

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO 28 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE KIPTANUI SIMATWA
(DECEASED)

MARGARET JEPKURGAT SIMATWA.....1ST
PETITIONER/RESPONDENT

CHRISTOPHER KIPRUT YEGO.....2ND
PETITIONER/RESPONDENT

VERSUS

LEAH JERUBET KIPTANUI.....1ST OBJECTOR/APPLICANT

REUBE KIPTARBEI TANUI.....2ND
OBJECTOR/APPLICANT

Coram: Before Justice R. Nyakundi
M/s Z.K. Yego Law Offices
M/s R.M. Wafula & Co Advocates
M/s Miyienda & Co Advocates

RULING

1. What is pending before this Honourable Court are two (2) Applications. The first Application is dated 30th October 2025 premised upon sections 1A, 1B, 3A of the Civil Procedure Act, Order 45 Rules 1 and 2 of the Civil Procedure Rules and Rule 63 and 73 of the Probate and Administration Rules in which the Applicants herein Leah Jerubet Kiptanui and Reuben Kiptarbei Tanui are seeking the following orders: -
 - a. *That this Honourable Court be pleased to review its orders issued on 16th October 2025 confirming the grant issued to the Petitioners.*
 - b. *The orders issued on 16th October 2025 confirming the grant of representation be reviewed to the extent that the estate of the deceased be distributed as follows;*

BENEFICIARY	ASSET	SHARE
<i>Margaret Jepkurgat Simatwa</i>	<i>ELDORET MUNICIPALITY/BLOCK 23 (KING'ONG'O)/1439</i>	<i>TO BE SHARED IN EQUAL SHARES</i>
<i>Leah Jerubet Kiptanui</i>		
<i>Reuben Kiptarbei Tanui</i>		
<i>Miriam Jepng'etich Simatwo</i>		
<i>Stephen Kipsang Tanui</i>		
<i>Naomi Cheptoo Tanui</i>		
<i>Meshack Kiprotich Tanui</i>		
<i>Abednego Kiptoo Tanui</i>		
<i>Shadrack Kiplimo Tanui</i>		
<i>Rebecca Chemeli Tanui</i>		
<i>Betty Chelagat</i>		

c. Such other orders be made as are just and expedient.

d. Costs of this application be in the cause.

2. The Application is made on the following grounds: -

a) That the Applicants approached this Honourable Court vide an application dated 24th January 2020 seeking orders that the grant of representation issued to the Respondents be revoked.

b) That the Honourable Court vide a judgement delivered on 19th September 2023 held that the application for revocation lacked merit as this was an old matter and revoking the said grant would delay the process.

- c) That the Court in its judgement further held that the parties are directed to file their proposed modes of distribution of the estate keeping in mind that the minors (Kelvin Kiptoo and Dennis Kipkemboi) had not been proven to be beneficiaries to the estate of the deceased.
- d) That the Applicants were misadvised and opted to file an Appeal to the Court of Appeal as they were partly dissatisfied with the court's decision to dismiss their application for revocation of grant on grounds that this was an old matter.
- e) That in the effort to fast track the appeal, they failed to file their summons for confirmation indicating their proposed mode of distribution.
- f) That they were recently informed by their advocate on record that the grant of representation in this matter was confirmed on 16th October 2025.
- g) That they quickly made their way to the registry and obtained a copy of the said certificate of confirmation.
- h) That the certificate of confirmation of grant issued included the two minors being Kelvin Kiptoo and Dennis Kipkemboi as beneficiaries yet they had been exempted by the Court's judgement delivered on 19th September 2023.
- i) That there is an error apparent on the face of the record as the orders confirming the grant issued on 16th October 2025 is contrary to the Court's judgement issued on 19th September 2023.
- j) That the Applicants are hopeful that this Court shall review its orders and direct that the estate of the deceased be distributed in line with the provisions of section 40 of the Law of Succession Act.
- k) That the Applicants pray that the orders issued on 16th October 2025 be reviewed and that the estate of the deceased be distributed per the schedule attached above.
- l) It is therefore apparent that the Learned Judge erroneously directed that the two minors Kelvin Kiptoo and Dennis Kipkemboi be included as dependants of the estate of the deceased.

- m) It is in the best interest of justice that this application be allowed and the orders issued on 16th October 2025 be reviewed accordingly.
3. The Application is supported by the annexed Affidavit dated 30th October 2025 sworn by Leah Jerubet Kiptanui who averred as follows: -
- a. *That I am the first applicant and the beneficiary to the estate of the deceased by virtue of being his widow hence competent to swear this affidavit on behalf of the 2nd Applicant.*
 - b. *That we approached this Honourable Court vide an application dated 24th January 2020 seeking orders that the grant of representation issued to the Respondents be revoked.*
 - c. *That the Honourable Court vide a judgement delivered on 19th September 2023 held that our application for revocation lacked merit as this was an old matter and revoking the said grant would delay the process.*
 - d. *That the Court in its judgment further held that the parties are directed to file their proposed modes of distribution of the estate keeping in mind that the minors (Kevin Kiptoo and Dennis Kipkemboi) had not been proven to be beneficiaries to the estate of the deceased.*
 - e. *That we were misadvised and opted to file an appeal to the Court of Appeal as we were partly dissatisfied with the court's decision to dismiss our application for revocation of grant on grounds that this was an old matter.*
 - f. *That in an effort to fast track the appeal, we failed to file our Summons for Confirmation of Grant indicating our proposed mode of distribution.*
 - g. *That we were recently informed by our Advocate on the record that the Grant of representation in this matter was confirmed on 16th October 2025.*
 - h. *That we quickly made our way to the registry and obtained a copy of the said certificate of confirmation.*

- i. That the Certificate of Confirmation of Grant issued has an error apparent on the face of the record in those the deceased's assets being distributed has not been indicated.
- j. That the Certificate of Confirmation of Grant issued included the two minors being Kelvin Kiptoo and Dennis Kipkemboi as beneficiaries yet they had been exempted by the court's judgement delivered on 19th September 2023.
- k. That there is an error apparent on the face of the record as the orders confirming the grant issued on 16th October 2025 is contrary to the court's judgement issued on 19th September 2023.
- l. That we are hopeful that this Court shall review its orders and direct that the estate of the deceased be distributed in line with the provisions of section 40 of the Law of Succession Act.
- m. That based on the Court judgement delivered on 19th September 2023, the beneficiaries entitled to the estate of the deceased are as follows: -
 - (a) Margaret Jepkurgat Simatwa - Widow
 - (b) Leah Jerubet Kiptanui - Widow
 - (c) Reuben Kiptarbei Tanui - Son
 - (d) Miriam Jepng'etich Simatwo - Daughter
 - (e) Stephen Kipsang Tanui - Son
 - (f) Naomi Cheptoo Tanui - Daughter
 - (g) Meshack Kiprotich Tanui - Son
 - (h) Abednego Kiptoo Tanui - Son
 - (i) Shadrack Kiplimo Tanui - Son
 - (j) Rebecca Chemeli Tanui - Daughter
 - (k) Betty Chelagat - Granddaughter representing her late mother Charity Chebet daughter to the deceased.
- n. That we pray that the orders issued on 16th October 2025 be reviewed and that the estate of the deceased be distributed as follows;

