



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1067 OF 1991
IN THE MATTER OF THE ESTATE OF MOSES KAPOYA OLE
MOSIRO (DECEASED)

RAPHAEL SENTERO KAPOYA 1ST

APPLICANT

RICHARD MOL KAPOYA 2ND

APPLICANT

VERSES

RUTH WANJIKU KAPOYA 1ST

RESPONDENT

SIMON MUTUNKEI KAPOYA 2ND

RESPONDENT

RULING

1. This ruling relates to the following:-
 - i. Application dated **16th February, 2024.**
 - ii. Application dated **5th May, 2025.**
 - iii. Preliminary objection dated **12th May, 2025.**
 - iv. Application dated **22nd May, 2025.**

2. The application dated **16th February, 2024** filed by the Applicants, Raphael Sentero Kapoya and Richard Mol Kapoya, seeking for **ORDERS THAT:-**

1. Spent.

2. Leave be granted to the firm of Messrs. Seko Minayo & Company Advocates LLP, to come on record for the Applicants.

3. Pending the hearing and determination of this application, this honourable court be pleased to stay implementation and execution of its orders of 2nd May, 2023 and consequential orders, which orders were issued summarily and conclusively at an ex - parte stage leaving nothing for inter - partes hearing.

4. The orders issued by this honourable court on 2nd May, 2023 be set aside and/or discharged and the status quo on the property known as NGONG/ NGONG/11077 be maintained until the hearing of the review application filed in the Court of Appeal in Civil Appeal No. 40 of 2015 is concluded and until all beneficiaries agree to the lifting of cautions/ restrictions and orders registered against the property known as NGONG/NGONG/11077.

3. The application is supported by joint affidavits sworn by Raphael Sentero Kapoya and Richard Mol Kapoya on **16th February, 2024** and **19th June, 2024**.

4. They aver *inter alia* that they are sons of the deceased and beneficiaries of the estate. On **2nd May, 2023**, the Court issued *ex parte* orders in terms of prayer **1** of the Respondents application dated **30th January, 2023**, directing the Land Registrar Ngong, to remove all cautions, caveats, inhibitions and orders registered against **NGONG/NGONG/11077** to facilitate distribution of the property.
5. They contend that the Respondents failed to disclose to the Court that there is a pending application for review of the judgment of the Court of Appeal delivered on **25th October, 2021** in **Civil Appeal No. 40 of 2015**, which remains unresolved before the Court of Appeal in Nairobi. The Respondents also failed to notify the beneficiaries, including the Applicants, of the filing of the application dated **30th January, 2023**, thereby misleading the Court into granting the orders.
6. The Applicants added that the cautions, restrictions and orders registered against the property were lodged by beneficiaries, most of whom are now deceased, to protect their beneficial interests. They only became aware of the orders of **2nd May, 2023** on or about **10th February, 2024**, nearly **10** months after the orders were issued. They argue that the orders were obtained through material non-disclosure and misrepresentation, including the false impression that the Court of Appeal had issued a final determination in **Civil Appeal No. 40 of 2015**.

7. They further assert that the Respondents did not seek or obtain the consent of the beneficiaries before filing the application, nor did they notify them of their intention to seek the impugned orders. Given the material non-disclosure, they submit that the Court has discretion to set aside orders obtained in such circumstances and urge the Court to vacate the orders of **2nd May, 2023**.
8. The Applicants maintain that unless the Court intervenes, they and other beneficiaries stand to lose their rightful inheritance due to the Respondents' alleged deceptive conduct. They identify potential harm, including violation of their property rights under **Article 40**, infringement of their right to be heard under **Article 50(1)** and the risk of being deprived of their share of the estate without due process.
9. They further state that the Respondents misled both the Court and family members and recently convened a meeting on **1st February, 2024**, without involving the Applicants, to initiate a survey. They accuse the Respondents of acting in bad faith by holding undisclosed meetings with their advocates.
10. In the circumstances, they pray for the Court to set aside the orders of **2nd May, 2023** and to allow the prayers sought in the Chamber Summons dated **16th February, 2024**.
11. The application is opposed vide joint replying affidavit sworn by Ruth Wanjiru Kapoya and Simon Mutunkei Kapoya on **7th November, 2024**.

