



REPUBLIC OF KENYA



**In re Estate of the Late James Kimarta Ruto (Deceased) (Succession Cause 311 of 2013) [2026] KEHC 1143 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1143 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 311 OF 2013  
RN NYAKUNDI, J  
FEBRUARY 5, 2026**

**IN THE MATTER OF THE ESTATE OF THE LATE JAMES KIMARTA RUTO (DECEASED)**

**BETWEEN**

**MARK KIMURGOR TANUI ..... 1<sup>ST</sup> APPLICANT  
STEPHEN LAGAT KIPKURGAT ..... 2<sup>ND</sup> APPLICANT  
DAVID KIPRONO KORIR ..... 3<sup>RD</sup> APPLICANT  
BEN KOSGEI ..... 4<sup>TH</sup> APPLICANT  
ANN JEPKOECH KOSGEI ..... 5<sup>TH</sup> APPLICANT  
MONICA CHEPKORIR RUTTO ..... 6<sup>TH</sup> APPLICANT  
ANN MURTIONY ..... 7<sup>TH</sup> APPLICANT  
JAIRUS K RUTO ..... 8<sup>TH</sup> APPLICANT**

**AND**

**ISAAC K MARTA ..... 1<sup>ST</sup> PETITIONER  
HENRY K SANG ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. What is pending before this Honourable Court for determination is Summons for Revocation of Grant dated 21<sup>st</sup> May 2025 premised upon section 11, 15, 29, 45, 47, 70 and 76 of the [Law of Succession Act](#) and section 3A of the [Civil Procedure Act](#) in which the Applicants are seeking the following orders: -
  - a. Spent



- b. That pending the hearing and determination of this Summons for Revocation of Grant, this Honourable Court be and is hereby pleased to issue conservatory orders in respect of the estate of the deceased conserving the following parcels of land: -
    - a. Tulwet/Kiosagat(Sochoi) Block 1/67
    - B. Tulwet/Tulwet Block 7 (terige) 25
    - C. Lessos Settlement Scheme Keben Block Phase Three No. 347
    - D. Plot At Lessos Centre No. 85
    - e. Plot At Koisagat Trading Centre
  - c. That this Honourable Court be pleased to grant an order of stay of execution of a ruling delivered on 24<sup>th</sup> December 2024 and on 16<sup>th</sup> May 2025 pending the hearing and determination of the Summons for revocation of Grant.
  - d. That this Honourable Court be pleased to admit the Last Will dated 26<sup>th</sup> September 2011 and the same be propounded and enforced as per the wishes of the deceased.
  - e. That costs of the application be in the cause.
2. The Application is made on the grounds on the face of it among others: -
- a. Justice R. Nyakundi delivered a ruling on 24<sup>th</sup> December 2024 and another one on 16<sup>th</sup> May 2025 herein in favour of the Petitioners/Respondents herein.
  - b. The Honourable Court gave the Petitioners a go ahead to distribute the Estate under the security of the OCS Kesses and Lessos Police Stations, yet there are other left out beneficiaries and liabilities who were not included as the beneficiaries of the estate.
  - c. That there is a valid last WILL by the deceased dated 26<sup>th</sup> September 2011 which provides for the applicants herein but were not factored in, in the grant as beneficiaries of the estate.
  - d. The Applicants herein some being children of the deceased and other purchasers of the property of the deceased are not in agreement with the court's decision as they were left out and yet they were provided for by the deceased in his last WILL dated 26<sup>th</sup> September 2011.
  - e. That some of the legitimate beneficiaries herein who were left out will be rendered destitute if the orders for stay are not granted.
  - f. That the Advocate Mr. Titus Bitok has sworn an affidavit stating why the Last WILL had not been earlier filed in court because the court was all along under the impression that the estate is intestate.
  - g. That all the beneficiaries including the Petitioners herein were aware that there was a last WILL left by the deceased.
  - h. The said last WILL was properly executed and therefore, it should be considered by this Honourable Court.
  - i. The Respondents are on the verge of executing the said Court Order anytime now yet they failed to factor in their own family members who were left out for distribution together with buyers who bought land from the deceased and yet they have been provided for in the deceased last WILL.



