

# Till Death Do Us Part: The Ailment Affecting the Widow's Life Interest in Kenyan Intestate Succession

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## Abstract

*Succession law in Kenya has developed from pre-independence where an array of regimes determined inheritance depending on whom they applied to, to an age where a single legislation was made to resolve this multiplicity; the Law of Succession Act. Since then, a new Constitution has been promulgated and the old one repealed. There are certain areas of the Act that resemble the latter more than the former. One such area is that of intestacy. More specifically, the position taken on the one-sided determination of the life interest of a widow upon remarriage. This study tackles this issue and finds that Sections 35(1) and 36(1) are indeed contrary to the entitlement of rights in Article 45(3) guaranteeing equal rights to parties within a marriage. It further advances the argument that this inconsistency has its possible origins in African Customary law and owes its longevity to a foregone constitutional era. The recommendation offered is an amendment to the Act aimed at equalising the parties to a marriage by ensuring parity in the duration of the life interest. In addressing itself on these issues, a synthesis of literature review, case review, legislative review and a key analysis of constitutional preparatory documents is used.*

**Key words:** Succession, equality, Article 45, Law of Succession Act

## I. Introduction

### i. Background

In Bleak House, Charles Dickens provided a social commentary of the legal conditions of his time using the fictitious case of *Jarndyce v Jarndyce*.<sup>1</sup> The case

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involved a large inheritance and illustrated the absurdity of the law of the time, by emphasising the inadequacies of the Chancery court system.<sup>2</sup> The author of this paper possesses neither the skill nor the fame of that venerated writer, but will nonetheless attempt to highlight an ailment of the current inheritance law. The setting is not Victorian, and the object of analysis is certainly not in the realm of fiction. The setting is distinctly Kenyan, and the object is Sections 35(1) and 36(1) of our very own Law of Succession Act.<sup>3</sup>

Before the ailment is discussed, one must first understand the body it afflicts. Succession law in Kenya has a deep and intricate history. Before the coming into force of the Law of Succession Act on 1 July 1981.<sup>4</sup> Cotran comments that succession law in Kenya was governed by four concurrent regimes,<sup>5</sup> namely: African customary law,<sup>6</sup> Islamic law,<sup>7</sup> Hindu law<sup>8</sup> and the law applying to Europeans.<sup>9</sup> The multiplicity of laws was reflective of the diverse communities that constituted Kenya, and the colonial legacy of a pluralist legal system.<sup>10</sup> This array of succession regimes proved wanting after independence. Amongst its defects was the gradual obsolescence of the statutory laws governing succession, which included the succession laws applying to Europeans and those qualifying Indian succession under Hindu law.<sup>11</sup> If at post-independence the succession law applying to Europeans became the uniform law of succession, it would be

<sup>1</sup> Dickens C, *Bleak House*, Bradbury and Evans, London, 1853.

<sup>2</sup> This refers to the persistence of extremely lengthy legal proceedings that the Chancery system became known for. This resulted in a delayed legal process that often left cases such as the book's fictitious inheritance case of *Jarndyce v Jarndyce* which was undecided for a long period of time. See Petit P, *Equity and the law of trusts*, 12 ed, Oxford University Press, Oxford, 2012, 4.

<sup>3</sup> Sections 35(1), 36(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>4</sup> The Act was passed in 1972 but came into force almost a decade later. See Onyango P, *African customary law: An introduction*, LawAfrica, Nairobi, 2013, 95.

<sup>5</sup> Cotran E, 'The development and reform of the law in Kenya' 27(1) *Journal of African Law*, 1983, 46.

<sup>6</sup> *Native Estate Administration Rules and Orders* (Order No. 11 of 1899). Later, Africans were allowed to make wills under the *African Wills Ordinance* (Act No. 35 of 1961).

<sup>7</sup> Inheritance for Muslims was governed by the *Mohammedan Divorce and Succession Ordinance* (1920) which qualified the application of Islamic law.

<sup>8</sup> *Hindu (Marriage, Divorce and Succession) Ordinance* (Ordinance No. 42 of 1946).

<sup>9</sup> *Indian Succession Act* (Act No. 10 of 1865). This Act was brought into operation by virtue of the East Africa Order in Council of 1897. See Article 11(b), *East Africa Order in Council of 1897*.

<sup>10</sup> Musyoka argues that these regimes exist because of 'historical reasons.' Moreover, Munooru notes that 'the evolution of the Kenya legal order has always been influenced by the plurality of races, the social development of each race, and the political system for the time being established'. Musyoka W, *Law of succession*, LawAfrica, Nairobi, 2006, 9. See also Munooru G, 'The development of the Kenya legal system, legal education and legal profession' Lecture delivered at the Haile Selassie University's Faculty of Law, Addis Ababa, 18 December 1972.

<sup>11</sup> The Act governing Hindu succession did not reflect changes that had occurred in its country of origin. See Ang'awa M, *Procedure in the law of succession in Kenya*, LawAfrica, Nairobi, 2011, 3.

extremely outdated as inheritance law in England became gradually modernised.<sup>12</sup> The trend of deficiencies also extended to Islamic law where it became the norm that non-Muslims could not inherit from a relative who converted to Islam.<sup>13</sup> Meanwhile, African customary law was unclear with regard to non-traditional property, and there arose a need for some form of legislation qualifying the grounds of its application.<sup>14</sup>

Above all, there was an intense desire for a succession system that was ‘applicable to all persons in Kenya without distinction’.<sup>15</sup> A commission was created and a report published on the same.<sup>16</sup> The eventual result was a single unifying legislation, made to amend the deficiencies. This was the Law of Succession Act. Musyoka therefore summarises the purpose of the Act as follows:

‘The Law of Succession Act was passed with the intention of merging and consolidating all the four systems of law of succession and their supporting legislation into one comprehensive statute in order to give Kenya a uniform law of succession applicable to all sections of the Kenyan population, to ensure certainty, predictability and uniformity in the processes of devolution of property’.<sup>17</sup>

The Act itself alludes to this purpose as early as the first section.<sup>18</sup> Though it has had varied success as a piece of ‘uniform’ legislation,<sup>19</sup> the Law of Succession Act is the most authoritative piece of law on inheritance in Kenya.<sup>20</sup> Since it is the most authoritative legislation on the matter, any shortcoming it bears would be felt commensurate to its influence in this sphere of law. With the passage of time, one such shortcoming has become evident.