12. They aver *inter alia* that the reliefs sought by the Applicants are not available in law. They state that the Applicants' motion is grounded on the existence of an alleged pending matter in the Court of Appeal, namely **Civil Application No. Sup. 19 of 2019**, in which the Applicants sought leave to appeal to the Supreme Court against the Court of Appeal judgment delivered on **6th August, 2019**.
13. However, that application was heard by a fresh three-judge bench and was dismissed for want of prosecution on **26th February, 2024**, thereby extinguishing any further appellate process. The Respondents emphasize that the High Court had already issued an order on **3rd May, 2023** directing the Land Registrar, Ngong to remove all caveats, cautions, inhibitions and other restrictions registered against **NGONG/NGONG/11077**. That order was issued after the Court of Appeal, through its **2019** judgment, upheld the validity of the deceased's will and paved the way for distribution of the estate.
14. The High Court was merely implementing the binding findings of the superior court. The Applicants now ask this Court to reinstate or retain the caveats, cautions and inhibitions that were previously registered against the property pending their appeal. However, that appeal has already been fully concluded and dismissed twice by the Court of Appeal.
15. The Respondents argue that reinstating the restrictions would render both the Court of Appeal's final judgments

and the High Court's order of **3rd May, 2023** nugatory, as it would contradict the appellate court's conclusive pronouncements upholding the Will and authorizing distribution.

16. The Respondents contend that the Applicants have reached the end of the litigation process, as their attempts to escalate the matter to the Supreme Court have also failed. Accordingly, their continued assertion that they remain "Respondents" in ongoing litigation is untenable. Granting the orders sought, including reinstatement of the previously removed cautions, would effectively require this Court to sit on appeal against the Court of Appeal's final judgments, something it has no jurisdiction to do. It would also amount to overturning the High Court's earlier order of **3rd May, 2023**, even though both courts are of equal jurisdiction.
17. The Respondents further note that once they discovered that the Milimani court file had been marked "closed," the Applicants filed a similar application in the Kajiado ELC Court seeking police protection for survey and enforcement. For procedural caution, they thereafter withdrew the parallel application filed in the closed Milimani file. The Respondents conclude that the Applicants must now accept that the litigation has lawfully come to an end, comply with the Court of Appeal judgments and allow the court-appointed Executors to carry out the distribution of the estate without further obstruction.

18. The application dated **5th May, 2025** filed by the Applicants, Godfrey Saroni Kapoya, Alice Sisina Kapoya and Selt Kapoya, seeks for **ORDERS THAT:**

1. Spent.

2. Pending the hearing and determination of this summons the honourable court be pleased to temporarily stay and/or suspend the implementation of the confirmed grant dated 8th October, 1999, all orders consequential thereto and/or the transmission, vesting of the interest upon the beneficiaries of the estate as stated in the attached will and more specifically entering into, surveying and or otherwise interfering with land parcel number NGONG/NGONG/11077.

3. Pending the hearing and determination of this summons the honourable court be pleased to grant a temporary injunction restraining the Respondents, their servants, agents, employees and/or any other person claiming under them from interfering with the applicant's presence on any assets of the estate the subject of the confirmed grant dated 8th October, 1999.

4. Pending the hearing and determination of this suit, the honourable court does grant an injunction restraining the Respondents and interested parties herein by themselves, their agents, servants and/or any person purporting to be acting on their authority from dispossessing.

