovery in any lawful manner. Finding this to be one of the clearest cases warranting a mandatory injunction at the interlocutory stage, the court ordered the immediate release of the body upon payment of mortuary charges only, with the balance of the medical bill to be pursued through civil means.

198. In *Ludindi Venant & Anor -vs- Pandya Hospital* [1998] eKLR, the court stated as follows:

"... with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of Commercial ping-pong. Dead bodies are for interment or cremation or other disposal without delay unless there is a dispute on where to dispose of them or who should do it. The dead ought to 'Rest in Peace' while those who are left alive struggle with the realities of life such as payment of debts. In this particular case there is no dispute as to who should bury the deceased or where he should be buried. The dispute is on a debt for medical services solicited for by someone who is still alive, not the deceased, and there are legal ways of binding such person to pay the debt owed. The dead body of the deceased ought not be part of that equation. For it



199. In [Catherine Juma Omari v Kenyatta University Teaching, Referral and Research Hospital & Another](#) [2025] KEHC 4809 (KLR), the petitioner, a niece of the deceased, Roselyn Mukoko Aura, sought release of her aunt's body from Kenyatta University Teaching, Referral and Research Hospital, which had withheld it pending payment of an outstanding balance of KSh 561,502 on a medical bill. Despite letters from the area chief, the Kenya Medical Practitioners and Dentists Council and the local Member of Parliament, the hospital refused to release the body. The hospital raised two preliminary objections: that the petitioner lacked locus standi for want of letters of administration, and that she had failed to exhaust internal dispute resolution mechanisms before approaching the court.

200. The court dismissed both objections and granted the mandatory injunction. On locus standi, the court held that constitutional petitions aimed at vindicating the rights of another person are not subject to the requirements of the Law of Succession Act, as they do not concern administration of a deceased person's estate. On exhaustion of remedies, the court found that the hospital had neither produced any policy document nor demonstrated that its internal processes had ever been brought to the family's attention. On the substantive issue, the court reaffirmed that a dead body is not a merchantable product, that its detention causes psychological distress and poses a health hazard, and that releasing the body does not extinguish the hospital's right to recover the outstanding bill through other legal avenues. The court stated:

“A dead body is not a merchantable product and other than causing psychological distress to the family and being a health hazard, the Respondents stand to gain nothing from its continued detention. Further, the release of the body of the deceased will not extinguish respondents’ pursuit of any other legal remedies that may be available including the payment of the outstanding bill arising from deceased’s hospitalization.”

6.9.2 Judicial Checklist on Retention of Bodies by Hospitals over Unpaid Bills

201.The courts have consistently held that:

- a. Detention of a deceased person's body by a hospital or mortuary on account of unpaid medical bills is unlawful and unconstitutional.

- b. There is no property in a dead body. A dead body cannot be used as a lien or security for a debt.
- c. Detention of a body to compel payment of a debt is oppressive, unconscionable and repugnant to justice and morality.
- d. Release of a body does not extinguish the hospital's right to recover outstanding medical bills through civil litigation. The two obligations are independent.
- e. A court may grant a mandatory injunction for the immediate release of the body at the interlocutory stage. This is one of the clearest cases warranting such relief.
- f. The applicant need not hold letters of administration. Constitutional petitions to vindicate rights are not subject to the requirements of the Law of Succession Act, as there is no property in a body and it is not part of the estate.
- g. Upon ordering release, the court may, in balancing the rights of both parties, direct payment of mortuary or storage fees accrued while the body was detained, while leaving the underlying medical bill to be pursued through civil means.

202. Legal basis: [Iudindi Venant & Another V Pandya Memorial Hospital \[1998\] KEHC 88 \(KLR\)](#); [Mutua v Westlands Specialist Hospital \[2025\] KEHC 17568 \(KLR\)](#); [Mutua v Mater Misericordiae Hospital \[2025\] KEHC 13266 \(KLR\)](#); [Omari v Kenyatta University, Teaching Referral and Research Hospital & another \[2025\] KEHC 4809 \(KLR\)](#).

6.10 To Exhume or Not to Exhume?

203. Exhumation is the process of disinterring a buried body from a designated burial site, cemetery or other place, whether marked or unmarked. The process is delicate and intricate. Although exhumation may be contrary to many societal and communal traditions, courts have, in rare cases, issued such orders to correct injustice.

204. Kenyan courts recognise a strong presumption that a deceased person's remains should lie undisturbed, reflecting respect for dignity, culture and public morality. However, courts retain broad discretionary power to order exhumation where the circumstances make it desirable or imperative in the interests of justice. The cases in this area show that exhumation will be ordered only where it is necessary, proportionate and the most reliable means of achieving justice, particularly where the pursuit of truth outweighs the presumption of permanence and societal discomfort.

6.10.1 Judicial Precedent on Exhumation

205. In [HCK v EJK \[2008\] KEHC 3895 \(KLR\)](#), the court affirmed that it would not hesitate to order disinterment in suitable cases, particularly where good reasons exist and justice demands it. In that case, the applicant sought orders to exhume the deceased's remains for purposes of DNA testing, claiming that her child was a biological child of the deceased and therefore a dependant entitled to benefit from the estate. The court declined to grant the order, holding that exhumation was a draconian and unpleasant remedy that could not be made in the absence of sufficient evidence establishing a prima facie link between the deceased and the child. The court emphasised that while the best interests of the child were paramount, those interests must be grounded in credible facts and proper procedure. The applicant had not, during the deceased's lifetime, invoked the appropriate legal framework, such as proceedings under the Children Act, through which the court might have considered protective relief in a suitable case. Ultimately, the court held that no reasonable court would compel DNA testing, let alone order exhumation, where the material presented did not disclose circumstances connecting the deceased to the child so as to justify disturbing the remains.
206. In [re Estate of Peter Muraya Chege alias Muraya Chege \(Deceased\) \[2019\] KEHC 1445 \(KLR\)](#) the applicants, as administrators of the estate, sought orders compelling the respondents to present themselves at the Government Chemist for DNA testing after the objector claimed that her children were biological children of the deceased and therefore beneficiaries of the deceased's estate. The court held that where paternity is seriously contested and central to succession, it must be resolved by the best available scientific method. It found that sibling or secondary DNA comparisons were not foolproof in the absence of verified biological links, and that the most reliable sample was one obtained directly from the deceased. Consequently, the court concluded that exhumation of the deceased's remains was necessary to extract DNA samples capable of conclusively determining the paternity dispute.
207. In [In re Estate of Jacob Mwalekwa Mwambewa \(Deceased\) \[2021\] KEHC 12533 \(KLR\)](#) the petitioners applied for letters of administration, asserting that the deceased had died childless. The objector, however, claimed to be the deceased's only biological son, making paternity the central issue in the succession dispute. The court held that establishing the truth regarding paternity was fundamental to determining entitlement to the estate, and that DNA testing was the most conclusive method of resolving the controversy. Although

acknowledging the general reluctance to disturb human remains, the court found that the pursuit of truth and the just determination of the succession cause outweighed the discomfort associated with exhumation. Consequently, it granted orders for exhumation of the deceased's body to obtain samples for DNA analysis.