<sup>12</sup> Some of these Acts include: The *Administration of Estates Act* (England and Wales, 1925), the *Inheritance (Family Provisions) Act* (England and Wales, 1938) and the *Intestates Estates Act* (England and Wales, 1952).

<sup>13</sup> An example of this is *Ali Ganyuma v Ali Mohammed* (1927) KLR.

<sup>14</sup> Non-traditional property refers to those kinds of property such as ‘houses, modern furniture, registered land, bank accounts, or motor vehicles’ which customary law did not clearly apply to. Ang’awa M, *Procedure in the law of succession in Kenya*, 4-5.

<sup>15</sup> Charles Njonjo, Attorney General of the time, expressed this. See Cotran E, ‘Marriage, divorce and succession laws in Kenya: Is integration or unification possible?’ 40(2) *Journal of African Law*, 1996, 196.

<sup>16</sup> Commission on the Law of Succession, Report of the Commission on the Law of Succession, 1968.

<sup>17</sup> Musyoka W, *Law of succession*, 17.

<sup>18</sup> Section 2(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>19</sup> Muslims are excluded from the Act due to the protests after its enactment. Additionally, there are certain areas where Part V of the Act does not apply with regard to agricultural land and livestock. This limits the uniformity of the Act. See Section 2(3), 32, *Law of Succession Act* (Act No. 26 of 2015). See also Onyango P, *African customary law: an introduction*, 95. See also Cotran E, ‘Marriage, Divorce and Succession Laws in Kenya’, 203-204.

<sup>20</sup> Section 2(1), *Law of Succession Act* (Act No. 26 of 2015).

ii. *Identifying the ailment: the unequal determination of a life interest upon remarriage*

The Law of Succession Act contains inheritance laws of both a testate and intestate nature.<sup>21</sup> Of interest to this paper are the Act's provisions on intestacy. On the meaning of intestacy, the Act states that: 'A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect'.<sup>22</sup> More specifically, the ailment affecting the Act regards situations where the intestate has left a surviving spouse as established in Sections 35(1) and 36(1) of the Act.<sup>23</sup> Section 35(1) applies to situations where there is a surviving spouse and children, whereas Section 36(1) applies to a scenario where there is a surviving spouse but no children.<sup>24</sup> In either case, the surviving spouse is entitled to a life interest. The level of this interest's entitlement varies in either scenario.<sup>25</sup>

Generally speaking, the interest as the name would suggest, terminates in the event of death.<sup>26</sup> As an exception, where the spouse is a widow, this interest will additionally terminate in the event of remarriage.<sup>27</sup> The problem itself is not new as Kameri-Mbote and her peers noted more than a decade earlier: 'It is, however, remarkable that the surviving spouse gets only a life interest in the property and where that is the woman (widow) the interest terminates upon her remarriage'.<sup>28</sup> Unfortunately, as they further asserted, the presence of a clawback clause in the repealed Constitution that allowed discrimination on grounds of sex in inheritance matters, completely limited the potential for reform.<sup>29</sup>

In contrast, Article 45(3) of the Constitution of Kenya, 2010 (CoK) provides that parties to a marriage have equal rights at the time of the marriage, during the marriage and at its dissolution.<sup>30</sup> Inheritance concerns death and therefore

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<sup>21</sup> Testacy involves the deceased making a will that is capable of taking effect. For a distinction, see generally DiRusso A, 'Testacy and intestacy: The dynamics of will and demographic status' 23(1) *Quinnipiac Probate Journal*, 2009, 36-79.

<sup>22</sup> Section 34, *Law of Succession Act* (Act No. 26 of 2015).

<sup>23</sup> Section 35(1), 36(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>24</sup> Section 35(1), 36(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>25</sup> This is discussed in Chapter III.

<sup>26</sup> Section 35(5), *Law of Succession Act* (Act No. 26 of 2015).

<sup>27</sup> Sections 35(1), 35(5), 36(1), 36(3), *Law of Succession Act* (Act No. 26 of 2015).

<sup>28</sup> Kameri-Mbote P, 'The law of succession in Kenya: Gender perspectives in property management and control' *Nairobi: Women and law in East Africa*, 1995, 14.

<sup>29</sup> Kameri-Mbote P, 'The law of succession in Kenya: Gender perspectives in property management and control', 2. Section 82(4)(b), *The Constitution of the Republic of Kenya* (1963), as amended to 2008.

<sup>30</sup> Article 45(3), *Constitution of Kenya* (2010).

dissolution in this context can be understood as such. Indeed, according to the Marriage Act, a marriage subsists from the date of registration unless it is inter alia terminated by death.<sup>31</sup> Since the parties enjoy equal rights up to the point of the marriage's dissolution, this requires an equality in the duration of the rights. Accordingly, the life interest of each party should have an equal duration from the time of dissolution, regardless of whether the surviving spouse is the husband or the wife. This means that the events capable of terminating this life interest should be the same. Thus, even though remarriage occurs after the dissolution, the equality in rights at the point of dissolution subsists. The ailment therefore takes the form of a dichotomy; a conflict between the most absolute law generally,<sup>32</sup> and the most authoritative of laws in matters of inheritance.