- j. The Applicants stands to suffer irreparable loss and damages unless the court grants the orders prayed for.
  - k. The interest of justice dictates that justice should be done to all and sundry.
  - l. That it is in the interest of justice that conservatory orders be issued so as to preserve the estate of the deceased until the matter is well settled and all beneficiaries are provided for.
3. The Summons for Revocation is supported by the annexed Affidavit sworn by David Kiprono Korir whose deponents echo the grounds of the Summons and further deponed as follows: -
- a. That I am the 3<sup>rd</sup> Applicant herein and having authority to swear this affidavit on behalf of the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Applicants herein.
  - b. That I am the last born in our family and a beneficiary of the estate of the deceased herein.
  - c. That my parents are Mr. & Mrs. James Kimarta Ruto both deceased and my siblings; Jairus K. Ruto, Pauline J. Rutto, Annah Kosgey, Benjamin K. Rutto, Monica Jepkorir, Stephen Kipkurgat and Isaac K. Kemboi.
  - d. It is in the interest of justice that conservatory orders be issued so as to preserve the estate of the deceased until all the beneficiaries are provided for in accordance to the last WILL.
  - e. No fatal, irreparable or otherwise prejudice will suffer the Respondents if the prayers sought are granted.

### **Replying Affidavit**

4. The Application is opposed by the 1<sup>st</sup> Petitioner/Respondent vide a Replying Affidavit dated 27<sup>th</sup> May 2025 in which he deponed as follows: -
- 1. That my Advocate on record has read and explained to me the Objectors'/Applicants' application dated 21<sup>st</sup> May 2025 together with the supporting affidavits thereto and wish to respond as follows: -
  - 2. That the application lacks merit, is an afterthought, made in bad faith and an abuse of the court process.
  - 3. That I am advised by my advocates on record which information I verily believe to be true that the application and the affidavits in support are fatally incompetent as Counsel is not properly on record and ought to be dismissed with costs as judgment was already delivered in this matter.
  - 4. That a grant was issued to us in this cause and the same was confirmed on 27<sup>th</sup> September 2021 and a certificate of confirmation issued accordingly.
  - 5. That the 8<sup>th</sup> Objector/Applicant filed an application for revocation of the said grant dated 26<sup>th</sup> April 2022. The application was heard to conclusion interpartes and a ruling was delivered on 20<sup>th</sup> September 2024.
  - 6. That vide a ruling delivered on 20<sup>th</sup> September 2024 this Honourable Court ordered as follows;
    - i. That the any two children of the deceased listed as the beneficiaries do avail themselves at the Government Chemist together with the 2<sup>nd</sup> Objector to give samples for the sibling DNA test within 21 days from the date of this order and costs shall be borne by the 2<sup>nd</sup> Objector.