208. Courts consistently stress that exhumation is a drastic and exceptional remedy, to be avoided where less intrusive and scientifically sound alternatives are available, such as sibling DNA testing or samples from personal effects. Comparative authority from South Africa, such as [Morwamakoto and Others v Radingwana and Others](#) further illustrates that courts weigh urgency, evidential utility, statutory compliance, customary practice, and public and cultural sensitivities.

6.10.2 Judicial Precedent on Alternative Modes of DNA Extraction as Opposed to Exhumation

209. Alternatives to exhumation for DNA testing focus on the use of retained tissue samples, personal items or, more commonly, familial kinship testing, including sibling DNA testing, as credible options for establishing paternity, given the magnitude of exhumation and the high threshold for granting such an order. These methods are considered less intrusive and effective in determining paternity.

210. In [Too & another v Too & 15 others \[2026\] KEHC 2508 \(KLR\)](#), the court relied on sibling DNA confirming that the parties were half-siblings based on paternity, and admitted a party as a beneficiary in the proceedings. The court relied on a pronouncement by the Court of Appeal, which had been called upon to stay execution of the order for admission, as follows:

“Regarding the contention by the Applicants that the Court failed to establish a nexus between the 1st Respondent and the deceased, it is our view that there was ample evidence that the 1st Respondent had taken the initiative to have her DNA sample tested against that of the 5th Respondent who had been confirmed as child of the deceased and the said tests had indeed confirmed that the 5th Respondent was his biological half sibling on account of sharing the same father, a fact that the Applicants have again not contested”

211. The case of [Wilfred Koinange Gathiomi v Joyce Wambui Mutura & another \[2016\] KEHC 7005 \(KLR\)](#) involved siblings. The court, after taking note of cited authorities acknowledging that DNA testing is intrusive and interferes with the right to privacy, nonetheless found a basis for ordering DNA testing. It observed that the question of paternity was

central to the dispute at hand, namely, whether the 1st respondent was a beneficiary of the deceased's estate. The court noted that DNA testing was the only way to resolve the paternity issue, which the applicant had raised but was then reluctant to pursue to its logical conclusion.

212. Similarly, the court stated that, in the instant case, as between the applicant's inconvenience and the parties' mutual interest in conclusively determining whether they were siblings for purposes of distribution of the deceased's estate, the pursuit of truth outweighed the inconvenience.

213. [*In re Estate of JNM \(Deceased\)* \[2025\] KEHC 12472 \(KLR\)](#), three applicants, EWN, EWN and VMN, petitioned for letters of administration to preserve the deceased's estate, prompting a dispute over the paternity of two children, AGN and AGN2, claimed by IKM, who alleged a customary marriage with the deceased in 2008. An application was made to exhume the deceased's remains for purposes of DNA testing. The court declined to grant the order, holding that exhumation was unnecessary where alternative and less intrusive scientific methods were available. It directed that sibling DNA testing be conducted using samples from the applicants and the children in question. The court further observed that modern technology permits DNA extraction from personal effects such as a shaver, hairbrush or toothbrush, thereby avoiding disturbance of the grave. Emphasising respect for customary norms and the principle that a deceased person should rest in peace, the judge held that exhumation will only be sanctioned where it is strictly necessary and no other reliable means of establishing the truth exists.

214. In [*re Estate of JMK \(Deceased\)* \[2021\] KEHC 2767 \(KLR\)](#), the applicant, who was also an objector in the succession proceedings, sought orders to unseal and open the grave of the deceased and exhume his remains for purposes of obtaining DNA samples. The court declined the request, emphasising that exhumation is a drastic and culturally sensitive measure that may prejudice the family and community, and should therefore be approached with caution. While affirming that the court retains discretion to order disinterment where the circumstances make it desirable and imperative to meet the ends of justice, the court found that, in the case before it, less intrusive and scientifically viable alternatives were available. Accordingly, the court directed that DNA testing be undertaken using samples from close biological relatives rather than disturbing the deceased's remains.

6.10.3 Exhumation of Bodies to Secure the Commercial Value of Family Land

215. The [Public Health Act](#) under [section 146](#) provides that it is illegal to exhume any human body or remains from an authorised cemetery or other burial ground without a permit granted by the Cabinet Secretary responsible for health. Such a permit is strictly granted to legal personal representatives, next of kin or their authorised agents. Further, [Section 147](#) allows the Cabinet Secretary to order the removal of bodies for public works or public purposes, subject to mandatory procedures, including publication of a notice in the Kenya Gazette and notice to families, particularly in authorised cemeteries.

216. It is an offence to exhume a body contrary to these provisions, or to fail to follow the precautions set by the permit.

217. In [Milanga v Attorney General \[2022\] KEHC 16654 \(KLR\)](#), an applicant sought to exhume a body to “free up dead capital” for sale, arguing that the land lacked economic value while the grave remained on it. The applicants argued that the deceased had been buried on property which now fell within a commercial zone, and that the deceased’s family intended to commence commercial development. The court dismissed the application as lacking merit, emphasising that even where there are meritorious reasons for exhumation, strict compliance with Section 146 and 147 of the Public Health Act is mandatory.

6.10.4 Comparative Jurisprudence on Exhumation

218. Kenya’s law concerning exhumation borrows directly from the law in England and Wales, which is defined by a strong presumption of permanence. The Burial Act, 1857 makes it a criminal offence to disturb human remains without lawful authority, typically requiring a Ministry of Justice licence or, for consecrated ground, authority from the Church. This principle was reinforced in *Re Blagdon Cemetery [2002]*, where the court affirmed that burial is intended to be final, with exhumation permitted only in exceptional circumstances.

6.10.5 Judicial Checklist on When Exhumation May be Ordered

219. The following grounds have emerged from judicial precedent as justifying an exhumation order and may guide a court:

- a. Where the body was buried pursuant to an order made without jurisdiction, and is therefore void ab initio, and reburial is required.
- b. Where a party claiming an interest in succession requires DNA confirmation of paternity or biological relationship, and there is no less intrusive alternative.

- b. DNA from personal effects: extracting DNA from items such as the deceased's shaver, hair, toothbrush or other biological traces.
- c. DNA from biological relatives: testing against close biological relatives of the deceased.

224. Exhumation for DNA purposes should only be ordered where these alternatives are shown to be unavailable, unreliable or scientifically insufficient to resolve the paternity or biological relationship question.

225. Legal basis: [In re Estate of JNM \(Deceased\) \[2025\] KEHC 12472 \(KLR\)](#); [In re Estate of JMK \(Deceased\) \[2021\] KEHC 2767 \(KLR\)](#); [Wilfred Koinange Gathiomi v Joyce Wambui Mutura & another \[2016\] KEHC 7005 \(KLR\)](#); [Too & another v Too & 15 others \[2026\] KEHC 2508 \(KLR\)](#)

6.10.8 Judicial Checklist on Threshold for DNA Testing in Succession Proceedings

226. Exhumation for DNA extraction should not be ordered merely on the basis of an allegation. The applicant must present credible evidence establishing a prima facie connection between the deceased and the claimant.

227. The court must be satisfied that paternity or biological relationship is central to the determination of the succession matter and cannot be resolved by any other means.

228. The best interests of any child involved are paramount, but must be grounded in credible facts and the proper procedural framework, including the Children Act where applicable.

229. Legal basis: [HCK v EJK \[2008\] KEHC 3895 \(KLR\)](#); [In re Estate of Peter Muraya Chege alias Muraya Chege \(Deceased\) \[2019\] KEHC 1445 \(KLR\)](#).