BENEFICIARY	ASSET	SHARE
Margaret Jepkurgat		

<i>Simatwa</i>	<i>ELDORET MUNICIPALITY/BLOCK 23 (KING'ONG'O)/1439</i>	<i>TO BE SHARED IN EQUAL SHARES</i>
<i>Leah Jerubet Kiptanui</i>		
<i>Reuben Kiptarbei Tanui</i>		
<i>Miriam Jepng'etich Simatwo</i>		
<i>Stephen Kipsang Tanui</i>		
<i>Naomi Cheptoo Tanui</i>		
<i>Meshack Kiprotich Tanui</i>		
<i>Abednego Kiptoo Tanui</i>		
<i>Shadrack Kiplimo Tanui</i>		
<i>Rebecca Chemeli Tanui</i>		
<i>Betty Chelagat</i>		

- o. That it is therefore apparent that the Learned Judge erroneously directed that the two minors Kelvin Kiptoo and Dennis Kipkemboi be included as dependants of the estate of the deceased.*
- p. That it is in the best interest of justice that this application be allowed and the orders issued on 16th October 2025 be reviewed accordingly.*
- q. That we bring this application requesting the court to review the aforesaid inadvertent error and issue the orders sought.*

Responses to the Notice of Motion Application dated 30th October 2025.

Notice of Preliminary Objection

4. The Application was opposed by the Petitioners/Respondents vide a Notice of Preliminary Objection dated 7th November 2025 based on the following grounds;
- a. That the firm of M/s Z.K. Yego Law Offices is not properly on record for LEAH JERUBET KIPTANUI and REUBEN KIPTARBEI TANUI, the Applicants herein, the judgement in this cause having been delivered on 19th September 2023.*
- b. The Applicants have failed to comply with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010.*

- c. *Consequently, the purported Notice of Change of Advocate dated 30th October 2025 and Notice of Motion dated 30th October 2025 filed by the said firm are incompetent, fatally defective and ought to be struck out.*
- d. *The said firm lacks standi to act in this matter and all pleadings filed by it should be expunged from the record.*

Replying Affidavit dated 28th November 2025

5. The Application was also opposed by way of a Replying Affidavit dated 28th November 2025 sworn by Margaret Jepkurgat Simotwa who deponed as follows;
 - a. *That I am the 1st Petitioner/1st Administrator herein.*
 - b. *I am a lawful senior widow of the deceased herein, the 1st Applicant being my junior in so far as our marriage to the deceased is/was concerned.*
 - c. *The contents of the application dated 30th October 2025, the supporting affidavit of Leah Jerubet Kiptanui (the 1st Applicant herein) and those of the annexures thereto have been read to me and I respond as follows;*
 - d. *That the Applicants Advocate is purporting to come on record after judgement was delivered in this cause on 19th September 2023 and further after the conclusion of the confirmation proceedings on 16th October 2025 without complying with order 9 rule 9 of the Civil Procedure Rules.*
 - e. *That the Applicants Advocates, M/s Miyienda & Co Advocates has not ceased acting for the Applicants, neither is there a consent between the said Law Firm and M/s Z.K. Yego Law Offices nor leave of court as a mandatory required by law.*
 - f. *That the current application is an afterthought, incompetent, legally untenable and abuse of court process, aimed at re-opening concluded matters, null and void and ought to be struck out/dismissed on that ground alone.*

- g. That the courts have consistently held that failure to comply with order 9 Rule 9 of the Civil Procedure Rules is not a technicality but a jurisdictional defect.*
- h. That the Applicant seek review of the orders of 16th October 2025 yet they have not demonstrated discovery of new and important evidence; error apparent on the face of the record or any sufficient cause, as required under order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.*
- i. That the Applicants reasons they were “misadvised and opted to file an appeal to the Court of Appeal and that in an effort to fast track the appeal we failed to file our summons for confirmation of grant indicating our proposed mode of distribution” do not constitute grounds for review.*
- j. That the Environment and Land Court in ELC No 140 of 2017 had declared me as a lawful wife of the deceased herein and this Honourable Court found that it was indisputable that I am a wife of the deceased.*
- k. That the Environment and Land Court held that LR. No Eldoret Municipality/Block 23 (Kingongo)1439 belonged to the estate of the deceased herein.*
- l. Vide its judgement dated 19th September 2023, this Honourable Court directed parties to file proposed mode of distribution in light of its judgement and it also found that the two minors had not been proved to be dependants of the deceased.*
- m. That in full compliance with this Honourable Court’s clear directions, the 2nd Petitioner and I filed our Summons for Confirmation of Grant dated 30th October 2023, proposing an equal distribution of the estate between the two (2) houses, reflecting the structure of a polygamous family. The deceased belonged to the Nandi, a sub tribe of Kalenjin Community.*
- n. That the deceased and I got married under Nandi Customary Law, which marriage is recognized and protected by our laws and that since*

- we were persons' subject to the said customary law, it was legally correct to distribute the estate equally between the two (2) houses.*
- o. That the Applicants did not file any alternative proposal despite being given the opportunity and this Honourable Court therefore correctly adopted ours.*
 - p. That nothing in the Court's distribution contradicts the judgement of 19th September 2023 and that although the Court mentioned the two (2) minors Kelvin and Dennis in the Certificate of Confirmation of Grant is expressly adopted a distribution between the two (2) Houses not between individuals.*
 - q. That the Applicants attempt to cite the said minors is an attempt to mislead the Court, because the minors were already found not to be dependants and the Court did not allocate them any independent shares but shares according to the two (2) houses.*
 - r. That the Applicants rely on the fact that the parcel number was omitted from the Certificate of Confirmation and that such an omission is a clerical and typographical error which is strictly a matter for rectification under Rule 43 of the Probate and Administration Rules, not review.*
 - s. That such minor errors do not justify reopening the entire distribution and that the Applicants request to distribute the estate equally between me, the 1st Applicant and her children is not only illegal but grossly unfair and intended to disinherit me, a complete departure from this Honourable Court's direction/decisions and Discriminative.*
 - t. That no error apparent on the face of the record exists that the current application is simply an attempt at appeal through the back door, which the law does not permit under Order 45.*
 - u. That the Applicants did lodge an Appeal at the Court of Appeal and which they have not withdrawn, hence they should prosecute their said appeal instead of coming back to this Honourable Court, a court that is functus officio.*

- v. *That the Applicants have intermeddled with the estate of the deceased herein by selling positions of the estate to third parties as demonstrated by the annexed Photographs.*