- ii. That the 2<sup>nd</sup> Objector shall avail instruments used for registration of his birth certificate at the Registrar of Births and Deaths for this court's scrutiny.
  - iii. The 2<sup>nd</sup> Objector is hereby directed to deposit in court all title documents in his possession to the estate of the deceased within 21 days' failure to which he shall be held in contempt and after a period of 21 days, the Land Registrar, Uasin Gishu County shall be at liberty to cancel the title documents on grounds of misplacement, particularly for parcels Tulwet/Tulwet/Block 7(terige) 25 And Lessos Settlement Scheme/347.
  - iv. That the costs of the suit shall be borne by the estate.
7. That the Objectors/Respondents failed to comply with the orders issued by this Honourable Court.
  8. That upon the court noting that the 2<sup>nd</sup> Objector had no intention of complying with the orders issued on 20<sup>th</sup> September 2024, the court went on to deliver a ruling on 24<sup>th</sup> December 2024 stating that the Objectors claim on dependency remains moot and that the we were at liberty to administer the estate and have it transmitted to the recognized heirs of the estate.
  9. That the Objectors/Respondents filed a Notice of Appeal appealing the ruling delivered on 24<sup>th</sup> December 2024 and filed an application for stay of the execution but the same was dismissed with costs to the Petitioners/Respondents.
  10. That there are no stay of execution orders and we are in the process of sub diving the estate of the deceased among the known beneficiaries of the estate.
  11. That land parcels number Tulwet/Tulwet Block 7(terige)/25, Nandi (lessos Settlement)/347 And Tulwet/koisagat Block 1 (Sochoi)/67 have already been legally transferred to the 2<sup>nd</sup> Petitioner and I by way of transmission and therefore this application is overtaken by events.
  12. That we have already booked a Surveyor to undertake sub-division of the parcels and even obtained a court order directing that the OCS Kesses police station and Lessos police station to provide security during the sub division process.
  13. That this application by the Applicants is merely an attempt to prevent the beneficiaries of the estate of the deceased from getting their portions of the estate of the deceased.
  14. That the alleged will introduced by the Applicants is a ploy to circumvent justice and prevent the administrators from discharging their duties.
  15. That we together with the rest of the beneficiaries were not privy to the existence of any will by the deceased and the same was never brought to our attention.
  16. That the alleged will being introduced at this stage in the proceedings is suspicious especially because as per the will, the second house are the only ones provided for leaving the other three houses without any share of the estate. Further, the intestate proceedings in this matter was already finalized.
  17. That in any event 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Applicants were provided for in the distribution of the estate as per the certificate of confirmation of grant issued on 27<sup>th</sup> September 2021.



18. That it is absurd that the above stated parties are introducing and praying that this Honorable Court propounds an alleged will that does not provide for all the beneficiaries and furthermore the alleged will is not valid for the following reasons;
  - a. I am advised by my advocates on record which information I verily believe to be true that the alleged will is not properly executed as the thumb print on the face of it has not been marked whether it is the left or right thumb print. Furthermore, the alleged will is not signed on every page by the alleged testator.
  - b. The alleged will has been tampered with as there are hand written amendments which cannot be said to have been done by the deceased.
  - c. The validity of wills is dependent on the capacity of the maker and whether the same was made in proper form. A will is defined as valid if made by a person with the relevant capacity in proper form. The *Law of Succession Act* states that the soundness of mind of the maker of a will shall be presumed unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
  - d. The deceased was unwell from July 2011 up until February 2012 when he passed on. The alleged will being introduced by the Applicant was allegedly prepared on the 26<sup>th</sup> September 2011. This is suspicious as at that time the deceased had been diagnosed with brain tumour and prostate cancer and was bedridden at the time.
  - e. The introduction of an alleged will 13 years after passing of the deceased is suspicious.
19. That I am advised by my advocates on record which information I verily believe to be true that Honourable Court is functus officio and allowing this application will lead to reopening of a matter that had already been heard to finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter. The principle is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
20. That the Applicants have filed an appeal in the court of appeal and this application is merely a delay tactic.
21. That I am advised by my advocates on record which information I verily believe to be true that the named executor in a will is the primary applicant for propounding(proving) the will and obtaining a Grant of Probate. If the named executor refuses or declines to act, another eligible person may apply to the court. No executor has come up to propound the alleged will in this instance.
22. That I am advised by my advocates on record which information I verily believe to be true that the employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice and this is what the Applicants as doing in this instance.
23. That further I am advised by my advocates on record which information I verily believe to be true that a will generally cannot be propounded without a petition for probate with will annexed. The *Law of Succession Act* (Cap. 160) mandates that an application for probate or



letters of administration be made by filing a petition and an affidavit in the prescribed form. This is a mandatory requirement for any will, whether written or oral.