- 5. The certificate of confirmation of grant dated 8th October, 1999 be revoked and all orders arising thereof be set aside and all assets/land properties revert back to the estate in the deceased's name.**
- 6. The honourable court be pleased to grant an order declaring all the four copies of the purported wills of the deceased be null and void.**
- 7. The honourable court be pleased to make an order that the cause herein does proceed as intestate succession and the assets be distributed in accordance with the provisions of Section 41 of the Law of Succession Act Cap 160 Laws of Kenya.**
- 8. The honourable court be pleased to order that the Respondents produce all Wills whether original/copies in their custody and more specifically the Wills produced before this honourable court in different occasions by the Respondents for scrutiny and/or examination by a court appointed forensic document examiner.**
- 9. The honourable court be pleased to order the respondent/administrators of the estate herein to render a full account of the estate and its assets within 7 days of this order.**
- 10. The costs of this application be borne by the Respondents.**

19. The application is based on the grounds thereof and supported by affidavit sworn by Godfrey Soroni Kapoya and Richard Mol Kapoya on **5th May, 2025** and **15th July, 2025**.
20. They aver *inter alia* that they are beneficiaries of the deceased's estate, being his children from the second wife. They challenge the Respondents' petition for probate, which was premised on an undated will that purported to disinherit the entire second house in a manner inconsistent with Maasai customary law, the Constitution and the Law of Succession Act.
21. That when the authenticity of that undated will was questioned, the Respondents produced a second document - a Kiswahili Will dated **29th January, 1991** - and, after being directed by Githinji J. to present a duly signed Will, they produced yet another different will dated **10th March, 1991**.
22. The Applicants point out that these three wills differ markedly in form, content and execution, raising grave doubts about their authenticity and suggesting they were fabricated to exclude the second house. They add that even the Will dated **10th March, 1991** gives reasons relating only to the deceased's marital relationship with the second wife, and offers no lawful justification for disinheriting her children, making it invalid for purposes of succession.
23. They further state that despite a pending case in the Kajiado Environment and Land Court concerning **LR No.**

NGONG/NGONG/11077, the Respondents forcibly entered the property on **25th March, 2025** accompanied by surveyors and unknown individuals. Their siblings, including Richard Mol Kapoya who has lived there for over **12** years, risk eviction and loss of their homesteads unless the court intervenes.

24. The Applicants therefore assert that the Respondents obtained the grant fraudulently and that it should be revoked. They request that the Respondents be compelled to produce the original will, if any exists, for forensic examination.
25. The Applicants also contend that investigations by the Directorate of Criminal Investigations established that the identity card number used in the alleged will belongs to Kapoya Ole Mosiro and not “Moses Kapoya Ole Mosiro,” the name used in the succession proceedings. There is no evidence that the deceased ever changed his name in accordance with the law.
26. They note that four conflicting Wills exist, yet the court failed to interrogate this issue, and even relied on a forged document. Fingerprint analysis shows that at least two Wills do not contain the deceased’s fingerprints and one document lists properties that were not owned by him.
27. The Executors also subdivided and allocated among themselves a parcel of land that was not part of the deceased’s estate.
28. The Applicants maintain that the wills are products of forgery and fraud perpetrated by certain family members

and unnamed third parties, making the resulting grant illegal and liable to revocation. They argue that it would be unjust to allow forged documents to govern distribution of the estate.

29. They therefore pray that the application dated **5th May, 2025** be allowed, and that interim preservatory orders be issued to protect the estate and prevent dispossession pending determination of the matter.
30. The application is opposed vide preliminary objection dated **12th May, 2025** which is based on the grounds that the application dated **5th May, 2025** is *res judicata* and that this court lacks jurisdiction to entertain it.
31. The High Court cannot, in any form, sit on appeal over two final judgments of the Court of Appeal concerning the same issues. They contend that the Applicants have deliberately failed to disclose that all the matters raised in the present application were fully argued, considered and dismissed with costs in **Civil Appeal No. 40 of 2015**, whose judgment was delivered on **6th August, 2019**.
32. Furthermore, the Applicants' subsequent attempt to challenge that decision through an application dated **25th October, 2021** seeking review, recall and reopening of the appeal was also dismissed with costs by a different bench of the Court of Appeal on **26th February, 2024**.
33. In light of these two conclusive determinations, the Respondents assert that this court lacks jurisdiction even to consider the present application, as the issues have already been decisively adjudicated by the superior court.