6.10.9 Restraining Burial on Account of Unpaid Dowry

230. Failure to pay dowry is not, on its own, a legal ground for stopping a burial. Rather, courts consider dowry as evidence in determining whether a valid customary marriage existed. If a person's claim to bury the deceased depends on spousal status under customary law, and the person cannot prove the marriage because dowry was not paid, the claim fails for lack of proof of marriage. It does not fail because dowry is owed as a debt. In short, burial rights depend on a claimant's legal relationship to the deceased, and dowry is only one evidentiary factor in proving that relationship. A claim that dowry is owed, therefore, cannot by itself support an application to restrain burial.

6.10.10 Judicial Precedent on Dowry and Burial Disputes

231. In [Vincent Aliero Ayumba v Livingstone Eshikuri Liakayi \[2017\] KEHC 33 \(KLR\)](#) a man claimed the right to bury a woman whom he alleged was his wife under Luhya, specifically Bunyore, customary law. The respondents disputed his claim on the ground that the appellant had not paid dowry in accordance with Luhya customary law, and that there had been no dowry negotiations. Although the appellant had given KShs.8,000 to the deceased's parents, the court found that this was merely a gift because there had been no formal dowry negotiations in the presence of elders, and that it did not amount to *bukhwi* under Luhya custom. The trial magistrate dismissed his burial claim, and the High Court upheld the decision, finding that in the absence of dowry payment, there was no valid marriage and, therefore, no right to bury.
232. In *PZG & 2 others v TMT* [2019] KEHC 4212 (KLR), a Giriama burial dispute, one ground of appeal was that the respondent had failed to pay dowry or bride price for the mother of the deceased, and was therefore disentitled to any burial rights, even though he had performed the *kadzama* ceremony, involving the payment of palm wine to recognise him as the father of the child. The trial magistrate accepted this ceremony as sufficient to entitle him to bury the deceased, his child. The High Court upheld the magistrate's finding.
233. The succession dispute in [Joyce Atemo v Mary Ipali Imujaro \[2003\] KECA 170 \(KLR\)](#) is instructive on dowry and burial. The deceased's clan rushed to pay dowry after death but before burial, as dowry had not been paid during the deceased's lifetime. The elders took the position that this post-death payment validated the marriage, recognised the appellant as the lawful wife, and enabled her to participate in the burial rites as such. The Court of Appeal recognised this Teso custom in the succession dispute.
234. The bottom line is that non-payment of dowry does not, in isolation, furnish a ground for stopping a burial. It is, however, relevant evidence in determining whether a customary marriage was validly contracted. If no valid marriage is proved, the claimant loses priority in the burial hierarchy, and the burial right passes to the person who is next in that order or who best proves legal proximity. The court should not allow dowry disputes to be used as a lever to indefinitely delay burial, as that would be contrary to the principle of prompt and dignified disposal that runs through burial disputes jurisprudence.

7.0 AREAS FOR REFORM AND LESSONS FROM OTHER JURISDICTIONS

7.1 Framework Law on Burial

235. Legislation on burial is long overdue, as stated by the Court of Appeal bench that decided the S.M. Otieno case in 1987. Although the need for legislation is clear, legislating burial in Kenya is unlikely to be a straightforward logistical task comparable to that proposed by the England and Wales Law Commission's 2026 report,¹⁹⁸ which recommends a single, coherent statutory framework regulating burial grounds through measures such as the standardisation of burial records. There may be some overlap in the broad concerns that animate reforms in both contexts, including demographic pressure on burial space, the need to accommodate religious and cultural diversity, and the need to develop a system capable of balancing respect for the dead with practical necessity.
236. The divergence arises largely because Kenyan burial disputes are made more complex by the challenge of upholding constitutional rights within a reality defined by legal pluralism. Kenyan courts routinely confront not only the question of who decides, but also which normative system applies. Burial in Kenya is not merely administrative; it is deeply tied to identity, land, belonging and community. Reforms must therefore integrate, rather than displace, customary norms within a constitutional framework.
237. For this reason, it may be too ambitious to aim for anything more than a minimalist framework law. Such a law would establish the foundational principles governing burial disputes, including the order of priority in burial rights, the legal status of the wishes of the deceased, and the role of personal law, while preserving sufficient judicial discretion to accommodate the diversity of Kenya's communities and the unique facts of each case. Such a framework would bring much-needed certainty and consistency to an area of law that touches on some of the most profound moments in human experience, without displacing the sensitivity and humanity that these disputes invariably demand.
238. A framework law could also introduce a regulatory framework for governing burials, including rationalising records and addressing the emerging practice of family burial plots in light of land use law and regulations.

¹⁹⁸ <https://lawcom.gov.uk/publication/burial-and-cremation-final-report/> accessed on 24.04.2026



7.2 Judicial Measures in the Interim

240. Pending such a framework law, the judiciary could, in the meantime, develop a case management tool for specialised, fast-track dispute resolution mechanisms, such as mediation and AJS under certificate of urgency, to handle burial disputes. Rule 3(1) of the Public Health (Public Mortuaries) Rules, 1991, subsidiary legislation under the Public Health Act, Cap. 242, establishes a clear statutory expectation that human remains should not be retained in public mortuaries beyond ten days without interment, with penalties accruing thereafter and disposal processes commencing after 21 days. Although framed as a public health provision, it reflects a broader legislative judgment on urgency, dignity and the timely resolution of matters concerning the dead.

241. Although courts in comparable jurisdictions resolve burial disputes with urgency, none appears to have anchored that urgency to a fixed legal timeline. Rule 3(1) therefore offers Kenya an existing statutory standard that can be adopted as a procedural benchmark to guide courts in delivering determinations within a defined and dignified timeframe.

242. Courts handling burial disputes should adopt this 10-day norm as a case management yardstick. This approach aligns with the constitutional imperatives of human dignity under Article 28 and the obligation to administer justice without delay under Article 159(2)(b), and responds to the well-recognised harm caused by prolonged retention of bodies pending litigation.

7.2.1 Recommended Expedited Framework for Practice Directions

243. The following expedited framework may be considered for practice directions:

- a. **Day 0-3:** Filing of an urgent application as of right, with interim preservation orders issued where necessary.
- b. **Day 3-5:** Immediate notification of all affected parties and referral to structured ADR, mediation or AJS mechanisms where feasible.
- c. **Day 5-8:** Inter partes hearing on affidavit evidence, with the scope of the hearing tightly confined to the legally decisive questions.

- d. **By Day 10:** Delivery of a reasoned ruling determining who has the right and duty to bury the deceased, the place of burial, and the rites or procedures to be observed.
- e. **Post-ruling, within 21 days of death:** Burial to be effected in compliance with the court order.

244. This framework does not require a full trial within 10 days. Its purpose is to prioritise determination of the core burial question, while reserving ancillary issues, including succession, paternity, DNA testing or property-related claims, for subsequent proceedings where necessary.

245. Implementation note: Pending legislative codification, courts may adopt this approach through practice directions or active case management under existing procedural powers.