24. That from the foregoing, it is evident that the application and the supporting affidavit before court that the same is unmerited and a desperate bid by the Objectors/Applicants to subvert justice.
25. That further I am advised by my advocates on record which information I verily believe to be true that Section 76 of *Law of Succession Act* provides that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
26. That I am advised by my advocates on record which information I verily believe to be true that it is incumbent upon the applicant seeking the court to exercise its discretion in his or her favour to prove the ingredients set out under Section 76 aforesaid.
27. That I am advised by my advocates on record which information I verily believe to be true that in this instant case there is no evidence of wrong doing for the court to invoke Section 76 of the Law of the Succession Act and order to revoke or annul a grant. We did not obtain the grant fraudulently making any false statements and neither did we conceal any material facts.
28. That the chief's letter used in the petition for grant of representation intestate listed the names of all the rightful beneficiaries. The Petition itself also contained the names of all the rightful heirs to the estate and the same is reflected in the certificate of confirmation of grant.
29. That further I am advised by my advocates on record which information I verily believe to be true that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime. With respect to matters touching on title to and, and occupation of land, the proper forum ought to be the Environment and Land Court.
30. That this court (High Court) has no jurisdiction to determine any disputes that centers on ownership, occupation and use of land. Further, the issue as to the ownership once raised in a succession cause, they must be resolved before such property is distributed. The 1<sup>st</sup> Applicant therefore ought to have presented the instant issue before the court with competent jurisdiction which is the Environment and Land Court. Therefore, a sale of part of the estate cannot be used as a basis for revocation of grant by a purchaser especially where the purpose is to exclude the property from the estate of the deceased or to confer proprietary interest on such person. Those are matters for another forum but not probate court.
31. That under the circumstances, the instant application lacks merit and ought to be dismissed with costs.
32. That we stand to suffer prejudice if the application dated 21<sup>st</sup> May 2025 is allowed.

### **Further Affidavit in support of the Summons for Revocation**

5. The 2<sup>nd</sup> Applicant filed a Further Affidavit dated 2<sup>nd</sup> July 2025 in which he deponed as follows: -



1. That I am a male adult of sound mind, the 2<sup>nd</sup> Applicant herein and duly authorized by my co-Applicants to swear this affidavit on their behalf hence competent to swear this affidavit.
2. That we filed an application dated 21<sup>st</sup> May 2025 for revocation of grant which is pending hearing and determination before this Honourable Court.
3. That the deceased died testate leaving his last written will dated 26<sup>th</sup> September 2011 which is valid in form and in substance.
4. That the Will ought to be formally propounded so that the true wishes and intentions of the deceased can be fully honoured and given effect by the Court.
5. That a valid written Will was discovered after the Grant of Confirmation had already been issued, and the contents of the said Will alter the previously confirmed distribution of the deceased's estate.
6. That I am advised by our advocate on record, which advice I verily believe to be true, that where a valid Will is discovered after a Grant has been confirmed, and the Will alters the mode of distribution, the Honourable Court has jurisdiction and discretion to revoke the said Grant in order to accommodate the Will, as guided by Sections 47,51,54 and 76 of the [Law of Succession Act](#) and Rule 44 of the Probate and Administration Rules.
7. That there was misrepresentation, concealment and non-disclosure of the existence of the Will during the petition and confirmation of grant processes.
8. That the deceased's true intentions are clearly and unequivocally expressed in the Will and should be reflected in the administration and distribution of his estate.
9. That I am further advised by my advocate on record, which I believe to be true, that Executors named in a Will have a legal obligation and fiduciary duty to disclose the existence of the Will to all beneficiaries and to present the same before the Court during probate.
10. That all the beneficiaries including the Petitioners/ Respondents herein were aware that there was a Last Will left by the Deceased. However, despite this awareness and disclosure, some of the beneficiaries deliberately ignored the existence of the Will and proceeded to file a petition for letters of administration intestate, while concealing this material fact from the Court.
11. That the continued concealment and administration of the estate as if the deceased died intestate amounts to misrepresentation and is prejudicial to the lawful beneficiaries and the deceased's testamentary intentions.
12. That I swear this Further Affidavit in good faith and in strong support of our application dated 21<sup>st</sup> May 2025 seeking revocation of the Grant issued in this cause.

#### **Supplementary Affidavit dated 5<sup>th</sup> June 2025**

6. The 1<sup>st</sup> Petitioner/Respondent also filed a Supplementary Affidavit further to his Replying Affidavit dated 27<sup>th</sup> May 2025 and deponed as follows: -
  - a. That I am advised by my advocate on, record which advise I verily believe to be true that when we attended court on 28<sup>th</sup> May 2025, this Honourable Court directed that I should issue the court with a status report on the status quo on distribution of the estate of the deceased.