Petitioner's submissions in support of the preliminary objection summary

6. The Petitioners filed their written submissions dated 3rd December 2025 in which the Learned Counsel submitted that judgement was delivered in this cause on 19th September 2023 and the whole time M/s Miyienda & Co Advocates represented Leah Jerubet Kiptanui (Leah) and Reuben Kiptarbei Tanui (Reuben). He added that Leah and Reuben purported to appoint M/s Z.K. Yego Law Offices, they failed to comply with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules 2010 and that the Notice of Change of Advocates dated 30th October 2025 and the Notice of Motion Application dated 30th October 2025 filed by the said firm of Z.K. Yego Offices are incompetent, fatally defective and therefore ought to be struck out.
7. Counsel submitted that Order 9 rule 9 of the Civil Procedure Rules 2010 is crucial and that the Rule is couched in mandatory terms being that compliance is not optional. Counsel also submitted that in this matter judgement was delivered by this Honourable Court on 19th September 2023, M/s Z.K. Yego Law Offices filed a purported Notice of Change of Advocates dated 30th October 2025, without seeking leave of court, no consent between M/s Z.K. Yego Law Offices and M/s Miyienda & Co Advocates has been filed and that M/s Z.K Yego Law Offices has proceeded to file an application (the one dated 30th October 2025) for substantive relief while improperly on record. It was submitted by Counsel that the said law firm has done that in blatant violation of Order 9 Rule 9 of the Civil Procedure Rules and that their purported change of Advocate together with the application are strange documents on this Honourable Court's file and hence deserve to be expunged from the said record.
8. The learned made reference to the following caselaws: ***Mukisa Biscuits Manufacturing Ltd Vs West End Distributors (1969) EA 696; Hassan Ali Joho & Another Vs Suleiman Said Shabal & 2 Others***

SCK Petition No. 10 of 2023 [2014] eKLR; Hassan Nyanje Charo Vs Khatib Mwashetani & 3 Others [2014] eKLR. It was submitted by learned Counsel that at paragraph 5 of her supporting affidavit which she swore on 30th October 2025, Leah acknowledged that there is a judgement in the matter and that the judgement in the matter is not disputed. Counsel cited the following caselaw **Chelule & Another Vs Kuria & Another (Appeal E001 of 2022) [2024] eKLR.**

9. The learned Counsel further submitted that the mandatory provisions of the Law governing change of Advocates after judgement enables the courts to maintain orderliness in its proceedings and is not a mere technicality that can be cured by reliance on Article 159 of the Constitution and/or the principle of overriding objective and cited the case of **Julieta Marigu Njagi Vs Virginia Njoki Mwangi & Another [2022] eKLR.** In conclusion the learned counsel urged this Honourable Court to uphold the Petitioner's Preliminary Objection and strike out both the purported Notice of Change of Advocates and the accompanying application with costs.

Respondent's Submissions in opposition to the Preliminary Objection summary

10. The Respondents filed their written submissions dated 14th December 2025 in which it was submitted that upon looking at the CTS record, there is no preliminary objection filed in the portal and we confirm that none was served upon them and that as such there being no notice of preliminary objection duly filled, the submissions dated 3rd December 2025 ought to be struck out with the costs to the Respondents. Counsel for the Respondents submitted that without prejudice, the Applicants in the impugned submissions made reference to Order 9 rule 9 of the Civil Procedure Rules 2010 and that this being a succession matter, the Civil Procedure Rules do not apply. Counsel made reference to Rule 63(1) of the Probate and Administration Rules, Legal Notice 104 of 1980 and **Albert Imbuga Kisigwa Vs Recho Kawai Kisigwa [2016] eKLR.** It was

the learned counsel's final submission that the said purported objection is fatally defective and prayed that it be disregarded by this Court.

Petitioners/Respondents Submissions summary in opposition to the Notice of Motion Application dated 30th October 2025

11. The Petitioners/Respondents filed their written submissions dated 3rd December 2025 in which the Learned Counsel on record Mr. Wafula listed six (6) issues for determination as follows: -

- a. *Whether the application meets the threshold for review under Order 45 of the Civil Procedure Rules (as adopted in succession matters)*
- b. *Whether the alleged errors apparent on the face of the record are genuine errors or an attempt to re-litigate already determined issues.*
- c. *Whether the Court was right in distributing the estate between the two (2) houses.*
- d. *Whether the Applicants/Objectors are barred from seeking review having already filed an appeal.*
- e. *Whether M/s Z.K. Yego Law Offices is properly on record in light of the judgement delivered by this Honourable Court on 19th September 2023.*
- f. *Whether the Applicants/Objectors are before this Honourable Court with unclear hands.*

12. On the first issue, the Learned Counsel submitted that the principle of review is not an avenue to re-open or re-argue a case, nor is it meant to substitute for an appeal. He cited the case of ***In the Matter of the Estate of Sheban Kenyanya Nangabo (deceased); National Bank of Kenya Ltd Vs Ndungu Njau [1997] eKLR; Pancras T. Swai Vs Kenya Breweries Limited [2014] eKLR***. Counsel also submitted that the right to review is available to the aggrieved persons on restricted grounds as enumerated in Order 45 of the Civil Procedure Rules, that the right of review is not a right of appeal and that the Applicants must meet the narrow grounds stipulated under the said section 45 of the Civil Procedure Rules. Counsel made reference to the 1st Applicant's supporting grounds in the affidavit sworn on 30th October 2025. Counsel further

submitted that the Applicants are challenging the orders of this Honourable Court because the distribution of the estate herein was not done their way and that they want this Honourable Court to review its orders and direct that the estate be distributed in line with the provisions of section 40 of the Law of Succession Act and also that they have come up with their own proposal meant to displace and or interfere with the Honourable Court's order of 16th October 2025. Reference was again made to ***Pancras T. Swai Vs Kenya Breweries Limited [2014] eKLR.***

13. Counsel further submitted that if the Applicants want distributions that align with their preferences, then they should take up the matter at the Appeal level since this Honourable Court is functus officio, the Applicants have an appeal at the Court of Appeal and that one of the grounds being relied upon by the Applicant is that they were recently informed by their advocate on record that the grant of letter of representation in this matter was confirmed on 16th October 2025 stating that this does not in any way amount to discovery of new evidence as demanded by law. Counsel further added that in the judgement dated 19th September 2023, this Honourable Court did direct the parties to file proposed modes of distribution of the estate and that the Applicants were all through aware of what was required of them and that there is no new and important evidence that was not within their knowledge despite due diligence.
14. It was submitted by the Learned Counsel that the Applicants argue that they were 'misadvised' and opted to file an appeal to the Court of Appeal and that in an effort to fast track the appeal, they failed to file their summons for confirmation indicating their proposed mode of distribution. He opined that the said argument cannot be a ground of review and compliance with the court directions/orders is mandatory and negligence, laxity, ignorance or 'misadvise' by an advocate is not ground for review and that the Applicants cannot now blame 'misadvice' to reopen proceedings more than two (2) years later.
15. It was moreover submitted that the current application is an appeal disguised as an application for review and that it is trite law that where a party disagrees with the merits of a decision, the remedy is appeal, not

review and in this regard review cannot be used to correct a judge's reasoning or decision or to appeal through back door. It was added by the Learned Counsel that the Applicants have admitted filing an Appeal at the Court of Appeal and that they have admitted having given preference to their said appeal. He opined that as things stand the said appeal has not been withdrawn by the Applicants and that the same is still pending before the Court of Appeal and thus is an abuse of the Court process, against the law for the Applicants to ow return to this Honourable Court, a *functus officio* court for review and that failure to file their proposed mode of distribution is not a ground of review.