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9.0 REFERENCES FOR FURTHER READING

1. Agbi, Samuel E, 'What is Personal Law? (Academia.edu undated) https://www.academia.edu/20065275/what_is_personal_law accessed 8th January, 2026.
2. Atieno-Odhiambo ES and David W. Cohen, *Burying SM: the Politics of Knowledge and the Sociology of Power in Africa* (J. Currey, 2006);
3. Conway, Heather 'Whose Funeral? Corpses And The Duty To Bury' (2003) 54 (2) *Northern Ireland Legal Quarterly* 183.
4. Griffiths, John, 'What is Legal Pluralism?' (1986) 18 (24) *The Journal of Legal Pluralism and Unofficial Law*.
5. Harden, Blaine, 'Battle for the Body', in Blaine Harden (ed) *Africa: Dispatches from a Fragile Continent* (Harper Collins, 1992) 95;
6. Hashim, Abdulkadir, 'Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation' (2005) 25 (3) *Journal of Muslim Minority Affairs* 449.

7. International Council for Human Rights Policy (ICHRP), 'When Legal Worlds Overlap: Human Rights, State and Non-State Law' (2009) <https://reliefweb.int/report/world/when-legal-worlds-overlap-human-rights-state-and-non-state-law-0> accessed 8th January, 2026.
8. Mancuso, Salvatore, 'African Law in Action' (2014) 58 1 *Journal of African Law* 12.
9. Muinzer, Thomas L., The Law of the Dead: A Critical Review of Burial Law, with a View to its Development (2014) 34 (4) *Oxford Journal of Legal Studies* 791-818.
10. Ngira, David Otieno, 'Re-examining Burial Disputes in Kenyan Courts through the Lenses of Legal Pluralism' (2018) 8 (7) *Oñati Socio-legal Series* 1021 <https://doi.org/10.35295/osls.iisl/0000-0000-0000-0982> accessed 8th January 2026.
11. Ngunjiri, 'Burial disputes in Kenya, a Case for Legislation', https://erepository.uonbi.ac.ke/bitstream/handle/11295/11784/Ngunjiri_Burial%20disputes%20in%20Kenya.pdf?sequence=2&isAllowed=y
12. Njogu, Roseline K., Patricia Kameri-Mbote and Nkatha Kabira, 'The Wife of Law: Equality and Its Discontents', (2023) *East African Law Journal* 178-210 (hereinafter Njogu and others).
13. Nwabueze, Remigius Nnamdi, 'Legal Control of Burial Rights' (2013) 2 (2) *Cambridge Journal of International and Comparative Law* 196.
14. Ojwang, Jackton B., JN Kanyua Mugambi, and G. O. Aduwo, *The SM Otieno Case: Death and Burial in Modern Kenya* (University of Nairobi Press, 1989).
15. Okech, Awino, 'Burying SM: Simply Complex' Available at <<https://www.pambazuka.org/burying-sm-simply-complex>> accessed 8th January 2026.
16. Stamp, Patricia, 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya' (1991) 16(4) *Signs: Journal of Women in Culture and Society* 808.

1.0 INTRODUCTION

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4. PADVA similarly defines “violence” expansively to include physical, verbal, sexual, emotional, psychological and economic abuse. It also encompasses practices often rationalised as cultural, including child and forced marriage, female genital mutilation, virginity testing, widow cleansing and forced wife inheritance. PADVA’s definition of violence goes beyond forms of violence recognised as criminal under Kenya’s Penal Code. It includes intimidation, stalking and interference by in-laws.

2.0 CONSTITUTIONAL FRAMEWORK FOR PROTECTION FROM DOMESTIC VIOLENCE

5. Protection from domestic violence is anchored in [Articles 28](#) and [29\(c\)](#) of the Constitution of Kenya, 2010. [Article 28](#) recognises the inherent dignity of every person and the right to have that dignity respected and protected. [Article 29\(c\)](#), on freedom and security of the person, guarantees every person the right not to be subjected to “any form of violence from either public or private sources.” These provisions are reinforced by the guarantee of equality and equal protection and benefit of the law under [Article 27\(1\)](#), the right to fair administrative action under [Article 47](#), and the right of access to justice under [Article 48](#). Together, these provisions place an obligation on state agencies to ensure effective legal and administrative responses in domestic violence matters. In addition, Article 53(1) (d) specifically protects children from violence. It guarantees every child the right to be protected from “abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment...”

3.0 RELEVANT INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

6. The African regional human rights system provides a more explicit and robust framework on domestic violence than the general international human rights system.

3.1 [The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa \(Maputo Protocol\)](#)

7. The Maputo Protocol specifically addresses gender-based violence. As a treaty focused on women’s rights, it addresses violence from the perspective of women and girls. This differs from PADVA, which addresses violence in domestic relationships generally, irrespective

of the sex or gender of the complainant, victim or survivor. The Maputo Protocol contains strong provisions under Article 3 on dignity, Article 4 on the right to life, integrity and security of the person, and Article 5 on the elimination of harmful practices.²⁰⁰

8. Article 3(4) calls upon states to adopt appropriate measures to protect women from all forms of violence, particularly sexual and verbal violence. Article 4(2) is particularly detailed, with eleven sub-clauses identifying distinct forms of violence that threaten women's bodily integrity and security of the person. The article underlines the state's duty to address violence whether it occurs in the private or public sphere, and to invest in measures that not only punish perpetrators, but also provide information, rehabilitation and reparation for victims and survivors. This is part of what PADVA is intended to achieve, although its implementation is hampered by under-investment of resources. For instance, Kenya has no state-funded safe houses to provide alternative temporary accommodation, nor subsidized medical care specifically for persons affected by domestic violence.

3.2 African Union Convention on Ending Violence Against Women and Girls (CEVAWG)

9. Against the background of the Maputo Protocol, in February 2025, the African Union adopted the Convention on Ending Violence Against Women and Girls (CEVAWG). CEVAWG is the first binding regional treaty focusing exclusively on ending gender-based violence. Its aim is to 'prescribe an enabling environment for ending violence against women and girls by establishing and strengthening coordination mechanisms among government agencies, civil society organizations, and international partners.' Like the Maputo Protocol, it emphasizes norm transformation toward valuing the dignity of women and girls.
10. CEVAWG calls for the delivery of integrated services to victims and survivors, including counselling and therapeutic programmes (Article 4). It also emphasizes the collection and use of disaggregated data to inform policymaking, monitoring and evaluation.
11. CEVAWG goes further than the Maputo Protocol by expressly including violence perpetrated in cyberspace. PADVA refers to violence perpetrated in cyberspace only indirectly in its definition of "harassment", which includes contacting or attempting to contact the complainant through electronic means (section 2). Arguably, PADVA may also address

²⁰⁰ For legal commentary on each of these articles of the Maputo Protocol, see Annika Rudman, Celestine Nyamu Musembi & Tresor Makunya (eds), [The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary](#) (PULP, 2023).

such conduct as psychological abuse or under its omnibus clause defining violence as “any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person.”

3.3 African Charter on the Rights and Welfare of the Child

12. The African Charter on the Rights and Welfare of the Child, often referred to as the African Children’s Charter, contains several provisions relevant to violence in family settings. Article 16 requires states to ensure that every child is protected from torture and abuse while in the care of parents, guardians, school authorities or any other person who has care of the child. Such abuse may be physical, mental, sexual, or may take the form of neglect or maltreatment. The African Children’s Charter also addresses violence under Article 21, which deals with customs and practices that harm a child’s health, life, dignity or welfare. Article 27, on protection from sexual exploitation, is also relevant, as is Article 29 on abduction and trafficking, including by parents and guardians.

