

THE SUPREME COURT OF KENYA AFFIRMS EQUAL INHERITANCE RIGHTS FOR CHILDREN BORN OUT OF WEDLOCK UNDER MUSLIM LAW

Executive Summary

On ***30th June 2025***, the **Supreme Court of Kenya** issued a watershed judgment in *SC Petition No. E035 of 2023 – Fatuma Athman Abud Faraj vs Ruth Faith Mwawasi & 2 Others*, unequivocally affirming the right of children born out of wedlock to inherit from a deceased Muslim father's estate—provided paternity is established and the children were acknowledged during his lifetime.

This authoritative decision redefines the contours of Islamic succession law in Kenya, harmonizing personal religious practices with the supremacy of the 2010 Constitution, particularly Articles 27 (Equality and Freedom from Discrimination), 24(4) (Limitation Clause for applicability of the Muslim Law), and 53 (Best Interests of the Child). It also offers clarity for families navigating blended households, multi-spousal unions, and complex familial structures involving religious, customary, and statutory succession systems.

Background and Procedural History

The dispute originated from succession proceedings concerning the Estate of the late Salim Juma Hakeem Kitendo, a Muslim who died intestate in 2015. Three women claimed to be his lawful widows and sought recognition of their respective children as beneficiaries. The Appellant, Fatuma Faraj, challenged the inclusion of the other women's children, contending they were born out of wedlock and thus disqualified under Islamic inheritance principles.

The case, emblematic of Kenya's plural legal system, travelled from the Kadhi's Court, through the High Court, to the Court of Appeal, and was finally determined by the Supreme Court, which delivered a holistic and progressive judgment.

Core Constitutional and Legal Issues

1. Whether Article 24(4) of the Constitution of Kenya 2010 allows absolute application of Muslim law in matters relating to inheritance.
2. Whether children born out of wedlock can be denied inheritance solely based on birth status under Islamic law.
3. How Kenyan courts should reconcile Muslim inheritance principles with the Bill of Rights, especially Articles 27 and 53 of the Constitution of Kenya 2010.
4. What role Section 2(3) of the Law of Succession Act plays in the context of Muslim intestate estates.

Findings and Determinations of the Supreme Court

- **Jurisdiction Properly Invoked**

The Supreme Court held that the matter involved constitutional interpretation and application under Article 163(4)(a) and was properly before it.

- **Equality Clause Prevails Over Discriminatory Practices**

The Court held that while Article 24(4) permits application of Muslim law in specific contexts, any deviation from constitutional equality must meet the threshold of being "strictly necessary" and pass a proportionality test. Blanket exclusions of children based on birth circumstances were found to be unreasonable, unjustifiable and incompatible with the constitutional values of dignity, equality and non-discrimination.

The Court argues that Article 24(4) must be read as allowing only narrowly tailored and strictly necessary departures from the equality and freedom from discrimination provisions of the Bill of Rights.

- **Child's Welfare is Paramount**

Referencing Article 53(2), the Court reaffirmed that the best interests of the child are paramount. The Court agreed with the Court of Appeal that no reasonable justification has been advanced to deny children born out of wedlock by the same parents the same benefits accorded to children born within wedlock, on the basis of the alleged "sins" of their parents.

All children fathered by the deceased and acknowledged during his lifetime were therefore declared beneficiaries and/or dependants, save for one whose paternity was disproven.

Legal and Societal Significance

This Judgment reshapes Islamic succession law in Kenya and addresses key realities of modern family life:

- **Blended Families:** Recognizes the diverse structures within which modern Kenyan families operate—including children from previous relationships, informal unions, and polygamous marriages.

- **Religious Pluralism vs Constitutional Supremacy:** While Muslim personal law is recognized under the Constitution, it must not contravene human rights norms and constitutional protections.

- **Protection of Vulnerable Children:** Solidifies the principle that no child shall suffer disinheritance due to their birth circumstances—irrespective of religious, marital, or cultural labels.

In conclusion, whilst some Muslims are against this decision by the Supreme Court, some scholars and Islamic law commentators have argued that liberal interpretation of Chapter 4 Verse 8 and 9 of the Holy Qur'an can permit children born out of wedlock to inherit.

How CM Advocates LLP Can Assist You

At CM Advocates LLP, we have a long-standing track record of advising clients across Kenya and globally in the nuanced and often contentious intersection between Islamic law, customary practices, and constitutional rights. Our firm brings multi-disciplinary strength and cross-border capability to every family, succession, and inheritance challenge.

For Blended and Complex Family Arrangements, we;

- Structure legally compliant succession frameworks for polygamous, blended, and multi-generational families.
- Draft family constitutions, shared estate governance mechanisms, and dispute-proof succession instruments.

- Offer advisory for families with cross-cultural, interfaith, or non-traditional structures navigating estate planning.

For Succession Disputes and Inheritance Litigation, we;

- Litigate and mediate in contentious probate, beneficiary disputes, and paternity-based claims.
- Offer strategic advice on confirmation of grants, letters of administration, and equitable distribution of estate assets.

For Faith-Compliant and Constitutionally Aligned Estate Planning, we;

- Draft Islamic-compliant wills, inter vivos gifts, and family trust instruments.
- Structure Shariah-aligned wealth succession plans that meet both religious obligations and constitutional imperatives.

For Court-Annexed Mediation and Settlement Agreements, we;

- Facilitate Court-Annexed Mediation to resolve inheritance disputes amicably and confidentially.
- Draft Deeds of Family Arrangement, consent orders, and blended family agreements.

For Cross-Border Estate Administration and Diaspora Support, we;

- Apply for resealing of foreign grants and manage international probate matters.
- Represent Kenyan diaspora families in local succession claims and asset repatriation.

For Guardianship, Parental Care, and Child-Centric Legal Advisory, we;

- File and defend guardianship applications, child maintenance suits, and custodial arrangements.
- Offer advisory for vulnerable dependants under the Children Act and Mental Health Act.

Our Enduring Commitment

At CM Advocates LLP, we are your strategic legal partner in matters of family, faith, and legacy. We help you navigate:

- Complex inheritance scenarios;
- Sensitive blended family dynamics;
- Multi-jurisdictional planning; and
- Constitutionally compliant dispute resolution.

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