They argue that the application should therefore be struck out *in limine* or summarily dismissed, as the High Court is barred from revisiting questions already settled by the Court of Appeal.

34. They further state that the Applicants' addition of new parties in the present motion does not alter the jurisdictional bar; no new party, regardless of status, can revive or reopen issues already conclusively determined by two distinct benches of the Court of Appeal.
35. The application dated **22nd May, 2025** filed by the Applicants, Godfrey Saroni Kapoya, Alice Sisina Kapoya and Selt Kapoya, seeks for **ORDERS THAT:**

1. Spent.

2. Pending the hearing and determination of this summons the honourable court be pleased to grant an order for maintaining status quo in favour of the Applicants in regard to land parcel number NGONG/NGONG/11077 to specifically remain in possession; continue having unfettered access to their homes located therein, continued access to the property for the Applicants' cattle or animals grazing therein.

3. Pending the hearing and determination of this summons the honourable court be pleased to grant a temporary injunction restraining the Respondents, their servants, agents, employees and/or any other person claiming under them from interfering with the Applicants' presence on

land parcel number NGONG/NGONG/ 11077 being one of the assets of the estate the subject of the confirmed grant dated 8th October, 1999.

4. The honourable court be pleased to give directions as to service of the summons herein and for inter partes hearing either in priority or together with the summons dated 5th May, 2025.

5. The costs of this application be borne by the Respondents.

36. The application is based on the grounds thereof and supported by affidavits sworn by Godfrey Saroni Kapoya and Richard Mol Kapoya on **22nd May, 2025** and **15th July, 2025**.

37. They aver *inter alia* that they are the deceased's children from his second wife and beneficiaries of the estate. They have filed a summons for revocation of grant, arguing that the grant was obtained fraudulently, as the petitioners allegedly produced a forged photocopy of a will, fully aware that the document was not part of the deceased's true testamentary wishes.

38. On **21st May 2025**, the Respondents unlawfully entered **LR No. NGONG/NGONG/1077** and began fencing the land without notice, with the intention of denying them access to their homesteads while the revocation proceedings - based on the allegedly forged will and fraudulently obtained probate - are pending. They believe their revocation application has strong chances of success.

39. The Applicants further explain that the 3rd Applicant, being the youngest child in the second house, has lived on and cared for the deceased's homestead for many years. All of them have continuously engaged in farming, grazing livestock and other agricultural activities on the property both before and after their father's death. They grew up on the land, have homes there, and their families know it as their ancestral residence. Eviction would therefore cause irreparable harm that monetary damages cannot remedy.
40. The Respondents continue fencing the property illegally and are threatening eviction without any court order. They fear that the Respondents may demolish houses, permanent structures and other installations on the land.
41. Additionally, they claim that the Respondents have unlawfully enlisted officers of the National Police Service, particularly from Kiserian Police Station, who have threatened the Applicants with arrest and prosecution on unspecified grounds.
42. The Applicants argue that unless restrained, the Respondents will interfere with and possibly dissipate the estate to their detriment. They ask the Court to intervene in the interest of justice and equity to safeguard their rights over the property pending determination of the revocation application.
43. They further state that **LR No. NGONG/NGONG/11077**, measuring approximately **34.07 hectares**, forms part of the estate. They recently discovered that titles for

subdivisions were issued on **16th December, 2024** and **31st January, 2025**, yet the County Surveyor, Kajiado North, confirmed in a letter dated **6th March, 2025** that the subdivisions were only approved on **9th February, 2025**. This shows that titles were issued even before the subdivisions were approved, contrary to the law.