From the foregoing, the focus of this article therefore relates to the constitutionality of sections 35(1) and 36(1) of the Law of Succession Act.<sup>33</sup> The guiding question is therefore as follows: does the termination of a widow's life interest upon remarriage violate her entitlement to the enjoyment of equal rights at the dissolution of the marriage? In addressing this problem and answering this question, the paper will take the following approach. It will attempt to trace the problem to its genesis by considering its possible foundation in African customary law. An additional understanding of Part V of the Law of Succession Act discussing the powers conferred on a surviving spouse is necessary if one is to understand the disparity these provisions present.<sup>34</sup> More importantly, the paper analyses the purpose of Article 45(3) by making reference to constitutional preparatory documents and uses this as a basis to determine the constitutionality of the immediate provisions.

The structure of this paper is highly reflective of the approach mentioned. Part I has given an overview of the history on the law of succession in Kenya, and, in doing so, has emphasised the importance of the Law of Succession Act. This importance necessitates an inquiry into the shortcomings that Sections 35(1) and 36(1) hold. Part II of this paper attempts to lay the foundations of the problem and the reason of its persistence under the repealed Constitution of Kenya, 1963 (the Repealed Constitution). Part III accentuates the legal consequences of the termination of a life interest upon remarriage, by exploring the entitlements accorded to surviving spouses in intestate succession as outlined in Part V of the

<sup>31</sup> Section 3(2), *Marriage Act* (Act No. 4 of 2014).

<sup>32</sup> Article 2(1), *Constitution of Kenya* (2010).

<sup>33</sup> Section 35(1), 36(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>34</sup> Part V, *Law of Succession Act* (Act No. 26 of 2015).

Law of Succession Act. Part IV, by drawing from existing Kenyan case law, will briefly discuss the negative implications of the provisions' outdated nature in relation to Kenyan case law. These implications will be used to fuel the arguments in favour of reform. Part V will show the content and purpose of Article 45(3), specifically 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'.<sup>35</sup> By examining the purpose of Article 45(3), it will be possible to illustrate that sections 35(1) and 36(1) of the Law of Succession Act are inconsistent with the Constitution. Finally, Part VI will provide recommendations needed to move forward and will thereafter conclude the article.

## II. Genesis of the Problem: Possible Origins in African Customary Law

From the preceding chapter, this paper posits that there exists a conflict between the Constitution and the aforementioned sections of the Law of Succession Act. It must be understood that the Act was passed under an entirely different constitutional dispensation which allowed the ailment's continued existence. But before exploring how this continued existence was facilitated, one must first examine the problem's possible origins. The acquisition of a life interest upon death of the one spouse by a surviving spouse in matters of succession is not a particularly novel occurrence. A variation of the same provision can be seen in the English Inheritance Act of 1938, enacted decades prior to Kenya's own Act.<sup>36</sup> What is of interest is the distinction between the span of a widow's life interest and that of a widower.

Kenya is a common law jurisdiction. The position of the wife at common law has historically been lower than that of the husband. This is not an emotive discourse on gender politics. It is a fact. In *Dibble v Hutton*, the court made void a contract between a husband and wife for the sale of jointly owned land, as they were considered a single entity in law.<sup>37</sup> Perhaps it is this history that prompted Lord Denning to state the following of common law: 'the law regarded the husband and wife as one and the husband as that one'.<sup>38</sup> Regarding inheritance, the old common law position on life interests in intestacy undoubtedly reflected

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<sup>35</sup> Article 45(3), *Constitution of Kenya* (2010).

<sup>36</sup> Section 1(2), *Inheritance (Family Provisions) Act* (England).

<sup>37</sup> *Dibble v Hutton* (1804), The Supreme Court of the State of Connecticut.

<sup>38</sup> *William and Glyn's Bank Ltd v Boland* (1980), The United Kingdom House of Lords, 4.

the wife's lowered position. When the surviving spouse was a widower, he would be entitled to a life estate in all the property held by the deceased wife.<sup>39</sup> Meanwhile, where the surviving spouse was a widow, she would only be entitled to a third of the land acquired during the marriage.<sup>40</sup>

However, though it is tempting to attribute the problem's origins to a system of law derived from a foreign land, its foundation may in fact be closer to home than one realises. Under the English Inheritance Act of 1938, a life interest in matters of succession terminated in the event of remarriage regardless of whether it was a widow or a widower.<sup>41</sup> Even if one examines the Indian Succession Act of 1865, which was the inheritance law applying to Europeans in Kenya and was also the oldest law of succession to have taken effect in Kenya, Part IV of the Indian Succession Act, which discusses intestacy, has no provision terminating the life interest of a widow upon remarriage.<sup>42</sup>

But if these provisions are not based on the oldest law of inheritance in Kenya, then what are they based on? The answer may be found in African customary law. Musyoka notes that the Law of Succession Act adopts customary law practices such as polygamy.<sup>43</sup> Furthermore, it has been observed that the Law of Succession Act recognises certain aspects of African culture such as dependants outside the typical nuclear family like half-brothers and step-sisters.<sup>44</sup> It is therefore not outlandish to say that the sections in question may have been influenced by African customary law. Volume II of Eugene Cotran's restatement project which compiled the succession laws of various communities is particularly illuminating.<sup>45</sup>

<sup>39</sup> Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 231-232.

<sup>40</sup> Kariuki F, Ouma S and Ng'etich R, *Property law*, 231-232.

<sup>41</sup> Section 1(2)(a), *Inheritance (Family Provisions) Act* (England).

<sup>42</sup> Part IV, *Indian Succession Act* (Act No. 10 of 1865).