- b. That a grant was issued to my co-administrator in this cause and the same was confirmed on 27<sup>th</sup> September 2021 and a certificate of confirmation issued accordingly.
  - c. That the 8<sup>th</sup> Objector/Applicant filed an application for revocation of the said grant dated 26<sup>th</sup> April 2022. The application was heard to conclusion interpartes and a ruling was delivered on 20<sup>th</sup> September 2024 directing them to conduct DNA testing and when they failed to do so this Honourable Court dismissed their application and directed us to distribute the estate among the known beneficiaries.
  - d. That there are no stay of execution orders and we are in the process of sub diving the estate of the deceased among the known beneficiaries of the estate.
  - e. That land parcels number Tulwet/Tulwet Block 7(terige)/25, Nandi (lessos Settlement)/347 And Tulwet/koisagat Block 1(Sochoi)/67 have already been legally transferred to the 2nd Petitioner and I byway of transmission and therefore this application is overtaken by events
  - f. That we have already booked a Surveyor to undertake sub-division of the parcels and even obtained a court order directing that the OCS Kesses police station and Lessos police station to provide security during the sub division process.
  - g. That we served the police protection order upon the OCS Kesses police station and Lessos police station and the orders has already been verified by them.
  - h. That we have already made payments for the survey process and the same has been fixed for 16<sup>th</sup> June 2025.
  - i. That we stand to suffer prejudice if the application dated 21<sup>st</sup> May 2025 is allowed.
  - j. That I make and swear this affidavit in strong opposition to the application now before court.
7. The Summons was canvassed by way of Written Submissions.

### **Applicants/Objectors Submissions summary**

- 8. The Applicants filed their written submissions dated 2<sup>nd</sup> July 2025. The Learned Counsel for the Applicants/Objectors Mrs. Tum submitted that the central issues for determination were whether the written Will dated 26<sup>th</sup> September 2011 was valid and admissible to probate, whether its discovery constituted new and important evidence warranting review, whether the court was functus officio and whether the confirmed grant issued on the basis of intestacy ought to be revoked for material non-disclosure and/or fraud.
- 9. Counsel argued that the deceased James Kimarta Ruto died testate, having executed a valid written Will in compliance with section 11 of the *Law of Succession Act* and that there was no evidence rebutting the statutory presumption of testamentary capacity under section 5(3) and (4) of the Act. Allegations that the deceased was unwell were said to be unsupported by proof. Reliance was placed on In Re Estate of G.K.K (Deceased) [2013] eKLR and John Kinuthia Githinji v Githua Kiarie & Others, to underscore that illness alone does not invalidate a will absent evidence of lack of capacity. Counsel further submitted that failure to provide for all family members does not invalidate a will, citing Re Estate of Francis Andabwa Nabwangu (Deceased) [2021] eKLR and that the burden of disproving the validity of a will lay with the challengers as held in Re Estate of Monica Katei Kithinga (Deceased) [2025] KEHC 5945 (KLR).



10. On review, Counsel contended that the Will was discovered on 7<sup>th</sup> May 2025 after judgment had been delivered, despite due diligence and thus constituted new and important evidence under Order 45 Rule 1 of the Civil Procedure Rules, 2010. The Applicants relied on *Re Estate of Penina Teriki Chepkurgat (Deceased)* [2020] eKLR, *Ladd v Marshall* [1954] 1 WLR 489, *K. Tarmohammed v Lakhani* [1958] EA 567 and *In Re Estate of Charles Kibe Karanja (Deceased)* [2015] eKLR to support admission of fresh evidence and review of orders where discovery of material evidence occurs post-confirmation.
11. Counsel further submitted that the court was not functus officio, as administration of the estate had not been completed, relying on *Makabulu & Another v Munyeti (Legal Representative of the Estate of the Late Simeon Munyeti Andashe) & 2 Others* [2023] KEHC 24442 (KLR). It was argued that the confirmed grant issued on intestacy was founded on material non-disclosure and concealment of the Will, rendering it defective and liable to revocation under section 76 of the *Law of Succession Act*, the discovery of the Will having rendered the grant useless and inoperative.
12. In conclusion, Counsel submitted that justice demanded the admission of the Will to probate, review of the earlier judgment and revocation of the confirmed grant issued on intestacy, urging the court to allow the Application dated 21<sup>st</sup> May 2025 as prayed.