16. On the second issue, the learned Counsel Mr. Wafula submitted that this Court's distribution of the estate on 16th October 2025 was consistent with the law as the court confirmed the status of the two (2) widows. It was submitted that the Petitioners complied with this Honourable Court's direction while the Applicants did not and the Court adopted the distribution between the two (2) houses of the deceased in accordance with the law. The Applicants who deliberately failed to comply with this Honourable Court's direction now seek to rewrite the law by proposing that the estate be divided among: Margaret Jepkurgat Simotwa, the 1st Petitioner; Leah Jerubet Kiptanui, the 1st Applicant and Leah's nine Children. Counsel added that the new proposed distribution is not fair, but an attempt to collapse the two (2) known houses into individual shares, the houses are the primary units of distribution in polygamous setups and that this Honourable Court's distribution is correct, lawful, appropriate and fair.
17. The learned Counsel opined that the distribution being complained of by the Applicants did not allocate any share to the minors and the mere mention of their names under the 1st Petitioner's household is not a distribution, and did not affect the actual shares distributed between the two (2) houses. It was added that the 1st Petitioner has no child of her own, she adopted the said two minors and that the 1st Petitioner has a right to decide who will inherit her share of the estate being that the mention of the minors is not illegal. Reference was made to the case of ***In***

the Matter of the Estate of the late Wahome Mwenje Ngonono (deceased), Nyeri Succession Cause No. 196 of 2005. Counsel also submitted that the parcel is missing in the Certificate of Confirmation of Grant and this is a simple typographical omission, falling squarely under Rule 43 of the Probate and Administration Rules.

18. On the third issue, the learned Counsel made reference to the case of ***Otieno Vs Ougo & Another [2008] eKLR; Ndolo Vs Ndolo (2008) eKLR*** and submitted that this Honourable Court's distribution of the estate on 16th October 2025 was perfectly consistent with the laws and if the Applicants are dissatisfied with that, then they should seek the opinion of the Court of Appeal instead of disguising their application as a review application yet it is more faulting the decision of this Honourable Court.
19. On the fourth issue of whether the Applicants are barred from seeking review having already filed an appeal, the Learned Counsel submitted that that the Applicants admitted that they have filed an appeal and that a party cannot pursue review and appeal simultaneously. He added that at the moment the Applicants filed their Notice of Appeal, the jurisdiction of this Honourable Court to entertain a review was ousted and that the applicants are therefore barred from seeking review in light of their said appeal.
20. On the fifth issue of whether M/s Z.K. Yego Law Offices is properly on record, the counsel submitted that the said law firm filed a Notice of Change of Advocates and the current application after this Honourable Court had delivered its judgement on 19th September 2025 and further after the conclusion of confirmation proceedings and the said law firm has done that without complying with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules.
21. On the last issue, counsel submitted that the Objector's application for review ought to be dismissed outright because the Applicants have approached this Honourable Court with unclean hands having engaged in blatant intermeddling, sale and dissipation of the estate during the pendency of the succession proceedings and made reference to section

45 (1) of the Law of Succession Act. Counsel added that the objectors, have however, taken drastic and unlawful steps including selling portions of the estate; dealing with the property as if they were absolute owners and continuing such acts even after the court's directions. Counsel furthermore submitted that the Applicants have voluntarily placed themselves outside the protection of the law and cannot now seek equitable relief from the very Court whose processes they have undermined and cannot seek the court's discretion while violating the same court's orders.

22. It was the Counsel's final submissions that the Applicants have approached this Honourable Court with unclean hands and prayed that the Honourable dismisses the application dated 30th October 2025 with costs.

Summons dated 10th November 2025

23. The second application is Summons dated 10th November 2025 premised under sections 45 and 46 of the Law of Succession Act and Rules 49, 63 and 73 of the Probate and Administration Rules in which the Applicants herein Margaret Jepkurgat Simotwa and Christopher Kiprugut Yego are seeking the following orders: -

(a) Spent

(b) That a restraining/conservatory order be and is hereby issued restraining/stopping LEAHJERUBET KIPTANUI and REUBEN KIPTARBEI TANUI, Respondents herein, and their agents, servants, nominees from disposing of, alienating, surveying, causing to be surveyed, sub-dividing, carrying out constructions, developing, that parcel of land comprised in Title No.Eldoret Municipality/Block 23 (Kingongo)/1439, the deceased's estate herein and from intermeddling with and or dealing adversely with the said parcel of land contained in Title No.Eldoret Municipality/Block 23 (Kingongo)/1439, pending the hearing and determination of this application.

- (c) That a restraining/conservatory order be and is hereby issued restraining/stopping LEAH JERUBET KIPTANUI and REUBEN KIPTARBEI TANUI, the Respondents herein and their agents, servants, nominees from disposing of alienating, surveying, causing to be surveyed, sub-dividing, carrying out constructions, developing, that parcel of land comprised in Title No.Eldoret Municipality/Block 23 (Kingongo)/1439 and further, they be restrained from intermeddling with and or dealing adversely with that parcel of land contained in Title No.Eldoret Municipality/Block 23 (Kingongo)/1439,pending the survey of the said land and the transmission of the said estate to the respective beneficiaries as ordered by the Court.
- (d) That this Honorable Court do issue summons directed at LEAH JERUBET KIPTANUI and REUBEN KIPTARBEI TANUI,the Respondents herein, to appear before this HonourableCourt to show cause why they should not be punished for intermeddling with the estate of the deceased herein contrary to section 45 of the Law of Succession Act (Cap. 160).
- (e) That an order for mandatory injunction do issue directing LEAH JERUBET KIPTANUI and REUBEN KIPTARBEI TANUI, to remove all the persons they have illegally sold portions of the estate herein to and also demolish and remove all the structures their agents have illegally put up on the said estate.
- (f) That an order for a mandatory injunction do issue directing the third parties who have entered onto Title No. Eldoret Municipality/Block 23 (Kingongo)/1439 to immediately remove themselves, their agents, their belongings and their structures and materials from the said parcel of land.
- (g) That this Honorable Court do make such further or other orders as it may deem just and expedient in the circumstances to preserve the estate.8.
- (h) That the O.C.S, Baharini police station do ensure compliance of this Honourable Court's Order.