<sup>43</sup> In his restatement project of the African customary succession laws of various communities, Cotran notes that where the husband lived a polygamous life, a large number of communities such as the Kikuyu, Luo and Luhya would distribute the inheritance with reference to each household. This seems to be adapted in the Law of Succession Act where a polygamous intestate's personal and household effects are divided among the houses according to the number of children in each house whilst also providing for the wife of each household. See Section 40, *Law of Succession Act* (Act No. 26 of 2015). See also Cotran E, *Restatement of African law: Volume 2 the law of succession*, Sweet and Maxwell, London, 1968, 8, 13, 20-21, 35-36, 44, 46-47, 56-57, 162-163.

<sup>44</sup> Kamau W, 'Customary law and women's rights in Kenya' University of Nairobi, 2010, 30 – <<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 9 November 2018. See also Section 29, 39, *Law of Succession Act* (Act No. 6 of 2015).

<sup>45</sup> Cotran E, *Restatement of African law*, 1968.

In terms of African customary law, the nature of inheritance may be either patrilineal or matrilineal. Patrilineal succession laws favour the male descent whilst matrilineal succession laws favour the female descent. Kikuyu, Kamba, Luo and Luhya succession laws are all patrilineal in nature and it has been observed that most African customary succession laws are of a patrilineal nature.<sup>46</sup> In the above-mentioned African communities, the widower inherits all property which the deceased held whether given by him or not.<sup>47</sup> Thus, the widower has total unconditional use and enjoyment of the property even if he remarries. The position of the widow on the other hand is different. There is a large emphasis on guardianship in African customary succession matters regarding the widow. If the widow, for instance, moves to her father's home then she severs completely her relations to the deceased and legal guardianship reverts to her father.<sup>48</sup> The same is the case upon remarriage, as the new husband becomes guardian.<sup>49</sup>

Applying this rationale to Sections 35(1) and 36(1) of the Law of Succession Act, it seems that remarriage equates to the severance of relations with the husband which further equates to the relinquishment of whatever interest she had in the property that devolved to her on his death. Related to this rationale is the notion in African communities of the male in the family being the head of the household and a figure who ensured that all members in the family had access to property.<sup>50</sup> This is because of the fact that men stayed within their family whereas women would leave their 'domiciles of origin' and move to their husbands' families upon marriage or remarriage.<sup>51</sup> Logically, then, if the widower in these patrilineal systems would remarry, he would not be replaced in his duty to ensure that all members of the family had access to property. This is because he would remain within his domicile of origin. One therefore sees a foundation upon which the provisions currently being discussed may have their origins.

But to merely examine the roots is insufficient. The nourishment that sustained the problem must also be examined. In the report of the Commission on

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<sup>46</sup> Cotran E, *Restatement of African law*, 8, 19, 42, 158. See also Maina R, Muchai V and Gutto S, 'Law and the status of women in Kenya' 8(1) *Columbia Human Rights Law Review*, 1977, 194-195.

<sup>47</sup> Cotran E, *Restatement of African law*, 14, 25, 48, 164.

<sup>48</sup> Cotran E, *Restatement of African law*, 17-18, 28, 50-51, 167.

<sup>49</sup> Cotran E, *Restatement of African law*, 17-18, 28, 50-51, 167. However, an exception exists in Kikuyu customary law where the younger brother may choose to inherit the widow and thus for all intents and purposes succeeds to all his deceased older brother's rights and duties. See Cotran E, *Restatement of African law*, 17.

<sup>50</sup> Kameri-Mbote P, 'Gender dimensions of law, colonialism and inheritance in East Africa: Kenyan women's experiences' 35(3) *Law and Politics in Africa, Asia and Latin America*, 2002, 382.

<sup>51</sup> Kameri-Mbote P, 'Gender dimensions of law, colonialism and inheritance in East Africa', 382.

the Law of Succession, the commission noted the lowered position of daughters and wives in the issue of inheritance.<sup>52</sup> Kameri-Mbote and her peers write that due to this, ‘a deliberate attempt was made to create rights that would remove existing injustices’.<sup>53</sup> In spite of this, they further note that ‘certain provisions of the Act leave doubt in its effectiveness on curbing certain discriminatory practices’.<sup>54</sup> This observation was made in 1995, during a period where the repealed constitution was still in effect and 14 years after the Act came into force. The observation itself was accurate. Its legal basis was tragically unfounded.

The Repealed Constitution provided for protection from discrimination on grounds of sex but at its own pace and with its own distinctive charm,<sup>55</sup> the protection did not extend to matters involving ‘devolution of property on death’.<sup>56</sup> It was therefore a clause that disqualified any challenge made regarding a law that discriminated in this regard. Subsequently, Sections 35(1) and 36(1) of the Act were entirely constitutional. Kameri-Mbote, in a separate article, makes a similar observation saying that the clause ‘negates any measures aimed at achieving justice in the distribution of matrimonial property’.<sup>57</sup>

It has been interpreted that the attempt to extinguish the difficulties presented by the earlier constitutional order crystallised itself in the form of a new and ‘transformative’ Constitution.<sup>58</sup> Yet the inconsistency remains. The current answer may be that the problem has been swept neatly under a rug so that though there may be an occasional sneeze or two of protest resulting from the escaping dust, those who pass by it have become so accustomed to the atmosphere it permeates that they forget the current means they have of expunging its source.<sup>59</sup>

<sup>52</sup> Commission on the Law of Succession, *Report of the Commission on the Law of Succession*, 1968, para. 8.

<sup>53</sup> Kameri-Mbote P, Katambo V and Machari J, ‘Law and the status of women in Kenya’ Nairobi: Women and law in East Africa, 1995, 8.

<sup>54</sup> Kameri-Mbote P, Katambo V and Machari J ‘Law and the status of women in Kenya’, 8.