3.4 United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW)

13. As noted at the beginning of this section, the international legal framework is not as explicit as the African regional framework. CEDAW, the principal international treaty on women’s rights, does not contain a dedicated article on violence. The CEDAW Committee has addressed this gap through General Recommendations that elaborate the link between gender-based violence and the denial of rights guaranteed under CEDAW.²⁰¹

3.5 UN Declaration on the Elimination of Violence against Women (DEVAW)

14. DEVAW is not legally binding. It expresses states’ commitments and aspirations towards legal and other responses to address violence against women. It was adopted by the UN General Assembly in 1993. Its definition of violence covers physical, sexual and psychological violence, whether occurring in private or in public. It links violence against women to the violation or impairment of a broad range of human rights, including the right to life, equality, liberty and security of the person, equal protection of the law, freedom from discrimination, the right to health, the right to favourable conditions of work, and freedom from torture and degrading treatment (Article 3). These rights have analogues in Kenya’s

²⁰¹ See, for example, [General Recommendation No.19 \(INT_CEDAW_GEC_3731_E\)](#).

constitutional framework. DEVAW calls upon states, within their available resources, to take diverse measures to eliminate violence against women.

4.0 JURISDICTION IN DOMESTIC VIOLENCE CASES

15. PADVA vests jurisdiction in the Resident Magistrate's Court ([section 24\(1\)](#)). Applications for protection orders under PADVA are brought before a magistrate's court,²⁰² with appeals lying to the High Court ([section 30](#)). As the court emphasised in [Eunice Kighenda Ziro -v- Captain Isaac Ochieng Onyango & another \[2025\] KEHC 17582 \(KLR\)](#), vesting jurisdiction in the Resident Magistrate's Court does not oust the jurisdiction of a magistrate's court of higher rank, particularly where the value of the subject matter exceeds the pecuniary jurisdiction of the Resident Magistrate's Court. The spirit of [section 24\(1\)](#) is to ensure accessible justice. The case was an appeal against a protection order issued by the Chief Magistrate's Court under PADVA.
16. The reference to the Resident Magistrate's Court under [section 24\(1\)](#) should not be understood as imposing a territorial limitation either, as the High Court held in [SNN -v- ANN \[2024\] KEHC 9927 \(KLR\)](#). This was an appeal against a protection order issued by the Senior Principal Magistrate's Court at Gatundu. The order required the appellant to refrain from "physically abusing the applicant and her children, harassing the applicant, whether by stalking them or picketing outside their matrimonial home..." One of the grounds of appeal was that the court at Gatundu lacked territorial jurisdiction, and that the matter ought to have been filed in Ruiru, where the matrimonial home was located and where the applicant had previously filed for divorce and caused the appellant to be criminally charged with assault. The High Court observed that, although the appellant had raised territorial jurisdiction as a preliminary objection before the trial court, he did not pursue it even after the court directed him to file a formal application. The court cited [section 16](#) of the Civil Procedure Act, which provides: "No objection as to the place of jurisdiction shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice."
17. The court concluded that the appellant was precluded from raising the issue on appeal. In addition, since the courts at Gatundu and Ruiru were both within the same county, that ground of appeal carried no weight.

²⁰² See Form PADV 6, Protection Against Domestic Violence Rules, 2020.

18. Although the High Court may entertain a PADVA application in the first instance under its original and unlimited jurisdiction, it would be imprudent to do so, as “the same would amount to denying an aggrieved party one stage in the appeal process” ([Robert Chesang -v- M.P.O. Chesang \[2018\] KEHC 3582 \(KLR\)](#)).

5.0 KEY CONCERNS ARISING FROM PADVA

19. The issues raised for discussion in relation to PADVA are:

- Scope of PADVA;
- Overlap in courts’ exercise of jurisdiction;
- PADVA’s interface with other laws;
- Evidentiary threshold for interim protection orders;
- Exclusive occupation orders and the property rights challenge.

5.1 Scope of the Protection against Domestic Violence Act (PADVA)

20. PADVA is framed to provide a broad legal basis for responding to domestic violence. It does this by defining, in expansive terms, who has standing to bring an application for relief, the types of relationships classified as “domestic”, and the types of conduct that constitute “violence”.

21. PADVA adopts a broad approach to locus standi. An application may be brought by the affected person or by the applicant’s representative. [Section 2](#) defines “representative” broadly to include a police officer, a social welfare officer, an employer of the applicant, a child’s guardian, a neighbour, a co-worker, a medical practitioner, a counsellor, a probation officer, an NGO concerned with the welfare of victims of domestic violence, a religious leader, a community elder, any other person or class of persons specified by law, or a relative. [Section 5 \(2\)](#) defines “relative” to mean a parent, grandparent, step-parent, father-in-law or mother-in-law, uncle, aunt, uncle-in-law or aunt-in-law, nephew, niece or cousin. It may be presumed that closer relationships falling within the category of “family members” under section 5 (1) may also serve as an applicant’s representative.

22. The scope of relationships that qualify as “domestic” is also wide ([section 4](#)). It goes beyond an existing nuclear family relationship to include persons who were previously



married to each other, persons living in the same household regardless of family relationship, persons engaged to be married, persons who have had a child together, and persons in a “close personal relationship”. In the last three categories, the persons need not be sharing the same residence. A close personal relationship excludes an employer-employee relationship, but the statute invites the court to examine the nature and intensity of the relationship by reference to factors such as the amount of time spent together and the places where such time is spent.

23. Similarly, the scope of conduct that amounts to “violence” is framed broadly. [Section 3](#) lists a wide range of conduct amounting to violence, including physical, sexual, verbal, emotional, economic and psychological abuse, as well as stalking. It gives particular emphasis to abuse directed at children, including causing a child to witness, or placing a child at risk of witnessing, abuse of a person with whom the child has a domestic relationship. [Section 3](#) also lists forms of abuse that may arise from practices ostensibly sanctioned by custom, including child and forced marriage, female genital mutilation, forced wife inheritance, interference by in-laws, sexual violence within marriage, virginity testing and widow cleansing.
24. The reliefs under PADVA are both civil and criminal in nature. This is not unique to PADVA; a similar approach is also evident under the Children Act.

5.2 Overlap in Courts’ Exercise of Jurisdiction

25. Proceedings under PADVA may run concurrently with proceedings under other statutes. Litigants may seek relief under PADVA even where proceedings are pending under the Children Act or the Marriage Act. [Section 3\(6\)](#) expresses this concurrence of jurisdiction as follows: “Conduct constituting domestic violence does not by that reason alone cease to constitute an offence under any other law and any such conduct may, despite this Act, be dealt with in accordance with any other law.”
26. A PADVA application may be made in the context of an ongoing criminal prosecution against the alleged perpetrator under other laws addressing various forms of violence. [Penal Code](#), [Sexual Offences Act](#), the [Prohibition of Female Genital Mutilation Act](#) or the [Children Act](#). The rationale behind PADVA was that ordinary criminal prosecution did not sufficiently accommodate the relational dynamics of domestic violence. PADVA therefore enables an approach that responds to those dynamics by taking the position of the victim or survivor into account.