(i) Costs of this application be provided for.

24. The Application is based on the following grounds among others: -

- a. That the Respondents have, without authority, unlawfully sold alienated, and disposed of portions of the estate herein to third parties.
- b. That such conduct amounts to intermeddling.
- c. That the said intermeddling is ongoing, and the Respondents have gone further to bar the Administrators from assessing the estate land.
- d. The Respondents have threatened the Administrators with dire consequences if they were to set foot on the said land.
- e. That the photographs annexed to the supporting affidavit herein clearly show the houses that have been illegally put up on the land by purported purchasers, and further, the same shows ongoing constructions by the said intermeddlers.
- f. That unless restrained, the estate herein shall suffer irreparable loss and the eventual distribution rendered nugatory.
- g. That this Honourable Court as inherent powers under Sections 45 and 47 of the Laws offends of justice and prevention of abuse of Court process.
- h. It is in the interest of justice that this application be allowed so that the bona fid beneficiaries are not disinherited.

25. The Summons is supported by the annexed affidavit dated 10th November 2025 sworn by Christopher Kiprugut Yego who deponed as follows: -

- a. *That I am the 1st Petitioner/Administrator/Applicant herein and duly authorized by my Co-Petitioner to swear this Affidavit on her behalf.*
- b. *That the Respondents herein have without the authority of this Honourable Court, unlawfully sold, alienated and disposed of portions of the estate herein, namely Title No. Eldoret Municipality/Block 23 (Kingongo)/1439 to third parties.*
- c. *That such conduct amounts to intermeddling with the estate herein and that the said intermeddling is ongoing and the Respondents have gone further to bar us from assessing the estate land.*

- d. *The Respondents have threatened us with dire consequences if we were to set our foot on the said land.*
- e. *That photographs annexed hereto are photographs taken on 29.07.2025 which clearly show the constructions that have illegally put on the said land by purported purchasers and further the same shows ongoing constructions by the said intermeddlers.*
- f. *That unless restrained, the estate herein shall suffer irreparable loss and the eventual distribution rendered useless.*
- g. *That we are advised by our Advocates on record which advise we verily believe to be true that this Honourable Court has inherent powers under sections 45 and 47 of the Laws of Succession Act and Rule 73 of the Probate and Administration Rules to issue orders for the ends of justice and prevention of the abuse of the court process.*
- h. *At the rate at which LEAH JERUBET KIPTANUI and REUBEN KIPTARBEI TANUI are wasting the estate, we are apprehensive that very soon the estate would be reduced to nothing thereby leaving nothing to the 1st Administrator/Petitioner/Applicant herein.*

Replying Affidavit

26. The Summons was opposed vide a Replying Affidavit dated 4th December 2025 sworn by Leah Jerubet Kiptanui who deponed as follows: -

- a. *That I have read the Notice of Motion Application and Supporting Affidavit dated 10th November 2025 before this Honourable Court and the same having been explained by my advocates on record and having fully understood the same, I wish to reply as follows;*
- b. *That the said application has no merit, is frivolous and vexatious and made in bad faith and contains full of half-truths hence the same is an abuse of the process of this Honourable Court and the same should be dismissed in limine.*
- c. *That it is laughable for the Applicant to state that Reuben Kiptabei the 2nd Respondent herein and myself have sold portions of the estate of the deceased herein, namely Title No. Eldoret Municipality/Block 23 (Kingongo)/1439 to third parties a position*

which is false and cannot be substantiated since the Applicant has not attached any sale agreement to prove any land transactions of the estate with third parties.

- d. That we have not prevented the applicants from accessing or setting foot on the aforementioned suit land, but nonetheless entering into the estate is premature since there is still a pending application dated 30th October 2025 which is still to be determined to enable us distribute the estate among the beneficiaries.*
- e. That the photographs attached showing constructions of structures at the estate belongs to me and others belong to my children who are beneficiaries of the estate as listed and those housing units shall form part of their share during the estate distribution and therefore cannot be demolished as prayed for by the Applicant.*
- f. That the suit parcel land has never been subdivided as alleged since the parcel map of the land is still intact and as not been interfered with.*
- g. That the allegations that the estate is being wasted and is about to get depleted is false, since the estate is 20% occupied by the beneficiaries as residential place and a large section of 80% is being used as food production/agricultural area hence there is a lot space left to be distributed to the listed beneficiaries once all court processes are finalized, we have an application for review under Order 45 pending before the Honourable Court.*
- h. That it is only fair and just for this Honourable Court to dismiss the Application herein since by allowing it will be a draconian step since there is our application which was filed first hence ought to be determined before we can deal with the present application.*

27. The Summons was canvassed by way of written submissions.

Applicants Submissions Summary

28. The Applicants filed their written submissions dated 3rd December 2025 with respect to the Summons dated 10th November 2025 in which the learned Counsel for the Applicant Mr. Wafula submitted making reference

to the judgement dated 21st February 2019 delivered in Eldoret ELC Case No. 140 of 2017 between the Petitioners and the Respondents & 2 others where the court held as follows: -

*“...this court finds that as at 12.5.2010 LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was registered in the name of **KIPTANUI SIMATWA(DECEASED)**. That LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was not validly/legally transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI**. That Land reference numbers **LR No. ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997 and 1998** hived from LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** were not legally created and transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI** This court does order Rectification of the register in respect of **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997 and 1998** by cancelling and or revoking the entries of the titles and restoring the original title **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** into the name of the deceased pending distribution and transmission of the same to the rightful beneficiaries...”*

29. The learned counsel submitted that the Respondents transferred estate property to themselves illegally because they did not have letters of administration and that the Respondents have sold portions of the estate illegally and ignored the judgement delivered by this Honourable Court on 19th September 2023 including filing of proposed mode of distribution. It was further submitted that the Respondents have persistently abused the succession process, violated the Law of Succession Act and continue to unlawfully interfere with the estate of the deceased herein despite clear and repeated Court findings and directions. He cited section 45 (1) of the Law of Succession Act which prohibits intermeddling of the free property of the deceased estate. Reference was made to the case of **Kirui & Another Vs Kirui [2024] KLR**.