<sup>55</sup> The Constitution of Kenya 1963 was notorious for its ‘clawback clauses’ and therefore its rights took more than what they gave. See Ambani JO and Mbondenyei M, ‘A new era in human rights promotion and protection in Kenya? An analysis of the salient features of the 2010 Constitution’s Bill of Rights’ in Mbondenyei M, Asaala E, Kabau T and Warris A (eds), Pretoria University Law Press, Pretoria, 2015, 18.

<sup>56</sup> Section 82(4)(b), *The Constitution of the Republic of Kenya* (1963), as amended to 2008.

<sup>57</sup> Kameri-Mbote P, ‘The law of succession in Kenya’, 2.

<sup>58</sup> Mutunga W, ‘The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions’ University of Fort Hare, Inaugural Distinguished Lecture Series, 2014, 1-2.

<sup>59</sup> These sneezes of protest manifest themselves in the form of the judicial activism that will be examined in Chapter IV.

### III. The Powers Conferred by a Life Interest

Having discussed the genesis of the problem, one must then understand what a life interest entails and the powers it confers. This is to accentuate the gravitas concerning the legal consequences that would be felt by a widow upon remarriage. By doing so, the disparity between a widow and widower's remarriage will be evident.

To restate what has already been mentioned, the life interest is provided for in both sections 35(1) and 36(1) of the Law of Succession Act. In Section 35(1) where there is a surviving spouse and children, the spouse is absolutely entitled to the personal and household effects of the deceased and a life interest 'in the whole residue of the net intestate estate'.<sup>60</sup> Where there is a surviving spouse and no children under Section 36 (1), the absolute entitlement of the spouse to the personal and household effects of the deceased must be determined. Additionally, the first ten thousand shillings out of the residue of the net intestate estate or twenty percent of this (whichever is greater) must also be ascertained.<sup>61</sup> The life interest will then extend to the remainder of the net intestate. It should be noted that the rules on intestacy in Part V of the Act exclude agricultural land and crops thereon, and livestock in specified districts of the Act's schedule – these are determined by customary law applicable to the deceased's community or tribe.<sup>62</sup>

Section 35(1) involves certain powers of appointment. This is due to the presence of an existing child or children that the spouse may wish to confer a benefit to. With the first, the spouse may appoint by way of gift, the capital of the net estate either in part or in whole to a surviving child or any of the surviving children.<sup>63</sup> This power has in the past been considered to be rightfully exercised in 'the sole discretion of the widow (spouse generally)'.<sup>64</sup> An appointment or lack thereof may still be challenged by one of the children, subject to certain considerations.<sup>65</sup>

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<sup>60</sup> Section 35(1), *Law of Succession Act* (Act No. 26 of 2015). Net intestate estate refers to 'the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of 'net estate', so far as the expenses, debts, liabilities and estate duty are chargeable against that estate'. See Section 3, *Law of Succession Act* (Act No.26 of 2015).

<sup>61</sup> Section 36(1), *Law of Succession Act* (Act No. 26 of 2015).

<sup>62</sup> Section 32, *Law of Succession Act* (Act No. 26 of 2015).

<sup>63</sup> Section 35(2), *Law of Succession Act* (Act No. 26 of 2015).

<sup>64</sup> *Bob Njoroge Ngarama v Mary Wanjiru Ngarama & another* (2014) eKLR, 6.

<sup>65</sup> Some of these considerations are the nature and amount of the deceased's property, any past, present or future capital or income from any source of the applicant and of the surviving spouse, the existing and future means and needs of the applicant and the surviving spouse and whether the

Enjoyment of a life interest is similar in both cases. During the lifetime of the spouse, he or she is entitled to the use and enjoyment of the property with the understanding that the property is held in trust ‘for the children and others’.<sup>66</sup> This is a very important aspect of a life interest as the surviving spouse may use the property conferred by the interest to sustain themselves. Additionally, under Section 37, there is an identical set of powers.<sup>67</sup> The spouse, with the consent of all the children of full age and any co-trustees or the consent of the court, is entitled to sell any of the property bestowed upon them by the life interest. If this property is immovable, then the sale will always be subject to the consent of the court.<sup>68</sup> The reason for this differing requirement is due to immovable property being traditionally identified with real property such as land, which has connotations of ‘political, social and economic power’, whilst movable property is traditionally associated with personal property which did not carry the same air of importance.<sup>69</sup>

The aforementioned rights, powers and implications of a life interest are therefore enjoyed by both the widower and widow. The exception to be reiterated is that the widow loses all of them in the event of remarriage. This is not the case for a widower. Indeed, it has been stated that though the widow may have inheritance rights, the widower has ‘priority rights’ meaning that the rights of the widower seem to take higher precedence.<sup>70</sup> Perhaps the term ‘life interest’ in itself is not reflective of the exception applying to widows. Though, admittedly, ‘life interest in the case of a widower and widow but with the exception of termination upon remarriage for a widow’ would be very arduous jargon to use in court.

#### IV. Dissonance: Judicial Continuity and Judicial Disregard

Since the days of the Act coming into force, Sections 35(1) and 36(1) have been applied by the Kenyan courts. *In the matter of the estate of Charles Muigai Ndung’u (deceased)*,<sup>71</sup> a woman had been cohabiting with the deceased for a long period of time and even had a child with him. Though she was a ‘wife’ for the

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deceased had made any advancement or other gift to the applicant during his lifetime or by will. See Section 35(4), *Law of Succession Act* (Act No. 26 of 2015).

<sup>66</sup> Musyoka W, *Law of succession*, 112.

<sup>67</sup> Section 37, *Law of Succession Act* (Act No. 26 of 2015).

<sup>68</sup> Section 37, *Law of Succession Act* (Act No. 26 of 2015).

<sup>69</sup> Kariuki F, Ouma S and Ng’etich R, *Property law*, 104-105.