27. A PADVA application may also arise in the context of ongoing matrimonial proceedings. [Section 84\(1\)](#) of the Marriage Act gives the court power to “order a party to refrain from molesting a spouse or former spouse.” An application for a protection order may also arise in the course of proceedings before a children’s court. It may also be brought as a stand-alone civil remedy, independent of any other ongoing proceedings. The civil remedy of compensation is provided for under [section 32](#). In light of this, jurisdiction under PADVA is simultaneously civil and criminal in character, and appeals from magistrates’ courts may cut across the various administrative divisions of the High Court.

28. For this reason, cases relevant to domestic violence may be difficult to research. Many applications are filed before magistrates’ courts and remain unreported. In some instances, PADVA issues are embedded within family, children, criminal or constitutional proceedings.

5.2.1 Judicial Precedent on Overlap in Jurisdiction in Domestic Violence Cases

29. The cases discussed below highlight issues of jurisdiction in matters involving PADVA. A notable trend is that courts have had to reiterate the concurrent and overlapping nature of jurisdiction under PADVA.

30. In [MJK-v-FML \[2019\] KEHC 10908 \(KLR\)](#), an application was filed before the High Court for a temporary injunction restraining the respondent from dealing with property claimed as matrimonial property, pending determination of the suit. There was a concurrent miscellaneous application before the magistrate’s court seeking a protection order against the respondent under PADVA, as well as an order for the applicant’s exclusive occupation of the residence she claimed was the matrimonial home. There was also a pending divorce petition before another court. While all three suits were pending, the applicant was violently evicted from the residence.

31. On the issue of concurrent proceedings under different statutes, the High Court stated: “Concerning similar matters pending before Milimani Magistrate’s Court ... touching on protection against domestic violence and exclusion of the respondent from the suit premises, the same are quite distinct in terms of the prayers sought. This court has no jurisdiction to entertain any prayers touching on claims of domestic violence and the issue of exclusive occupation by any one party in the suit premises within the meaning of [Section 3](#) of the Protection against Domestic Violence Act. That is for the magistrate’s court to determine under [Section 24](#) of the said Act.” [para 45]

32. The court further stated:

[“Section 15](#) of the Protection against Domestic Violence Act provides that a court shall not decline to make protection orders simply because of the existence of other proceedings relating to the parties. My mandate in this case is to preserve the property in question and also protect parties’ beneficial and proprietary interest on the said property by giving them equal opportunity to prove their stake in the said property. It is not for me to dictate who should visit who or who should not stay in the house based on allegations of domestic violence. The proceedings pending before the magistrate’s court do not affect the orders of this court in so far as preservation and division of matrimonial property is concerned.” [para 46]

33. In [MWK-v-AWW \[2022\] KEHC 15689 \(KLR\)](#) the defendant objected to the plaintiff’s application under PADVA, arguing that the issues raised were res judicata because cruelty had already been argued in divorce proceedings before the Chief Magistrate’s Court. The defendant contended that the plaintiff ought instead to have appealed against the judgment in the divorce case. The court dismissed this objection. [Section 3\(6\)](#) of PADVA provides that conduct constituting domestic violence may be dealt with under PADVA without prejudice to the same conduct being dealt with under any other relevant law.

34. [Eunice Kighenda Ziro -v- Captain Isaac Ochieng Onyango & another \[2025\] KEHC 17582 \(KLR\)](#) was an appeal against a protection order issued by the Chief Magistrate’s Court under PADVA. The order declared that the appellant’s conduct in withholding KShs 15 million from an insurance cover intended for the first respondent’s critical care amounted to economic and domestic abuse. The order also restricted the appellant, who was the respondent’s domestic partner, to visiting the first respondent only under the supervision of professional caregivers. The appellant challenged the court’s jurisdiction, arguing that the matter fell within the purview of the Retirement Benefits Act and ought to have been handled by the Retirement Benefits Tribunal. The appellant also argued that the matter could not be determined through an application brought under PADVA. The court held that the KShs 15 million was not paid out of a pension scheme but from an insurance policy, and that the Retirement Benefits Act was therefore not relevant. The court upheld the finding of economic abuse under sections 3 and 29 of PADVA and ordered the release of the funds to the first respondent.

35. [Mutisya-v-Kithu \[2024\] KEHC 8104 \(KLR\)](#) was an appeal against an interim protection order issued by a Principal Magistrate. The appellant was ordered to refrain from physically, emotionally, verbally, sexually or psychologically abusing or threatening the respondent,

and to communicate with her only through her advocate. The High Court noted that, since the order in place was interim rather than final, the appellant ought not to have proceeded by way of appeal. Instead, the appellant should have moved the subordinate court to proceed to full determination of the matter by taking oral evidence. Noting that the parties also had a pending matter before the Children's Court, the High Court dismissed the appeal and ordered the subordinate court to hear the matter within three months.

36. [EJO-v-RKO \[2022\] KEHC 12853 \(KLR\)](#) was an application challenging the issuance of a protection order by a Resident Magistrate under PADVA. The respondent had applied for and obtained the protection order while the parties were engaged in custody and maintenance proceedings before the Children's Court. The applicant argued that the protection order effectively denied him access to the child, despite an order of the Children's Court granting him access. The court observed that the protection order restrained the applicant from "abusing, intimidating or in any way accessing and/or harming/damaging the Respondent or her property." The order made no reference to the applicant's right of access to his son. The court held that the protection order did not, in any way, bar the applicant from accessing the minor.
37. Indeed, the court observed that the applicant had also filed an application before the Children's Court seeking amendment of the custody order to specify that he be allowed to access the minor at a neutral place away from the mother's residence. The application challenging the protection order was therefore dismissed.

5.3 PADVA's Interface with Other Laws

38. It is evident from the cases discussed above on jurisdictional overlap that PADVA's interaction with other laws, particularly family-related laws, remains a key concern. Courts have had to clarify the interface between PADVA and other statutes, including the Matrimonial Property Act, the Children Act, the Marriage Act and the Criminal Procedure Code. The precedents demonstrate that the relationship is complementary rather than conflictual.
39. However, complementarity does not mean that a court may determine multiple claims under different statutes within one application. In [WRK-v-FM \[2019\] KEHC 11329 \(KLR\)](#), an application relating to the Matrimonial Property Act also raised allegations of domestic violence. The court held that the allegations of domestic violence could not be dealt with within the same application. The applicant was required to file separate proceedings under [sections 3](#) and [24](#) of PADVA.

5.4 Evidentiary Threshold for Protection Orders

40. Protection orders are often first sought as ex parte interim protection orders under ([Rule 10, Protection against Domestic Violence Rules](#)). The court then orders the respondent to appear within five days of service. A protection order is issued following an inter partes hearing or upon the respondent's failure to enter appearance. It is common for a respondent served with an ex parte order to challenge it on the ground that the applicant did not establish a prima facie case to justify the grant of interim protection. The cases below distil the insights that have emerged and provide guidance on the evidentiary threshold in PADVA proceedings.