44. They highlight several irregularities and fraudulent activities regarding the subdivision process: No ground visit was carried out by the surveyor prior to subdivision. Titles were issued on **16th December, 2024** and **31st January, 2025** before the subdivisions were approved on **9th February, 2025**. The estate measuring 34.07 ha (84.12 acres) was subdivided into four parcels measuring 3.256 ha, 3.256 ha, 3.256 ha, and 17.49 ha, totaling 27.688 ha (68.4 acres). There is an unaccounted difference of 6.328 ha (15.77 acres), which cannot be explained by any known survey margin of error. No transfer consents were obtained as required by law. The surveyor allegedly responsible, Mr. Javans H. Rakwar, denies that his firm, Nyawade Geoconsult & Associates Ltd, conducted the subdivision, suggesting the documents were forged. The entire process was riddled with fraud and non-compliance with land and survey laws.
45. They add that on the morning of **25th March, 2025**, more than **100** police officers, led by the OCPD Ngong, stormed the property claiming to escort a surveyor to place beacons. The purported survey exercise conducted that day was unlawful since the subdivisions had already been

approved earlier on **12th February, 2025**, and titles had already been issued months earlier, making any such “survey” impossible and fraudulent.

46. Given these serious irregularities, illegalities and ongoing interference with the estate, the Applicants urge the Court to allow the application dated **22nd March, 2025** as prayed, to preserve their rights and protect the estate pending full adjudication.
47. The application is opposed vide joint replying affidavit sworn by Ruth Wanjiru Kaboya and Simon Mutunkei Kapoya on **27th May, 2025**.
48. She avers *inter alia* that the Respondents, being the Executrix and executor of the deceased’s estate, state that the Applicants have made sensational and unfounded allegations intended to create drama and depict them as hostile individuals seeking to disinherit their step-children and step-siblings. They insist that such accusations are false and contradict Maasai customary values, which prohibit disinheritance of children and regard such conduct as a serious curse.
49. They assert that they have repeatedly reached out to the Applicants, who are the children of the deceased’s second wife, to facilitate execution of transmission documents for their rightful **8** acres. The Respondents express surprise that the Applicants have for over **35** years misrepresented facts before various courts, despite the Court of Appeal in **Civil Application No. 40 of 2015** upholding the written will that granted the Applicants’ household eight acres on

Title No. **NGONG/NGONG/11077**. They deny ever attempting to evict or dispossess the Applicants, as alleged.

50. They explain that when they attempted to access the land pursuant to court orders, the Applicants violently resisted, attacking them and their surveyor with weapons, forcing them to enter the land on **25th March, 2025** under police escort. The Applicants were subsequently disarmed and charged before the Ngong Magistrates Court. The Respondents state that their sole purpose upon entering the land was to implement the Will by carving out **3** equal portions of **8** acres for each of the deceased's **3** houses: the Applicants' late mother's house, the first wife's house and the surviving widow's house. They maintain that great care was taken during the aerial and physical survey to ensure that all existing homesteads of the Applicants and their siblings were safely preserved within their **8**-acre entitlement.
51. That the mutation forms for the **3** parcels were duly prepared and registered with the Department of Survey and the Kajiado North Land Registry. They further note that an application filed before the Kajiado court seeking to stay police protection orders, issued due to earlier violent confrontations, was dismissed with costs on **28th April, 2025**. The court, in a ruling by Hon. Lolwatan, held that the Applicants were intentionally delaying the lawful distribution of the estate and attempting to revive issues already settled by the courts.

52. The Respondents conclude that they wish to complete transmission of titles and they deny any intention to disinherit the Applicants. They characterize the present application as another attempt by the Applicants to mislead the court and vilify them, and urge the Applicants to accept that litigation has run its course, emphasizing that the Applicants' **8-acre** entitlement will always be respected.
53. The 1st and 2nd Respondents, Ruth Wanjiru Kapoya and Simon Mutunkei Kapoya, have filed written submissions dated **2nd July, 2025**; on the applications dated **5th May, 2025, 22nd May, 2025** and preliminary objection dated **12th May, 2025**.
54. The 1st interested party, Richard Mol Kapoya, has filed written submissions dated **1st July, 2025**; opposing the preliminary objection dated **12th May, 2025**.
55. The Applicants, Raphael Sentero Kapoya and Richard Mol Kapoya, have filed written submissions dated **1st July, 2025**; in support of the application dated **16th February, 2024**.