<sup>70</sup> FIDA Kenya, *Women’s land and property rights in Kenya: Training handbook*, 2010, 24.

<sup>71</sup> (2002) KLR.

purpose of succession, as she had remarried after the death of her 'husband', the court held that she was not entitled to a life interest. As a result, the child was the sole heir to the deceased's property.

With the advent of the Constitution of Kenya 2010 (CoK), the judicial position on the place of the widow in matters of intestacy has not seen much change. The grounds for determination of a life interest upon remarriage were restated recently by Justice Musyoka in the case of *Tau Katungi v Margrethe Thorning Katungi & another*:

'The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage'.<sup>72</sup>

The same paragraph has since then been quoted in *Jane Ithima v Karia Murianki*<sup>73</sup> and *Re estate of Doris Wanjiku John Mwigaruri Alias Doris Wanjiku (deceased)*.<sup>74</sup> However, there has been a judicial stirring that has presented itself in the form of a disregard of the provision in favour of a different reading. This disregard is demonstrated by two cases.

In the same year that Justice Musyoka restated the law of our time, the High Court sitting at Nakuru was presented with a case that involved a widower's remarriage as opposed to the conventional widow's remarriage. *In the matter of the estate of the late Rose Wanjiku Njoroge (deceased)*,<sup>75</sup> Justice Emukule decided to give a very different reading of the provision on a spouse's life interest. The deceased, a woman, owned two properties worth a considerable amount. The appellant, who had remarried since her death, wished to be granted a life interest with regard to these properties. The court explicitly declared that section 35(1) was inherently discriminatory and that there is no 'plausible reason' why a widow's life interest should be subject to a termination on remarriage, whilst a widower's interest endures.<sup>76</sup> Citing Article 27(3) which entitles men and women to equal treatment, the judge blatantly refused to grant the widower a life interest. Thus, he also blatantly disregarded the provision in question.

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<sup>72</sup> *Tau Katungi v Margrethe Thorning Katungi & another* (2014) eKLR, para. 17.

<sup>73</sup> (2016) eKLR, para. 18.

<sup>74</sup> (2015) eKLR, 5.

<sup>75</sup> (2014) eKLR.

<sup>76</sup> *In the Matter of the Estate of the Late Rose Wanjiku Njoroge (Deceased)* (2014) eKLR, 2.

Two years later, a similar decision was reached by the High Court at Nairobi, in the case of *Samson Mutonga Muriithi v Kenneth Matekwa*.<sup>77</sup> Once more, the facts presented before the court, involved a widower wishing to acquire a life interest after his remarriage. The court quoting and using the *Rose Wanjiku* case as an authority, interpreted Article 27 once more to refuse the widower a life interest. Justice Muigai declared that the law ‘should be read in the spirit of the Constitution’.<sup>78</sup>

Both instances are reflective of the realisation by some judicial elements that the provisions in question are incompatible with the CoK. The result is a possible dissonance entailing a continuity in the application of a law as it is, and the disregard of a law that is explicit in its application. If anything, this makes the argument for reform even stronger. There is a need to adapt sections 35(1) and 36(1) to the current constitutional dispensation. It is true that Article 20 gives the courts the mandate to interpret the law in a manner that is complimentary to the Bill of Rights.<sup>79</sup> However, there is a thin line between interpreting a right and using that same right to legislate in the comfort of one’s chambers. In *Joseph Njuguna Mwaura and 2 others v Republic*, the court perhaps expressed it best: ‘The court cannot purport to be ahead of the people of Kenya or parliament’.<sup>80</sup> The learned judge recognised that interpretation and legislation are two different things and that Article 159 and 259 entailing application and interpretation respectively, cannot amount to a basis to legislate.<sup>81</sup> Though the result may not be on the scale of the Newgarthian Civil War envisioned by Fuller,<sup>82</sup> the law must still be reformed.

## V. Article 45(3): Content and Purpose of the Right

The paper has thus far set out to illustrate the deficiencies of sections 35(1) and 36(1) of the Law of Succession Act. At this point, it is necessary to expound

<sup>77</sup> (2016) eKLR.

<sup>78</sup> *Samson Mutonga Muriithi v Kenneth Matekwa* (2016) eKLR, 7.

<sup>79</sup> Article 20, *Constitution of Kenya* (2010).

<sup>80</sup> (2013) eKLR, 12-13. The particular legal position on the legality of the mandatory nature of the death penalty may have been the key issue in this case and, though the decision has since been reversed, the principle stated is still valuable. For the current position on the death penalty, see *Francis Karioko Muruatetu and another v Republic* (2018) eKLR.

<sup>81</sup> *Joseph Njuguna Mwaura and 2 others v Republic* (2013) eKLR, 12-13.

<sup>82</sup> Fuller L, ‘The case of the speluncean explorers’ 62(4) *Harvard Law Review*, 1949, 616-645. In Fuller’s fictional Commonwealth of Newgarth, uncontrolled judicial activism eventually led to a civil war resulting in the legislature asserting its supremacy over the judiciary.

on the nature and purpose of Article 45(3) which states 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’.<sup>83</sup> The reason behind this exercise is to understand that Article 45(3) was meant to achieve certain objectives in the Kenyan context. By elucidating these objectives, the argument that Sections 35(1) and 36(1) of the Constitution are contrary to Article 45(3) becomes substantiated.