Analysis and Determination

30. In this application, the core-principles are embodied in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The statute provides that review of Judgements or rulings can be carried out based on the errors apparent on the face of the record, new evidence which has been discovered and was not available during the initial verdict. The review jurisdiction can also be exercised by a court on grounds of sufficient cause or there was misreading of evidence which was so crucial and it did impact on the outcome of the final decision.
31. In the case of **National Bank v Ndungu Njau Civil Appeal No 211 of 1996** *It was emphasized that the error or mistake must be self evident and should not require an elaborated argument to be established, that it will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*
32. This was also the position taken by the **Court of Appeal in Nyamogo and Nyamogo Advocate v Moses Kipkolum (2001) 1EA 173** when it held as follows:
- a) *An error apparent on the fact of the record cannot be defined precisely or exhaustively or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to be determined judicially on the facts of each case.*
 - b) *There is a distinction between a mere error and an error apparent on the face of the record.*
 - c) *Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.*
 - d) *An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinion can hardly be said to be an error apparent on the face of the record neither can a view which is adopted by the Court in the original record, if a possible one, be an error apparent on by the court in the*

original record, if a possible one, be an error apparent on the face of the record even though another another view is also possible. Mere error or wrongs or an erroneous view of evidence of law is certainly no ground for review although it may be a ground for appeal See ALR commentaries on the Code of Civil Procedure by Chitale and Rao (4th edition) volume 3 Page 3227.

33. At this juncture, I think it is appropriate to delve deeper into what are the key characteristics from my perspective that can be said to constitute error of law on the record. This refer to a mistake made by a judge or court during a trial or hearing that is recorded in the official court documents or transcript. It involves an incorrect interpretation or application of the law. An error of law on the record can occur when a judge misapplies a legal principle misinterprets a statute, or fails to consider relevant legal precedents. This type of error can be grounds for appeal as it suggests that the judge's decision was based on an incorrect understanding of the law. Whereas, error of fact is a palpable evident mistake in the appreciation of evidence.
34. This domesticated jurisprudence is a kin to our common law jurisdiction from which the foundation of our legal system was fashioned as can be demonstrated by the following cases:
- a) ***State of West Bengal v Kamal Sengupta (2008) 8 SCC 612:***
The Supreme court detailed the principles of review, stating that a deliberate omission or mistake apparent on the face of the record, which constitutes a miscarriage of justice warrants review
 - b) ***S Bhagirathi Amaal vs Palani Roman (2009) 10 SCC 464:***
Held that an error must be apparent on the face of the record and not one that needs to be fished out or requires long-drawn reasoning
 - c) ***Persian Devi V Sumitri Devi (1997) 8 cc 715:*** *Reiterated that a review petition cannot be a ground for review, only an error apparent*
 - d) ***Moran Mar Basselios Catholicos V Most Rev. Mar Poulouse Athanasius (1955) 1 SCR 520*** *Established that a review is*

maintainable if there is a mistake or error apparent on the face of the record

35. In the Judgement of Apex Court in **Lily Thomas Vs Union of India, dated 05.04.2000 reported in 2000 (6) SCC 224 in particular at para No 56 It is observed as under:** *“It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The submissions and the pleas put-forth by the learned counsel appearing on behalf of the Review Petitioners do not include a misconception of fact or law by this Court, since there is no error or mistake apparent on the face of record that warrants review of the order dated 05.06.2023 passed in W.P.No. 24093 of 2008.*
36. **The Apex Court in the Judgment reported in 1980 (2) SCC 167, dated 21.12.1979 in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi observed at para-No. 8 as under: Para:** *It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and for a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final and departure from the principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. In the present case, this Court opines that no circumstances of a substantial and compelling character exist that warrant interference by this Court for passing of orders in favor of the review petitioners. 9. The boundary within which the power of review under Order 47 Rule 1 of CPC 1908 has to be exercised has been demarcated by the Hon'ble Supreme Court in its recent judgment in Murali Sundaram vs. Jothibai Kannan, dated 24.02.2023 reported in (2023) SCC OnLine SC 185 and at para No. 5.1 of the said judgment it is observed as under: "5.1. While considering the aforesaid issue two decisions of this Court on order 47 Rule 1 read with Section 114 Code of Civil Procedure. In the case of Perry Kansagra (supra) this Court has observed that while exercising the review jurisdiction in an application Under Order 47 Rule 1*

read with Section 114 Code of Civil Procedure, the Review Court does not sit in appeal over its own order. It is observed that a rehearing of the matter is impermissible in law. It is further observed that review is not appeal in disguise. It is observed that power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. It is further observed that it is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy has been finally decided. After considering catena of decisions on exercise of review powers and principles relating to exercise of review jurisdiction Under Order 47 Rule 1 Code of Civil Procedure, this Court had summed upon as under: (i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 Code of Civil Procedure. (ii) Power of review may be exercised when some mistake or error apparent on the face of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions. (iii) Power of review may not be exercised on the ground that the decision was erroneous on merits. (iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate. (v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit.

37. As can be seen from the above principles, this court is being asked to review its judgement on distribution arising out of a full trial detailing the justiciable issues surrounding the identification of beneficiaries under Section 29 of the Act and the net estate survived of the deceased. This is how the court ruled on the matter.

In view of the above discussed legal principles, the following orders by this

Honourable Court shall abide: -

- a) *That the Grant of Letters of Administration intestate made to Margaret Jepkurgat Simotwa and Christopher Kiprugut Yego on 14th September 2016 is hereby confirmed in respect of the intestate estate of the deceased.*
- b) *That the estate property known as ELDORET MUNICIPALITY/BLOCK 23 (KINGOGO) 1439, measuring approximately 9.491 hectares, shall be distributed as follows:*

Schedule

HOUSE	BENEFICIARY	SHARE
1 st House	Margaret Jepkurgat Simotwa- To hold in trust of herself and in trust of other beneficiaries namely: - a. Kelvin Kiptoo b. Dennis Kipkemboi	4.75 Hectares
2 nd House	Leah Jerubet Kiptanui - To hold in trust of herself and in trust of other beneficiaries namely: - Reuben Kiptarbei Tanui Miriam Jepngetich Tanui Stephen Kipsang Tanui Naom Jeptoo Tanui Meshack Kiprotich Tanui Abedneco Kipbitok Tanui Shadrack Kiplimo Tanui Rebecca Jelimo Tanui	4.75 Hectares

- c) *That the Administrators shall complete the distribution of the estate in accordance with the confirmed grant and file in court a final and accurate probate account within six (6) months from the date hereof.*
- d) *There shall be no orders as to the costs of this application.*
- e) *It is so ordered.*

38. It is trite that a review of a Judgement like in the instant case which delivered and pronounced the issues on the net estate and the heirs to inherit the above itemized immovable property is a serious step and a reluctant sought to its proper only where a glaring omission or patent mistake or like grave error has crept in the earlier decision by Judicial fallibility. The present stage of exercising jurisdiction by this court is not a virgin ground in the legal process but one in which the session Judge sets the record right for a final Judgement is aimed at declaring the rights of the parties with finality. What we are now concerned about is that the Application when Juxtaposed in the impugned judgement of 16.10. 2025, there is a substantial question of law as an error apparent on the face of the record. The fact is this court had made a finding to the effect that one Kevin Kiptoo and Dennis Kipkemboi did not discharge the burden of proof as stipulated in Section 107 (1), 108 & 109 of the Evidence Act, that they had a right to inherit any of the shares of the Intestate Estate of the deceased within the definitional dimension of Section 29 of the Law of Succession Act. With that decision on record, there could be no way that they would make it to the inheritance table as provided for in the Judgement of this court dated 16.10.2025. In essence this impugned Judgement being the one which ruled on beneficiaries and set the legal tone on the scheme of distribution it deed include the two purported beneficiaries when indeed they did not qualify under the law of Succession Act. It follows therefore, that the power of review donated to this court by Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules and subsequently construing Section 1(A), 1(B), 3 and 3(A) of the aforesaid Act and in addition my reading of Rule 73(1) of the Probate and Administration Rules, I exercise discretion to correct the error of fact which culminated into an error of law to vary and set aside the erroneous order on inheritance involving Kelvin Kiptoo and Dennis Kipkemboi. So far as the grievance of the Applicant seeking review is concerned there is merit to grant the orders which have the effect of striking out the names of Kelvin Kiptoo and Dennis Kipkemboi as heirs to the estate.