ANALYSIS AND DETERMINATION

56. I have looked at the applications before this court, the responses thereto and the rival submissions and address them as follows:
57. The application dated **16th February, 2024** raises the following issues for determination:-

- a. Whether the Applicants' advocates should be granted leave to come on record?
 - b. Whether the Applicants have satisfied the threshold for stay of implementation of the orders issued on 2nd May, 2023?
 - c. Whether the *ex parte* orders issued on 2nd May 2023 should be set aside for being obtained through material non-disclosure or misrepresentation?
 - d. Whether a "pending application" exists before the Court of Appeal capable of justifying maintenance of status quo?
 - e. Whether this Court has jurisdiction to reinstate cautions/restrictions or otherwise halt distribution in light of final Court of Appeal determinations?
 - f. Whether the Applicants have demonstrated violation of their rights
58. The Applicants challenge the *ex parte* orders of **2nd May, 2023** lifting cautions over **NGONG/NGONG/11077** on grounds that the Respondents failed to disclose a pending review in **Civil Appeal No. 40 of 2015** and misled the Court.
59. However, the Respondents demonstrate that all appellate processes, including **Civil Application No. Sup. 19 of 2019**, were dismissed on **26th February, 2024**, thereby conclusively upholding the will and authorizing distribution. Against this factual background, the Applicants' case is weakened by the absence of a subsisting appeal, the substantial delay in approaching the

court and the jurisdictional limitation that the High Court cannot reopen or suspend implementation of a final appellate decision. Accordingly, save for leave to come on record, the substantive prayers lack legal foundation as granting them would contradict the doctrine of finality of litigation and improperly invite the High Court to sit on appeal over the Court of Appeal.

60. In my considered view, the application lacks merit save for the procedural prayer for leave for new counsel to come on record. The substantive prayers for stay, setting aside of the *ex parte* orders of **2nd May, 2023** and reinstatement of cautions cannot lie because the Applicants have not demonstrated a subsisting appeal or review before the Court of Appeal capable of sustaining interim relief.
61. Indeed, the Respondents' evidence that the final appellate application was dismissed on **26th February, 2024** suggests that the litigation has reached its legal end and this court is now *functus officio* regarding implementation of the Court of Appeal judgment that upheld the will and authorized distribution. Even if non-disclosure occurred, it is not material enough to empower this court to re-open or suspend execution of a binding appellate decision, as doing so would amount to sitting on appeal over the superior court and undermine the doctrine of finality of litigation.
62. Consequently, I find that this court lacks jurisdiction to reinstate the cautions or halt distribution and the

Applicants have not met the threshold for stay, rendering the application untenable.

63. As shall be stated below the removal of cautions and or inhibition nonetheless does not permit the Respondents to execute the grant without involving the Applicants noting that they are also beneficiaries of the estate.
64. The application dated **5th May, 2025** raises the following issues for determination:
 - a. Whether the application is *res judicata* and whether this court has jurisdiction to entertain it in light of two final judgments of the court of appeal of **6th August, 2019** and **26th February, 2024**?
 - b. Whether the Applicants have established a basis for temporary stay, injunctions and preservative orders to halt implementation of the **1999** confirmed grant and activities on **NGONG/NGONG/11077**?
 - c. Whether sufficient grounds exist under **Section 76** of the Law of Succession Act to revoke the confirmed grant, including allegations of fraud, forgery, concealment of material facts and defective proceedings?
 - d. Whether the competing wills are authentic or forged and whether the Court may order production of originals for forensic examination?
 - e. Whether the estate should revert to intestacy under **Section 41** of the Law of Succession Act, should the wills be declared invalid.

