

SPECIAL ISSUE

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SENATE BILLS, 2023

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**THE LAW OF SUCCESSION (AMENDMENT) BILL,
2023**

A Bill for

AN ACT of Parliament to amend the Law of Succession Act; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Law of Succession (Amendment) Act, 2023. Short title.

2. Section 3 of the Law of Succession Act, hereinafter referred to as the “principal Act”, is amended— Amendment of section 3 of Cap 160.

(a) in subsection (1) by inserting the following new definitions in their proper alphabetical sequence—

“child” includes an adopted child and a child who is conceived during the lifetime of a deceased person and is subsequently born after the death of the deceased person;

“intermeddling” means —

(a) taking possession of, disposing off, charging, receiving, distributing, leasing or using property of a deceased without authority under this Act or any other applicable law;

(b) ejecting a surviving spouse or child from the matrimonial home; or

(c) any unlawful dealing with the deceased person’s estate;

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home; and includes any other attached property;

(b) by deleting subsection (2); and

(c) by deleting subsection (3).

3. The principal Act is amended by repealing section Repeal of section 32 of Cap 160

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33. 4. The principal Act is amended by repealing section 33. Repeal of section 33 of Cap 160.
5. Section 35 of the principal Act, is amended — Amendment of section 35 of Cap 160.
- (a) in subsection (1) by —
- (i) inserting the words “subject to subsection (1A) at the beginning of paragraph (b); and
 - (ii) deleting the proviso; and
- (b) by inserting the following new subsections immediately after subsection (1) —
- (1A) The interest of the surviving spouse under subsection (1)(b) shall determine upon remarriage.
- (1B) Notwithstanding subsection (1), —
- (a) where the surviving child is not a child of the surviving spouse—
 - (i) the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely and a life interest in one-half of the whole residue of the net intestate estate; and
 - (ii) the surviving child shall be entitled to one-half of the whole residue of the net intestate estate which shall be held in accordance with section 41, and if there be more than one child they shall share equally;
 - (b) where the surviving children include a child who is not a child of the surviving spouse —
 - (i) the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely;
 - (ii) the net intestate estate shall, in the first instance, be divided equally amongst the surviving spouse and all the surviving children;
 - (iii) the surviving spouse shall have a life interest in his or her share and that of his or her children under subsection (1B)(b)(ii); and

- (iv) the share of the surviving child who is not a child of the surviving spouse under subsection (1B)(b)(ii) shall be held in accordance with section 41, and if there be more than one child they shall share equally.
 - (c) by deleting subsection (5) and substituting therefor the following new subsection –
 - (5) Subject to the provisions of sections 41 and 42 and to any appointment or award made under this section, the whole residue of the net intestate estate shall, on the death or re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
- 6. Section 36 of the principal Act is amended —**
- Amendment of
section 36 of Cap
160.
- (a) in subsection (1) by —
 - (i) inserting the words “subject to subsection (1A) at the beginning of paragraph (c); and
 - (ii) deleting the proviso; and
 - (b) by inserting the following new subsection immediately after subsection (1) —
 - (1A) The interest of a surviving spouse under subsection (1)(c) shall determine upon re-marriage.
 - (c) by deleting subsection (3) and substituting therefor the following new paragraph –
 - (3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the following order of priority –
 - (a) father and mother in equal shares; or if either is dead;
 - (b) the surviving parent;
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares;

- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

7. Section 39 of the principal Act is amended in subsection (1) —

Amendment of
section 39 of Cap
160.

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—
 - (a) father and mother in equal share; or, if either is dead;
- (b) by deleting paragraph (b) and substituting therefor the following new paragraph—
 - (b) surviving parent; or if none

8. Section 40 of the principal Act be amended by inserting the following new subsection immediately after subsection (2) —

Amendment of
section 40 of Cap
160.

- (3) Notwithstanding subsection (1), where any of the surviving children is not a child of any of the wives of the deceased, that child shall —
 - (a) be considered as an additional unit in determining the share of dependants in the net intestate estate under subsection (1); and
 - (b) the share of such child shall be held in accordance with section 41, and if there be more than one child they shall share equally.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to amend the Law of Succession Act to eliminate discrimination in distribution of the property of the deceased. To achieve this, the Bill seeks to amend section 3(2) and repeal section 3(3) of the Act which the Kenyan Courts have found discriminative against adopted children and children who have not been expressly recognized and accepted by their father. This will ensure that the Law of Succession Act complies with the provisions of Article 53 of the Constitution which provides for the equal care, protection and responsibility towards children by both parents regardless of their marital status.

The Bill further seeks to protect children of the deceased whose mother was not a wife of the deceased by ensuring that they are considered as additional units and their share of the estate devolves to them at the time of succession. The Bill also seeks to eliminate discrimination against widows, as they lose life interest in their deceased's spouse's property upon remarriage whereas widowers do not. The Court has previously found section 35 and 36 of the Act to be unconstitutional for discrimination on the basis of gender. The Bill thus ensures that the widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry.

Additionally, the Bill seeks to ensure that where the parents of the deceased are entitled to inherit their deceased child's estate, both the mother and the father receive an equal share of the estate. The Court has previously found section 39 to be unconstitutional in so far as it gives fathers the priority when it comes to inheriting the property of their deceased child.

The Bill further seeks to exclude community land from the ambit of succession.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate legislative powers nor does it limit the fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Bill deals with succession matters which essentially touch on land and other movable and immovable property of a deceased person. Succession matters have implications on the well-being of members of the society especially dependants of the deceased person. The stability and

continuity of life of the dependants of a deceased person contribute greatly to the economy and security of a county. The Bill is therefore a Bill concerning county government in terms of Article 110 (1) (a) of the Constitution.

**Statement that the Bill is not a money Bill, within the meaning of
Article 114 of the Constitution**

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 12th April, 2023.

VERONICA MAINA,
Senator.