39. With regard to the facts of the instant case, I have had the advantage of reviewing the affidavit on review and the corresponding protest touching on the mode of distribution. In the impugned Judgement this court proceeded to pronounce itself as follows:

That Margaret Jepkurgat Simotwa was to hold 4.75 HA in trust of herself and in trust of other beneficiaries namely: Kelvin Kiptoo and Dennis Kipkemboi whereas for the 2nd House Leah Jerubei Kiptanui was to hold 4.75HA in trust of herself and in Trust of other beneficiaries namely: Reuben Kiptarbei Tanui, Miriam Jepngetich Tanui, Stephen Kipsang Tanui, Naom Jeptoo Tanui, Meshack Kiprotich Tanui, Abedneco Kipbitok Tanui, Shadrack Kiplimo Tanui, Rebecca Jelimo Tanui

40. From the wording of this Judgement plainly, it is not about distribution of the Intestate Estate but creation of a trust which is a fiduciary relationship created where the individual gives a third party (Trustee) the right to hold his or her property for the use, protection and benefit of a beneficiary. The main objective indeed of a Trust is to ensure that the assets are legally protected, managed and distributed according to the wishes of the Trustee. In the current legal regime, there is recognition testamentary Trust, Pension and Provident Trust, and Trusts created for any purpose like religious, Educational, Scientific, Athletic or charitable purposes. In terms of legal policy, Trust law is covered under two primary statutes being The Trustees (Perpetual Succession) Act (Cap 164 and Perpetuities and Accumulation Act (cap 161) of the Laws of Kenya. In the current legal regime Trust Law does not adequately recognize non charitable purpose Trust.

41. The administration of an Intestate Estate under the Succession Act entitles collection, and preservation of the Estate, payment of the deceased's funeral, testamentary and administration expenses, and all the deceased's debts and other liabilities and with finality distribute the net estate among the beneficiaries. It is therefore necessary to appreciate the law that the administration of an Estate is the responsibility of the Personal Representative(s) duly appointed under

Section 66 of the Law of Succession Act and his or her or their names must be gazetted in the official Kenya Gazette as a mandatory procedural requirement. This is the very reason where the legislature enacted provisions relating to administration of Estates of a deceased person under part 7 of the Law of Succession Act covering Section 44 to 95. In adherence to the law Section 82 expressly states inter-alia that an Administrator(s) has powers to enforce by suit or otherwise all causes of action which by virtue of any law survived the deceased or rise out of his death for his Estate.

*b to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that-(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and(ii) no immovable property shall be sold before confirmation of the grant;(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation. **Section 84 sets out the following duties:***

(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;(c) to pay, out of the

estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);(d) to ascertain and pay, out of the estate of the deceased, all his debts;(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be.(g) within six months from the date of confirmation of the grant, of such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

42. The Courts have spoken on these issues as reflected in the application of Section 83(B) of the Act which provides: “Section 83 (b) provides that it is the duty of personal representatives to collect in the assets of the deceased’s estate after a grant has been made to them. Waki J in the matter of the Estate of Yusuf Mohamed (deceased) Mombasa HCP & A No 434 of 1995, pointed out that under Section 83 the personal representative has a duty to get in all the free property of the deceased

and is at liberty to reasonably exercise the powers conferred by law in pursuit of such property.

43. In any distribution of an Estate, the Personal Representatives must collect an inventory of the net estate as defined in Section 2 of the Act and have the same distributed to the beneficiaries by the Court. The Probate Court provides governance oversight on the administration of the Estate hence the very reason why the legislature deemed it fit under Rule 25 (5) of the Probate and Administration Rules to provide powers to the court that at any time and from time to time to require the Personal Representative(s) to render to the court a true account of the Intestate Estate of the deceased and the administration of it as per the law established. There is nowhere in these provisions the law contemplates creation an entity by the name of a Trust or extent the powers of the Administrator or Administrator(s) to hold the Intestate Estate of the deceased in Trust on their own behalf or the legitimate beneficiaries.
44. It is therefore necessary to state that the Personal Representatives cannot enjoy the benefits of the Estate for themselves hence the ambiguity of the order in the impugned Judgement 15.10.2025 which comprises of a declaration that Leah Jerubet Kiptanui and Margret Simotwa were to hold in trust the Estate of the Deceased for their own behalf and the named beneficiaries. The primary duty of a Probate Court in exercising Jurisdiction is to identify the beneficiaries under Section 29 of the Act and the free net estate and proceed to distribute it within the scope of Section 35, 36, 37, & 38 of the same law on Succession Matters.
45. Although I am not sitting on appeal, an error of Law in a Judgement is a misinterpretation of the applicable statute and as a matter of law it did impact on the final outcome. This being an error apparent on the face of the record can be redeemed by invoking Section 80 of the Civil Procedure and Order 45 Rule 1 of the Civil Procedure Rules to review and set aside the order crafted in the name and style to bequeath the deceased estate by creating an ambiguous entity in favor of the Estate to hold in Trust for herself and the beneficiaries. The law by its nature delt with this lacuna

which permits a court of law to correct errors that are apparent on the face of the Judgement.