### **Respondents/Petitioners Case Summary**

13. The Respondents filed their submissions dated 30<sup>th</sup> June 2025. The Learned Counsel for the Respondents/Petitioners Mr. Yego submitted that the succession cause had been conclusively determined following the issuance and confirmation of a grant on 27<sup>th</sup> September 2021 and subsequent rulings delivered on 20<sup>th</sup> September 2024 and 24<sup>th</sup> December 2024 after the Objectors failed to comply with court orders. Counsel contended that the Applicants' current application was overtaken by events, as portions of the estate had already been transmitted to the Petitioners and subdivision was underway before conservatory orders were issued.
14. On the alleged will, Counsel argued that its introduction at this late stage of concluded intestate proceedings was suspicious, procedurally improper and legally untenable. It was submitted that the impugned will was invalid for failing to provide for all beneficiaries, contained unexplained handwritten alterations without a codicil and raised serious doubts regarding the testamentary capacity of the deceased at the time of its alleged execution. Reliance was placed on *Estate of Ngaulo Arap Tanui (Deceased)* [2022] eKLR, *In the Matter of the Estate of the Late Kipkosgei Arap Moita (Deceased)*, *In re Estate of Raphael Charles Makokha (Deceased)* [2024] KEHC 12277 (KLR), and *In re Estate of Ignatius Ndirangu Kamau (Deceased)* [2020] eKLR to support the position that delayed and unexplained production of a will attracts suspicion and may justify its rejection.
15. Counsel further submitted that the proper procedure upon discovery of a will would have been to seek revocation of the existing grant and initiate probate proceedings, which the Applicants failed to do. It was argued that the estate of a polygamous deceased was properly distributed under section 40 of the *Law of Succession Act* and there existed no justification to disturb the confirmed grant.
16. On jurisdiction, Counsel contended that disputes touching on ownership, sale, or occupation of land fall within the mandate of the Environment and Land Court, not the probate court, citing *Joseph Koori Ngugi & another v Stephen Ndichu J. Mukima* [2017] eKLR.
17. On functus officio, Counsel submitted that the court lacked jurisdiction to reopen the matter, relying on *Raila Odinga & 2 Others v IEBC & 3 Others* (2013) eKLR, *Telkom Kenya Limited v John Ochanda* (2014) eKLR, *Muchanga Investments Limited Vs Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR, *Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another* [2019] eKLR



and Daniel Lago Okomo v Safari Park Hotel Ltd & Another [2018] eKLR. It was argued that the application amounted to an abuse of court process and an attempt to delay finalization of the estate.

18. In conclusion, Counsel urged the court to dismiss the Applicants' application dated 21<sup>st</sup> May 2025 with costs, uphold the confirmed grant and allow the administrators to complete distribution of the estate.