5.4.1 Judicial Precedent on Evidentiary Standard for PADVA Orders

41. [DNM-v-JMK \[2024\] KEHC 9984 \(KLR\)](#) was an appeal against an interim protection order issued by the Principal Magistrate's Court. The appellant faulted the court for treating the respondent's assertions and allegations as "gospel truth", determining the application on the basis of "apprehensions and falsehoods", and failing to call independent witnesses to corroborate the assertions. The court held that the standard for establishing a prima facie case with a probability of success had been met. The applicant had shown that the appellant had consistently conducted himself in a manner that endangered the safety, freedom and privacy of the applicant, her family members and employees, and had subsequently tendered evidence to corroborate the allegations. The court also noted that, by the appellant's own admission, the respondent had made numerous reports against him at the police station, none of which had resulted in charges. This acknowledgement only served to confirm the respondent's apprehension that her rights were at risk of violation by the appellant, who was a police officer and who, according to the respondent, was obstructing her case.
42. [SNN -v- ANN \[2024\] KEHC 9927 \(KLR\)](#) established that the issuance of protection orders under PADVA is not contingent on a conviction for assault in parallel criminal proceedings. The case was an appeal against a protection order issued by the Senior Principal Magistrate's Court restraining the appellant from physically abusing the applicant and the children, and from harassing her. It also required him to stay away from the matrimonial home. One of the grounds of appeal was that the respondent had not provided sufficient evidence of assault. The appellant added that the criminal charges brought against him in another court had been dismissed, which he argued established that there was no

prima facie case to support the claim of domestic violence. The High Court observed that the criminal case had been withdrawn under [section 87\(a\)](#) of the Criminal Procedure Code, not for lack of evidence, but because the trial court had declined to grant a second adjournment after the police witness failed to attend court. The High Court stated: “The burden of proof was on a balance of probabilities. There was no need for the appellant to be convicted to prove the assault.” [para 30]

43. In essence, a court hearing an application for a protection order is placed in a position that calls for a precautionary approach to prevent escalation of violence or to arrest a threat of violence. The standard of proof for issuing ex parte orders is appropriately set on a balance of probabilities, pending the opportunity to hear both parties. A precautionary approach is consistent with the balanced safeguarding of constitutional rights.

5.5 Exclusive Occupation Orders and the Property Rights Challenge

44. [Section 19\(3\)\(a\)](#) empowers the court to issue a protection order granting the applicant exclusive occupation of a shared residence, or a specific part of it, “regardless of whether the shared residence is solely owned or leased by the respondent or jointly owned or leased by the parties.” An exclusive occupation order necessarily raises a conflict of rights: the applicant’s right to live free from violence, and the respondent’s property rights. [Section 19\(6\)](#) sets out the parameters that guide courts in resolving this conflict.
45. [Section 19\(6\)](#) provides that restriction of a respondent’s right to access premises by virtue of a PADVA protection order shall not affect the respondent’s title or any other interest in the property. Further, [section 19\(7\)](#) requires a court to issue an exclusive occupation order only if it is satisfied that there is no other way of securing the applicant’s safety. The exclusion order should be vacated as soon as the applicant obtains alternative accommodation, or when the court determines that the order is no longer necessary to secure the applicant’s safety.
46. The challenge of balancing the right to live free from violence against the right to property has confronted the early implementation of domestic violence legislation in many jurisdictions. Property rights challenges to domestic violence restraining orders were common in the United States in the 1980s and 1990s, when such legislation was relatively new. Respondents would challenge restraining orders barring them from accessing the home

as unconstitutional taking of property without just compensation.²⁰³ Courts, however, soon firmly established that the right to property is not absolute, and that temporary restriction to secure the right to live free from violence is permissible.

47. The cases discussed below show how Kenyan courts have applied the balance required under sections [19\(3\)\(a\)](#), [19\(6\)](#) and [19\(7\)](#).

5.5.1 Judicial Precedent on Exclusive Occupation Orders and the Property Rights Challenge

48. In [MWK-v-AWW \[2022\] KEHC 15689 \(KLR\)](#), the plaintiff sought an interim order for exclusive occupation of the matrimonial home, which was registered in the defendant's name but to which she claimed to have made substantial contribution. The marriage had been dissolved before the Chief Magistrate's Court, but division of the matrimonial property had not yet taken place. The plaintiff alleged that, although the defendant had moved out of the matrimonial home, he would occasionally appear unannounced and subject her and the children to violence. In addition to the prayer for exclusive occupation, she prayed that, upon division of the matrimonial property, the home be apportioned to her and the defendant be allocated other property owned by the couple in another county. The defendant objected, arguing that the court lacked jurisdiction to bar him from accessing the matrimonial home. The court granted the order for exclusive occupation, underlining that it was in the best interests of the children, and also issued an order restraining the defendant from disposing of or otherwise dealing with the property.
49. [FK-v-CMM \[2019\] KEHC 362 \(KLR\)](#) underlined that the premises from which a respondent is to be excluded must be clearly identified. The applicant sought a stay of an order for exclusive occupation of the matrimonial home made against him under PADVA, and also sought variation or revocation of the order, or that the matter be heard by a magistrate other than the Principal Magistrate who had issued the order. The respondent had sought the order in the lower court on grounds of the applicant's cruelty. The applicant argued that the order amounted to his summary eviction from his home without an opportunity to be heard. He further contended that the order was unnecessary because the respondent could access alternative accommodation with his two other wives. The order was stayed, not on account of the applicant's substantive arguments, but for lack of specificity. Neither

²⁰³ See, for example, *Cote-v-Cote* 599 A.2d 869 (Md. Ct. Spec. App. 1992), discussed in Joseph Singer, *Property Law: Rules, Policies, and Practices* (1993), 1081-1085.

the objection nor the order itself specified the property of which the respondent was to have exclusive occupation.

50. In [SNN -v- ANN \[2024\] KEHC 9927 \(KLR\)](#), appellant was aggrieved by a protection order issued by the Senior Principal Magistrate's Court in favour of his wife and children, requiring him to stay away from the matrimonial home. One of his grounds of appeal was that the respondent had not provided sufficient evidence of assault and was using the domestic violence proceedings to secure his technical eviction from the matrimonial home, which was registered in his name. He also faulted the magistrate for accepting, without evidence, the respondent's assertion that he had alternative accommodation. The court held that the issue of whether the appellant had an alternative home had been proved on a balance of probabilities by the respondent's pleadings, which stated that the appellant had built a house 500 metres away where he lived with his mistress, and by the appellant's own admission that he was in a polygamous union when he countered that the woman was not a mistress but a wife married under customary law.

5.6 PADVA and Alternative Dispute Resolution (ADR)

51. [Section 14\(1\)](#) of PADVA allows a court to refer parties to counselling, conciliation or any other programme that the court considers appropriate, taking into account the circumstances of each case. [Section 14\(2\)](#) elaborates that the purpose of such counselling is to ensure respect for the law prohibiting domestic violence and to foster a "protective environment within the family" and the "promotion of harmonious domestic relations".
52. While counselling may be indispensable in many cases, given the trauma associated with domestic violence, the requirement that the court take into account the circumstances of each case makes clear that not all domestic violence cases are suitable for referral to conciliation. The use of alternative dispute resolution (ADR) in cases involving domestic violence is generally discouraged. Most, if not all, ADR practitioners would agree that where children are involved, the matter is automatically placed beyond negotiation. A case involving a child would fail the first prong of the agency test developed by the Judiciary's policy on Alternative Justice Systems (AJS), namely, whether the parties have voluntarily chosen to have their matter resolved through AJS.²⁰⁴

²⁰⁴ Alternative Justice Systems Framework Policy (Judiciary of Kenya 2020).