46. It is crystal clear from the record that the deceased was survived by children and two spouses. One of the spouses by the name Margret Simotwa was never blessed with any child. That being the case the legal conceptual doctrine of house to house is not applicable in the circumstances of this Succession cause. Therefore, the cluster of the principles be applied run through the legal blood wire of Section 38, 40, & 41 of the Law of Succession Act applied and interpreted purposively. The children of the deceased are all above the age of 18 and therefore not subject to the provisions of Section 41 of the Act. In this case, the parties had intimated that they had agreed to have the property be held in Trust without distribution to the beneficiaries which in my view runs foul to the letter and spirit of Section 40 as construed with Section 38 of the Act.
47. The law of inheritance in Kenya prescribes certain provisions about distribution of an estate of the deceased may it be rooted in monogamous or polygamous household. The systematic procedure of distribution by the various courts depends upon certain facts which vary in each case having regard of personal law of each one of the beneficiaries. What has been transformed over time is the right of inheritance of the Kenyan women significantly so influenced by the constitutional imperatives under the Bill of Rights as read with Article 27 (1) & 4 of the Constitution. Undoubtedly, the International Law arena has espoused in Article 2(5) & 6 of the constitution the legislative changes have so far shaped women's inheritance rights. It should not be lost that the Constitutional Democratic Republic of Kenya, this far it has come for the patriarchal norms which have been deeply rooted dictating that the men are the principal heirs and Trustees of family property is now the exception to the Rule.
48. This legal historical transformation of the Country called Kenya has rendered certain customary standards and norms which exist in different counties of the Republic and which Significantly impact inheritance rights are no longer given prominence. This is not to say that the lingering inequality question on inheritance rights within our borders is yet to be

completely erased given the contextualized Societal norms yet to have a complete paradigm shift on culture change which by and large influences in inheritance rights in Kenya. What will this do? A paradigm shift in life is a fundamental change in one's belief system, mindset or perspective that completely alters how he or she interprets and interacts with the World. This is the radical shift in mental programming of the male gender when it comes to aspects of acquisition and distribution scheme of the Intestate Estate which at one time was wholly owned by their proceeded parents and by dint of the law it is there turn to succeed their deceased parents by inheriting the land survived of the deceased.

49. The state of facts on inheritance and pressure has produced uncertainty in the minds of women of exercising their rights and privileges, for the very reason that their traditional domestic roles has made them dependent on members of the male gender for scope, extent and availability of their property rights as understood generally within the context of customary law. The phenomenon has also seriously affected financial, proprietary and inheritance rights of the Kenya Women. As if that is not enough to their threats or infringement of the fundamental rights and freedoms the life of unmarried woman is even more catastrophic when it comes to the rights guaranteed in the constitution 2010 and the Law of Succession Act, for by and large she is supposed to remain under the control and influence of her paternal family and if she happens to get married thereafter her family of the in laws respectively. The legal battle ground on transmission of inheritance rights as it is understood within our multi cultural /ethnic society that there should be no women inheritance for the property survived of her biological parents. It is expected that she will be married anyway and there is no need to waste resources by allocating any shares or assets to her for there is an expectation to secure those rights at her marriage or adoption as a daughter in-law. This practice is prevalent in Kenya where families try as much as possible to retain the property within the male members of the family.

50. It is also important to underscore the fact that the current inheritance legal policy and legislative scheme one can say with certainty that widows are deprived of their right of inheritance if they are remarried to a person out of the family of the deceased husband. This to me raises a fundamental legal question pertaining to property rights and the scope of the right to equality and freedom from discrimination and the right to marry a person based on the free consent. In our constitutional dispensation Article 45(2) provides as follows: “ Every adult has the right to marry a person of the opposite sex based on the free consent of the parties. I take cognizance of the fact that Article 2(5) & (6) provides as follows: “ *The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution*”
51. This right to marriage is not limited to the scenario of a first marital union and in the event the female spouse by an act of God happens to lose her husband by dint of death and whatever circumstances as to her age she is prohibited from entering into any form of marriage and if she does so her rights to inheritance are restricted or by effluxion of the law her shares revert to the Intestate Estate. As a matter of emphasis both the Universal Declaration of Human Rights Article 16 in the European Union Convention on Human Rights Art 12 the right to marriage is perceived and defined as a fundamental Human Right as it was in fact by *Jus divinum* and by *Jus Naturale*. “*In the Universal Declaration of Human rights adopted by the UN in 1948 it was state that men and women of full age, without any limitation due race nationality or religion, have the right to Marry and found a family (Art 16 para 1) and at the same time, it was specified that the respective “Marriage shall be entered into only with the free and full consent of the intending spouses. (Art 16 para 2)*
52. The question which remain unanswered under the current Succession Act what would be the legal rationale of a spouse being arbitrarily deprived of his inheritance rights which had already devolved to her and by just change of her status in exercising her right to re-marry giving effect to an automatic impairment of the rights to property which are already accrued

from the original marriage. The convention of the Elimination of ALL forms of Discrimination against women adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979 which entered into force on 3 September 1981- also stipulated the obligation of the State Parties to ensure the recognition on a basis of equality for men and women, of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field. I am of the considered view that equal rights do exist for both men and women to acquire new marital rights either on the dissolution of the first marriage or upon death of a spouse. This change of status should not deprive a widow of her rights of inheritance acquired and guaranteed during the first marriage. This is a conversation the drafters of the law of Succession Act must confront as it is a Human Right issue and its extent of discrimination within the spectrum of the equality clause be mitigated. That is in so far as this question of the overall scope of inheritance has seen from the lens of the prevailing Legal Regime in Kenya.

53. In so far as this cause of action is concerned an issue arose as to the grant of preservation orders touching on the distribution of the Intestate Estate. This Kind of application draws its import on law by the principles in ***Giella vs Cassman Brown & Co Ltd (1973) EA 358***. For the court to preserve an Estate there must be compelling evidence and the beneficiaries alike must answer the question whether that is the best recourse given the timelines set in the law of Succession Act. An order for preservation of conservation of an Estate Assets is similar to freezing injunctions which in the context of estate transmission is considered draconian and extra-ordinary remedy which should not be granted as a matter of course. Therefore, the Applicant must proof more than a mere fear of loss. Why do I say so inheritance rights are collective rights and they flow from the corpus of Succession Human Rights. Indeed as a matter of legal discourse no beneficiary enjoys Superior Rights each of them start from the same platform of litigation. That is why the language of the law of Succession Act under Section 38 & 40 the doctrine of equality and equity govern the scheme of distribution. As for this

application, there is no strong prim-facie case for grant of preservation and conservation orders. In essence there is no merit and the risk of granting these orders will occasion prejudice and injustice to other beneficiaries. The application is lost.

54. The substratum of the entire litigation at this stage is whether the review under Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules is maintainable. The answer in the affirmative for there is a fundamental error, patent mistake and error of law apparent on the face of the record when this very court ordered that the distribution be anchored on a trust which is non-existence and yet to be formed by the administrators in conjunction with the beneficiaries. A perusal of this Judgement elsewhere would show the nature of the error of fact, mistake and law in so far as that distribution matrix is concerned. If that question of holding in trust is left to stand it runs foul the very express provisions of Section 71, Section 38, as read with 40, 82, 83, and 84 of the Law of Succession Act. What this means that the estate in question shall be shared equally and each beneficiary be counted as a unit within the provisions of Section 40 of the Law of Succession Act. The effect of this is to have an amended certificate of confirmation of grant within the prescription of the law which is not to create a trust but equal distribution to each heirs to the estate. I make no orders as to costs

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 20TH
DAY OF FEBRUARY, 2026**

.....
R. NYAKUNDI
JUDGE