The rights envisioned in Article 45(3) are relatively novel due to their absence in the repealed Constitution.<sup>84</sup> It may perhaps be regarded as part of the 2010 Constitution’s inclination to contain a ‘most exhaustive catalogue of human rights’.<sup>85</sup> Lumumba and Francheschi note that Article 45 generally has its foundations in Article 16 of the Universal Declaration of Human Rights.<sup>86</sup> In the specific Kenyan context, it is possible to assess the purpose of Article 45(3), thereby illustrating why it should apply to the sections of Law of Succession Act discussed. As has been established, the CoK is a transformative charter meant to ‘overthrow the existing social order and to define a new social, economic, cultural, and political order’.<sup>87</sup> Yongo notes that transformative constitutions require purposive interpretations as they ‘literally list social goals such as equity, equality and good governance as aims that interpreters should keep in mind’.<sup>88</sup>

Additionally, Article 259 of the Constitution states that the Constitution must be construed in a manner that promotes its purpose, values and principles.<sup>89</sup> The achievement of these goals through a purposive construction can be supplemented through the use of preparatory documents, as preparatory documents played a primary role in the very preparation of the Constitution.<sup>90</sup>

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<sup>83</sup> Article 45(3), *Constitution of Kenya* (2010).

<sup>84</sup> However, Justice Nyamu was ready to imply the right using the treaties ratified by Kenya; a decision that was largely unsubstantiated considering the place of international law in Kenya being certain at the time. See *Republic v Minister for Home Affairs and 2 Others Ex parte Leonard Sitamze* (2008) eKLR.

<sup>85</sup> Ambani JO and Mbondenyei M, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica, Nairobi, 2016, 175-176. See also Ambani JO and Mbondenyei M, ‘A new era in human rights promotion and protection in Kenya? An analysis of the salient features of the 2010 Constitution’s Bill of Rights’, 22-24.

<sup>86</sup> Article 16, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). See also Lumumba P and Francheschi L, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2015, 206-207.

<sup>87</sup> Mutunga W, ‘The 2010 Constitution of Kenya and its Interpretation’, 1.

<sup>88</sup> Yongo C, ‘Revisiting the place of preparatory documents in the interpretation of transformative constitutions: a survey of human rights decisions in Kenya and South Africa’ Law in global political economy: Heterodoxy Now Conference organized by the Institute for Global Law and Policy at Harvard University, Boston, 2-3 June 2018, 13-14.

<sup>89</sup> Article 259(1), *The Constitution of Kenya* (2010).

<sup>90</sup> Yongo C, ‘Revisiting the place of preparatory documents in the interpretation of transformative

As an interpretive aid, they are thus invaluable and will be used in this analysis to qualify the argument that the termination of the widow's life interest upon remarriage runs contrary to Article 45(3) of the Constitution.

At present, it is possible to refer to the preparatory documents in the form of the Commission of Kenya Review Commission's (CKRC) final reports to give effect to this Article.<sup>91</sup> The road to a new Constitution was paved by the people, and the vehicle of change towards the new era was driven by the people.<sup>92</sup> Therefore, many recommendations made by the CKRC that found their way into the Constitution were highly informed by the peoples' needs. Regarding the Bill of Rights, the CKRC envisioned an 'expanded Bill of Rights'.<sup>93</sup> For the particular purpose of this paper, the report makes some rather useful observations and recommendations. The report noted that it received a large amount of submissions on women's issues. These submissions involved, amongst other things, the entitlement of women to their property within and outside marriage, the illegalisation of 'retrogressive socio-cultural practices that impeded women's rights to participate, access and control resources' and; more specifically, submissions related to 'discrimination in inheritance'.<sup>94</sup> Consequently, the Commission noted that there would need to be provisions clearly setting out women's rights.<sup>95</sup> Article 45(3) does just this.

Significantly, the commission noted in its commentary on the people's suggestions that the repealed Constitution's provision qualifying discrimination in personal law matters relating to 'adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law' should be abolished.<sup>96</sup> This recommendation is reflected in the CoK under Article 27 which contains no such exceptions on discrimination.<sup>97</sup> Nevertheless, Article 45(3) is more specific and has found its way into regimes of law involving both marriage and property law, both being areas of personal law.<sup>98</sup> The Article has found itself in the Marriage Act, which restates Article 45(3) word for word in a preambular

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constitutions: a survey of human rights decisions in Kenya and South Africa', 13-14.

<sup>91</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 2005.

<sup>92</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 62-67. See also Constitution of Kenya Review Commission, *Working Draft of the Final Report of the CKRC: Chapter 1-18*, 2004, 92-94.

<sup>93</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 113.

<sup>94</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 114.

<sup>95</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 114-115.

<sup>96</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 104.

<sup>97</sup> Article 27, *Constitution of Kenya* (2010).

<sup>98</sup> Personal law is defined as 'the portion of law which constitutes all matters related to any individual, or their families'. See *Black's Law Dictionary*, 5 ed.

fashion.<sup>99</sup> Meanwhile, the Matrimonial Property Act more or less adapts the Article to its context:

- ‘Despite any other law, a married woman has the same rights as a married man
- (a) to acquire, administer, hold, control, use and dispose of property whether movable or immovable;
  - (b) to enter into a contract; and
  - (c) to sue and be sued in her own name’.<sup>100</sup>

Despite all this, the Article is yet to inform succession law. This becomes all the more puzzling as it is obvious that the Article in question was primarily meant to eliminate the imbalances within the domain of personal law by equalising the position of both parties to a marriage. If the Article in question can and has been applied to personal matters involving family and property law, then why should it be excluded from applying to the personal law of inheritance? It is very relevant since the devolution of property on death was specifically mentioned as an area of reform within the CKRC Final Report.<sup>101</sup>

The courts have even applied Article 45(3) outside of the aforementioned acts. This can be seen in claims of maintenance in family law,<sup>102</sup> and before the enactment of the Matrimonial Property Act, in cases of matrimonial property.<sup>103</sup> The author in his quest for sources involving Article 45(3) in matters of Kenyan succession law will, for the most part, find himself thoroughly and unintentionally informed on the state of alimony and matrimonial property in Kenya.<sup>104</sup>

Notwithstanding this, the situation may not be entirely bleak. The court in *Agnes Wanjala William v Jacob Petrus Nicolas Vander Goes*,<sup>105</sup> has implicitly recognised that Article 45(3) may be expansive. The court placed emphasis on the aspect of equal rights between spouses, affirming that these rights extend to areas of the law such as matrimonial property. This provides a possibility that the constitutional provision may apply to succession law in Kenya. Sadly and

<sup>99</sup> Section 3(2), *The Marriage Act* (Act No. 4 of 2014).