53. Beyond cases involving children, however, opinion among ADR professionals is divided. On one side are those who argue that ADR has no place at all in cases involving domestic violence because of the power asymmetries involved. Families may exert pressure on vulnerable parties to keep grievances out of public forums such as courts, often in the name of harmony and family honour.²⁰⁵ In light of these dynamics, ADR professionals on this side argue that referral to ADR in domestic violence cases should never originate from the court, because the victim or survivor may feel compelled to acquiesce to the process. The opposing view cites section 14 of PADVA to argue that ADR may be employed where a court diligently and sensitively screens cases to identify those suited to conciliation.²⁰⁶

6.0 AREAS FOR REFORM AND LESSONS FROM OTHER JURISDICTIONS

6.1 Building up Jurisprudence on Domestic Violence

54. Among the reform issues that emerge from the discussion of PADVA is the need for continued harmonization of judicial approaches to bring further clarity to two issues flagged in the precedents: overlap or concurrence in jurisdiction between PADVA and other laws, and clarity on the evidentiary standard, particularly in *ex parte* applications. One notable fact, which was also flagged by one of the judges in [MJK-v-FML \[2019\] KEHC 10908 \(KLR\)](#), is the dearth of authorities relating to PADVA. In that case, although both parties were represented by counsel, no judicial precedents were cited. The Family Division could take the lead in building well-researched precedents on these issues when appropriate opportunities arise in PADVA appeals.

6.2 Strengthen Remedies and Support Services for Victims and Survivors of Domestic Violence

55. The report of the Technical Working Group on Gender-Based Violence, including Femicide, observed that more needs to be done to improve support services and enforcement of remedies for victims and survivors of gender-based violence, including domestic violence. The report highlighted gaps in the provision of safe accommodation, psycho-social support

²⁰⁵ Family pressure to suppress cases of sexual and gender-based violence was noted as a major concern in Government of Kenya, 'Report of the Technical Working Group on Gender-Based Violence (including Femicide)' (November 2025), 42-3.

²⁰⁶ Views expressed by participants and panelists; panel on 'Mediation and PADVA' at the 4th Annual Mediation Summit organized by the Kenya Judiciary's Steering Committee on Mediation, held at Strathmore Law School, April 15th to 17th 2026.

and effective criminal prosecution.²⁰⁷ Where criminal prosecution is pursued, domestic violence complainants should be able to access the support services provided for under the Victim Protection Act, including access to the Victim Protection Trust Fund. However, the fund is yet to be established. Further, not all PADVA applications are accompanied by criminal prosecution, meaning that not all PADVA applicants stand to benefit from the remedies available under the Victim Protection Act.

56. This is in contrast to Ghana, which has established a dedicated Victims of Domestic Violence Support Fund. The fund pays for rescue, rehabilitation, construction of shelters, and training and equipping of service providers. Free medical care is provided to any person referred to a health facility by the police. In the United States and the United Kingdom, legal and court fees are waived for domestic violence protection order applications.²⁰⁸
57. Regular review of the [Protection against Domestic Violence Rules](#) to ensure that they serve the needs of victims and survivors and enhance access to justice would also be desirable.
58. Awareness about PADVA also needs to be improved. The Judiciary could strengthen efforts in this regard. One approach would be to collect data to track the use of PADVA and incorporate this data into monitoring under the Judiciary's Sexual and Gender-Based Violence (SGBV) Strategy 2023-2030. SGBV caseload statistics do not typically include PADVA. They are usually organised around specific crimes, such as rape, defilement, kidnapping and grievous harm.²⁰⁹
59. Both the Judiciary and the Bar can also contribute by ensuring that litigants in matrimonial proceedings are made aware of PADVA and its accompanying Rules. A divorce case founded on cruelty may be litigated to conclusion without any mention of the support services or protection orders that the affected party could apply for under PADVA, or any referral to the relevant agencies.

²⁰⁷ Government of Kenya, '[Report of the Technical Working Group on Gender-Based Violence \(including Femicide\)](#)' (November 2025).

²⁰⁸ See Coalition on Violence Against Women (COVAW), 'Handbook on Protection Orders in Kenya' (2021), available at <https://covaw.or.ke/download/handbook-on-protection-orders-in-kenya/>, p.20-21.

²⁰⁹ See Kenya Judiciary, 'Sexual and Gender-Based Violence (SGBV) Strategy 2023-2030' cited in Government of Kenya, '[Report of the Technical Working Group on Gender-Based Violence \(including Femicide\)](#)' (November 2025), 23.

6.3 Equip the Police and Ensure Accountability for the Ambitious Role Assigned to Them by PADVA

60. Another reform issue emerging from existing research concerns the wide-ranging powers that PADVA confers on police officers.²¹⁰ Significant expectations are placed on the police. These include the duty to inform complainants filing reports about the available remedies under PADVA, the duty to advise complainants on available support services, including access to medical care or emergency shelter, assistance in lodging a criminal complaint, and the power to enter and search premises where necessary. These powers must be accompanied by appropriate training, not only on the available services, but also on how to interact appropriately and sensitively with victims and survivors of domestic violence.
61. The exercise of these powers must also be subject to accountability linked to the victim or survivor experience, beyond routine administrative filing of returns by the institution. In South Africa, the police have similarly broad powers in enforcing two statutes: The Domestic Violence Act and the Protection from Harassment Act. Accountability is provided by requiring reports to Parliament specifically on the management of domestic violence cases, and by characterizing an officer's failure to discharge duties under the two laws²¹¹ as "gross misconduct."

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²¹⁰ See, for example, Coalition on Violence Against Women (COVAW), '[Handbook on Protection Orders in Kenya](#)' (2021).

²¹¹ See Coalition on Violence Against Women (COVAW), '[Handbook on Protection Orders in Kenya](#)' (2021), p.19.

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8.0 REFERENCES FOR FURTHER READING

1. Coalition on Violence Against Women (COVAW), Handbook on Protection Orders in Kenya (2021), available at <https://covaw.or.ke/download/handbook-on-protection-orders-in-kenya/>.
2. Government of Kenya, Report of the Technical Working Group on Gender-Based Violence, including Femicide (November 2025), available at https://africa.unwomen.org/sites/default/files/2026-02/technical_working_group_report_on_gbv_including_femicide_0.pdf.
3. Government of Kenya, Report of the Commission on the Law of Marriage and Divorce (Government Printer, 1968), available at <https://new.kenyalaw.org/akn/ke/doc/commission-report/1968-08-01/report-of-the-commission-on-the-law-of-marriage-and-divorce-1968/eng@1968-08-01>.
4. Meroka-Mutua, Agnes, 'Kenya's Legal Responses to Gender-Based Violence: Implications for Women in the Context of Family', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 183, available at <https://uonjournals.uonbi.ac.ke/index.php/EALJ/article/view/3030>.
5. Rudman, Annika, Celestine Nyamu Musembi and Tresor Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (PULP, 2023), available at <https://www.pulp.up.ac.za/latest-publications/the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-a-commentary>.
6. Singer, Joseph, *Property Law: Rules, Policies, and Practices* (1993).
7. UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 19: Violence against Women, UN Doc A/47/38 (1992)



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KENYA JUDICIARY ACADEMY



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