- f. Whether the Administrators should be compelled to render a full account of the estate.
65. The Applicants, children of the deceased from the second house, challenge the validity of the confirmed grant issued in **1999** and the authenticity of **4** conflicting wills produced at various stages of the probate process, asserting that they contain inconsistent signatures, fingerprints, property lists and identity details indicating forgery and fraudulent intent to disinherit their branch of the family. They cite alleged forced entry and survey of **NGONG/NGONG/11077** despite ongoing ELC proceedings and contend that their long-term occupation is threatened without interim protection.
66. They argue that the Respondents obtained the grant using forged documents and an identity card not belonging to the deceased, warranting revocation and referral of the wills for forensic examination.
67. Conversely, the Respondents raise a preliminary objection asserting *res judicata* and lack of jurisdiction, relying on two final Court of Appeal decisions that upheld the will and dismissed subsequent review attempts.
68. This contest frames the central issues: whether the High Court can revisit questions already conclusively decided by the Court of Appeal; whether the Applicants' fresh allegations of forgery and fraud fall within the narrow exceptions to *res judicata*; whether preservative orders are justified; and whether directions for forensic

examination and accounting are legally permissible given the jurisdictional limitations.

69. I have anxiously weighted the matter and on the same breath perused the Court of Appeal decision No. 40 of 2015 between the parties and the learned judges among others stated on the issue of the will that:-

“In the matter before us, we were not told of any new and important evidence which after due diligence was not within the appellant’s knowledge or could not be produced at the time the appellants urged the motion before Dulu, J. Again, no error apparent on the face of the record was pointed out. We also do not find any sufficient reason that would have made Dulu, J to review the decision of Githinji, J. The appellants may have been aggrieved as they did not get the same share of the deceased’s property, who seemed to have bequeathed more property to the children of Grace & Ruth.

The reason(s) why the deceased gave the household of Kireru less than that of the other two (2) households is explained in paragraph 9 of the will. It states:

“I declare that my wife KIRIRU KAPOYA and her children except RAPHAEL KAPOYA shall not get any additional portion of my estate for the following reasons: -

i. She separated from me about 15 years ago and she has not looked after me since then.

ii. I made sufficient provisions for her by way of 35 animals and Kshs 20,000/= at the time we were separated.

iii. She refused to move from KISERIAN TO RANGAU where I offered her 50 acres.

iv. She has generally not considered or treated me as her husband.”

We are satisfied that the learned judge properly exercised his discretion when he dismissed the Appellants’ application for review.”

70. This court cannot reopen or reconsider issues that have been conclusively determined by the Court of Appeal, and therefore lacks jurisdiction to revoke the confirmed grant, invalidate the wills, or convert the cause into intestacy.
71. The doctrine of *res judicata* and the principle of finality of appellate decisions bar this court from entertaining matters already adjudicated, including challenges to the will, allegations of fraud and objections to distribution; unless the Applicants demonstrate discovery of new and previously unavailable evidence of fraud that could not with reasonable diligence have been raised before the appellate courts.
72. The principle of *res judicata* was well articulated in **JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER V CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS [2021] ECLR** where the court stated:

“81. We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

[86] We restate the elements that must be proven before a court may arrive at the conclusion that a

matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.”

73. While the Applicants make serious allegations of forgery, fingerprint mismatches and identity-card irregularities, they do not demonstrate that these issues were genuinely undiscoverable during the earlier proceedings and thus these claims alone cannot defeat the jurisdictional bar.

74. Accordingly, although the Applicants seek wide-ranging preservatory and revocation orders, this court is *functus officio* and unable to intervene in implementation of the confirmed grant.

75. The application dated **22nd May, 2025** raises the following issues for determination:

a. Whether the Applicants have met the legal threshold for status quo orders and temporary injunctions to restrain interference with their occupation and use of **LR No.**

NGONG/NGONG/11077 pending determination of the revocation application?