<sup>100</sup> Section 4, *Matrimonial Property Act* (Act No. 4 of 2013).

<sup>101</sup> Constitution of Kenya Review Commission, *Final Report of the CKRC*, 104.

<sup>102</sup> *W.M. M v B.M.L* (2012) eKLR.

<sup>103</sup> *Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes* (2011) eKLR.

<sup>104</sup> Kariuki F *et al*, *Property Law*, 273-281. See also Kiage P, *Family Law in Kenya*, LawAfrica, Nairobi, 2016, 24. See Ambani JO and Mbodenyi M, *The new constitutional law of Kenya*, 208-209. See also Lumumba P and Francheschi L, *The Constitution of Kenya, 2010*, 207-211. See also Mbodenyi M, ‘The Bill of Rights’ in Mbodenyi M, Lumumba P and Odero S (eds) *The Constitution of Kenya: Contemporary readings*, LawAfrica, Nairobi, 2013, 92-93.

<sup>105</sup> (2011) eKLR.

ironically, the possibilities arising from our Constitution are infinite. This is owed to its transformative nature.<sup>106</sup> The tragedy is that there is no surety that any of them will be actualised or contemplated to this end. There must be an active effort to either appraise or expunge the unequal termination of a life interest as per Sections 35(1) and 36(1) of the Law of Succession Act.

## VI. Recommendations and Conclusion

### i. Recommendations

The study has endeavoured to demonstrate the nature and purpose of Article 45(3). From the foregoing analysis, the conclusion that has been reached is that Sections 35(1) and 36(1) are indeed incompatible with Article 45(3). This means that any form of change enacted on the provisions being discussed must reflect the content and purpose of the right as contextualised to these provisions: that the parties to a marriage must have their positions equalised in the sense that their entitlements to the devolution of property upon either of their deaths are equal. This purpose has been reflected in the proposed recommendations.

The courts' mandate to issue a declaration of unconstitutionality is entirely enshrined by the same Constitution.<sup>107</sup> In declaring the unconstitutionality, the author advocates using the severability test utilised in *Coetzee v Republic of South Africa*.<sup>108</sup> The court asks itself two questions: 'Is it possible to sever the invalid provisions?' and second, 'If so, is (sic) what remains giving effect to the purpose of the legislative scheme?'<sup>109</sup> In the present case, it is indeed possible to excise only those provisions which are contrary to Article 45(3). The second requirement is also fulfilled. The object and purpose of the Law of Succession Act is to provide a single uniform legislation that would have universal application.<sup>110</sup> It is not of relevance whether this purpose was achieved but only that it was the purpose to begin with. To excise the provisions in question would neither detract nor nullify the purpose of the Act. The unequal determination of a life interest upon remarriage by a widow has nothing to do with the purpose of the Act and if

<sup>106</sup> Mutunga W, 'The 2010 Constitution of Kenya and its interpretation', 1.

<sup>107</sup> Article 165(3)(d), *Constitution of Kenya* (2010).

<sup>108</sup> *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* (1995), Constitutional Court of South Africa.

<sup>109</sup> *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* (1995), Constitutional Court of South Africa, para. 15-17.

<sup>110</sup> Section 2(1), *Law of Succession Act* (Act No. 26 of 2015).

anything, detracts from its universal application. Therefore, under the severability test, the unequal determination of the life interest as per Sections 35(1) and 36(1) is capable of being declared inconsistent with the CoK.

Thereafter, it is possible for Parliament to amend the Act.<sup>111</sup> From this exercise, one of two results is acceptable. The first is that the sections would be removed and, therefore, the exclusive determination of a life interest upon remarriage by a widow would cease to exist. This would mean that both the widow and the widower would enjoy a life interest until it is extinguished upon death. Alternatively, the law can be amended so that there is no longer an exception, but a uniformity in application resulting in both the widow and widower being subject to the termination of a life interest upon remarriage. The first of these would seem more desirable as it would symbolise the elevation of the widow to a position that she has been denied for a very long time.

## *ii. Conclusion*

In 2010, a new constitution was given birth to and the old one buried. After this, however, some of the laws of the forgone constitution continued to exist. This lapse resulted in certain laws resembling more the fossil in its casket than the new-born in its crib. The impugned provisions discussed here are such laws. The Law of Succession Act in granting a widower continuity in his life interest upon remarriage, and denying the widow the same, directly contradicts the equalisation of both parties to a marriage that Article 45(3) was intended to secure. Sections 35(1) and 36(1) are therefore unconstitutional.

The author thus concludes that there is a problem. But there is also a solution to be found. It is time to accept that what is dead should remain dead and what is alive should be cultivated. The historically lower position of the widow ought to be reversed in the face of the new Constitution. A step that can be made towards this goal is recognising that Sections 35(1) and 36(1) of the Law of Succession Act are unconstitutional. In their place, provisions embodying the equality and rights of both a widow and widower should be put in place. Though Kenya inherited a law of succession that contained within it a perverse stipulation, this study has shown that there now exist means to reverse and change what was previously a complete legality. It would be a self-inflicted disservice if these means went to waste.

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<sup>111</sup> This is provided for under Article 94, *Constitution of Kenya* (2010).