### **Historical Background**

19. Before I delve into the substantive merits of this Summons, I would like to give a brief historical background with respect to this Succession Cause. I take note that Isaac K. Kemboi filed summons for Revocation dated 26<sup>th</sup> April 2022 seeking for the following reliefs: -
  - a. Spent
  - b. This Honourable Court be pleased to temporarily stay the execution and consequent activities arising therefrom, of Grant of Letters of Administration issued to the Respondents on the 27<sup>th</sup> September 2021 by this Honourable Court pending the inter parties hearing of this application.
  - c. That the Grant of Letters issued to the Respondents herein on the 27<sup>th</sup> September, 2021 be revoked and the same be given to the 1<sup>st</sup> Objector and the applicant herein or any other person that this Honourable Court may appoint.
  - d. Costs of this application be paid out of the Estate of the deceased.
20. The Application was premised on the grounds being: The Respondents have deliberately left out one of the deceased's dependant in the distribution of the deceased's estate namely: - Isaac K. Kemboi (son); The Applicant is a child of the deceased and recognized by the law; The Petitioners failed to disclose to the Court that the car listed for distribution does not form part of the Estate of the deceased as it belongs to the applicant herein; That the applicant is apprehensive that his own registered motor vehicle will be taken away by other beneficiaries of the estate of their deceased father and that is just and expedient in the circumstances that this Honourable Court do revoke the Grant of Letters of Administration on the 27<sup>th</sup> September 2021.
21. The Court in its ruling dated 20<sup>th</sup> September 2024 stated as follows: -
  41. Given the analysis above and in the administration of justice in this matter, the following orders shall issue:
    - a. Any two children of the deceased listed as the beneficiaries do avail themselves at the Government Chemist together with the 2<sup>nd</sup> Objector to give samples for the sibling DNA test within 21 days from the date of this order and the costs shall be borne by the 2<sup>nd</sup> Objector.
    - b. The 2<sup>nd</sup> Objector shall avail the instruments used for registration of his birth at the Registrar of Births and Deaths for this Court's scrutiny.
    - c. The 2<sup>nd</sup> Objector is hereby directed to deposit in court all title documents in his possession belonging to the estate of the deceased within 21 days, failure to which he shall be held in contempt and shall be at liberty to cancel the title documents on grounds of misplacement, particularly for the two parcels of land known as Tulwet/ Tulwet BLOCK 7 (TERIGE) 25 and LESSOS SETTLEMENT SCHEME/347.



- d. The costs of the suit shall be borne by the estate.
- e. Status conference on 4.11.2024.

22. This Court stated in its ruling dated 24<sup>th</sup> December 2024 as follows: -

- 2. Unfortunately, for reasons which are not very clear from the parties at as 4<sup>th</sup> November 2024, no steps had been taken to comply with the court orders. During the status conference, no sufficient cause was shown as to the reluctance of either parties to give effect to the court orders in this long outstanding succession cause initiated in our probate registry way back in 2013. In Kenya, disobedience of court orders is a problem that has developed into a repeating phenomenon and curated culture. As for this specific case, the resolution of the outstanding issues on identification of the heirs or beneficiaries under section 29 of the Law of Succession Act will remain a mirage if the DNA profile as ordered by this court is not carried out within the period specified.
- 3. For clarity purposes, disobedience of a court order is an act or behaviour that violates the court's ruling on a particular issue. The Learned Author in Black's Law Dictionary defines a Court Order as a written instruction or directive by a Court or Judge upon the issues being canvassed on the merits of the interlocutory application or the substantive suit touching on the cause of action. As for this specific case, the contempt of court as now set in since the expiry of the timeline defined in the ruling and that behaviour can only be described as intended to undermine the legitimacy of the Court and the administration of justice.
- 4. In *Pheko and Others Vs Ekurhuleni Metropolitan Municipality* [2015] ZACC 10, on this same subject the neighbouring court in the Republic of Zambia held that;  
"The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts to be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a Court bind all persons to whom and organs of state to which they apply. Disobedience to court would render the judicial authority a mere mockery.... the effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."
- 2. Based on the above observations, it is presumed that the Objectors claim on dependency remains moot and the Petitioners shall be at liberty to administer the estate and have it transmitted to the already recognized legitimate heirs to the estate of the deceased. In adherence to this guidelines, a final status conference be held on 24<sup>th</sup> January 2025 as I view this disobedience of the above court orders on submitting the DNA samples to the Government Analyst as a deliberate act of subversion of the law and the administration of justice.

23. The same Applicant herein being Isaac K. Kemboi appealed against the Ruling of this Court dated 24<sup>th</sup> December 2024 to the Court of Appeal in Civil Appeal No. E002 OF 2025. The Application for stay of execution and further proceedings of the ruling in this Court was dated 3<sup>rd</sup> February 2025. The Appellant sought ex parte orders as follows: -

- a. Spent
- b. That this Honourable Court be pleased to grant exparte interim order of stay of execution and further proceedings in Eldoret Probate and Administration No. 311 of 2013, in the Matter of the estate of the late James Kimarta Ruto (deceased) pending the hearing and determination of this application.