- b. Whether the Respondents' entry onto the land, subdivision, fencing and engagement of police officers justify interim preservative relief under succession and land law principles?
- c. Whether the Applicants' allegations of fraud in survey approvals, subdivision, issuance of titles and manipulation of acreage raise triable issues deserving protection pending hearing of the revocation summons?
- d. Whether the Respondents' actions were in lawful execution of a confirmed grant and Court of Appeal judgment, thereby barring this court from restraining them through interim orders?
- e. Whether the pending summons dated **5th May, 2025** should be consolidated or heard alongside this application and whether directions on service and *inter partes* hearing are warranted?
- f. Who should bear the costs of the application?

76. The Applicants, long-term occupants of **LR No. NGONG/NGONG/11077** and children of the deceased's second house, seek urgent status quo and injunctive orders after alleging that the Respondents forcibly entered the estate land on **21st May, 2025** and again on **25th March, 2025**, fenced portions, threatened eviction, procured police involvement and undertook fraudulent subdivisions culminating in issuance of titles even before

official approval, including an unexplained loss of over **6** hectares from the original acreage.

77. They assert that they have homes, grazing fields and ancestral ties on the land and that the pending revocation summons, based on serious allegations of a forged will, fraudulent probate and illegal survey processes, would be rendered nugatory if interference continues.
78. The Respondents counter that they are lawful Executors implementing a confirmed grant and Court of Appeal decisions entitling each of the deceased's **3** houses to **8** acres, that the Applicants violently resisted lawful survey activities, and that all actions were sanctioned by law enforcement and judicial orders.
79. In light of the long-standing occupation of the land by the Applicants, the seriousness of the alleged irregularities in subdivision and title issuance, and the real risk of eviction, demolition and interference before the revocation summons is heard, the Applicants have, on the face of it, satisfied the principles in *Giella v Cassman Brown* for interim protection, particularly the need to prevent irreparable harm and preserve the substratum of the dispute.
80. However, this Court's discretion must be exercised cautiously against the Respondents' argument that they are executing a confirmed grant long upheld by the Court of Appeal and that this court cannot restrain acts done in lawful implementation of those judgments.

81. The said grant to the extent that the Court of Appeal or this court has not set it aside must therefore be implemented or executed in a manner acceptable to all the parties including the Applicants who are recognised therein. The execution cannot be done surreptitiously and or forcefully without their involvement and their input.
82. This court's decision of 2nd May 2025 to allow the application dated 30th January 2023 which had prayed for orders to remove any cautions and or inhibitions on the register of the suit property herein was never set aside and it stands to date. The purpose of that application was to permit the execution of the confirmed grant and I do not see any sufficient reason why the court would not have allowed the application based on the reasons that there was no order barring the execution of the grant.
83. This does not mean however as stated earlier that the Executors can carry out any survey exercise without the Applicant's involvement. In the premises any survey exercise that was undertaken without their input is therefore null and void and any resultant registration for that matter.
84. In light of the above observations, I find that the preliminary objection by the Respondents holds water. The Applicants on the other hand succeeds only to the extent that they must be involved in the execution of the grant exercise till they obtain their respective portions.
85. **In the premises the court makes the following order:-**

- (a) The firm of Seko Minayo & Company Advocates LLP is hereby allowed to come on record for the Applicants in terms of prayers 2 of the application dated 16th February 2024.**
- (b) Any subdivision and transfer in terms of the confirmed grant herein in respect to land parcel number Ngong/Ngong/11077 without the involvement of the Applicants herein is hereby declared null and void.**
- (c) In view of order (b) above the Executors are hereby directed to carry out fresh subdivision of land parcel number Ngong/Ngong/11077 taking into consideration the Applicant's input and the confirmed grant.**
- (d) There shall be no eviction, destruction of property or any form of violence while carrying out the above exercise and the Executor may seek the assistance of the nearest police station, if need be.**
- (e) The rest of the prayers unless otherwise stated above as contained in the applications dated 16th February 2024, 5th May 2025 and 22nd May 2025 are disallowed.**
- (f) Costs in the cause.**

**Dated signed and delivered via video link at Nairobi
this 16th day of December 2025.**

H K CHEMITEI
JUDGE