- c. That this Honourable Court be pleased to grant ex-parte interim order of stay of execution and further proceedings in Eldoret Probate and Administration No. 311 of 2013, in the Matter of the estate of the late James Kimarta Ruto (deceased) pending the filing of appeal.
  - d. That this Honourable Court be pleased to grant ex-parte interim order of stay of execution and further proceedings in Eldoret Probate and Administration No. 311 of 2013, in the Matter of the estate of the late James Kimarta Ruto (deceased) pending hearing and determination of appeal upon filing.
  - e. That cost of the application be in the cause.
24. The Appellate Court vide its Ruling dated 16<sup>th</sup> May 2025 stated as follows: -
2. The problem as we see here is poor drafting of pleadings. Crafting a good pleading calls for precision in drafting, diligence and an understanding of the legal principles which are necessary to formulate a complete cause of action and precision in the prayers sought. Like a guided missile, a prayer sought in a court pleading must be specific and precise. There is clearly no prayer of stay of execution and stay further Proceedings in Eldoret Probate and Administration No. 311 of 2013 to consider a this inter partes stage. In the circumstances, it would be an idle exercise to contemplate consideration of the merits of the application. Clearly, the orders sought are already spent. No Court of law can knowingly grant an order which will serve no utilitarian purpose. Courts of law loath engaging in a futile exercise. This application was dead on arrival. Accordingly, the application dated 3<sup>rd</sup> February 2025 is dismissed with costs to the Respondents.
25. The Respondents herein filed Summons dated 24<sup>th</sup> March, 2025 expressed to be brought under the provisions of section 47 and section 83 of the Law of Succession Act together with Rule 49 of the Probate of Administration Rule. The Respondents sought the orders as follows: -
- a. Spent
  - b. The OCS, Lessos Police station and OCS Kesses Police station together with their officers to provide security during the execution of the orders issued by this Honourable court on 24<sup>th</sup> December, 2024 and to ensure compliance with the said orders.
  - c. Costs of the application be borne by the Defendants
26. The application is anchored on grounds as follows:
- a. That a grant was issued to the Petitioners in this cause and the same was confirmed on 27<sup>th</sup> September 2021 and a certificate of confirmation issued accordingly.
  - b. That the Objectors/Respondents filed an application for revocation of the said grant dated 26<sup>th</sup> April 2022. That the Objectors/Respondents failed to comply with the orders issued by this Honourable Court.
  - c. That when the matter came up for status conference on 4<sup>th</sup> November 2024, the 2<sup>nd</sup> Objector was yet to comply with any of the court orders.
  - d. That upon the court noting that the 2<sup>nd</sup> Objector had no intention of complying with the orders issued on 20<sup>th</sup> September 2024, the court went on to deliver a ruling on 24<sup>th</sup> December 2024 stating that the Objectors claim on dependency remains moot and that the Petitioners are at liberty to administer the estate and have it transmitted to the recognized heirs of the estate.



- e. That the Objectors/Respondents filed a Notice of Appeal appealing the ruling delivered on 24<sup>th</sup> December 2024.
- f. That the Objectors/Respondents did not seek leave to appeal to the Court of Appeal as required under Rule 41 of the Court of Appeal Rules.
- g. That the Objectors/Respondents made an application for stay of execution dated 10<sup>th</sup> January 2025 to the Court of Appeal and they were denied interim stay orders pending determination of the application.
- h. That as at now there are no stay of execution orders preventing the Petitioners from administering the estate of the deceased.
- i. That land parcels number Tulwet/Tulwet Block 7(terige)/25, Nandi (lessos Settlement)/347 And Tulwet/koisagat Block 1 (Sochoi)/67 have already been legally transferred to the Petitioners/Applicants by way of transmission.
- j. That the Petitioners/Applicants have already booked a Surveyor to undertake sub-division of the parcels but the same cannot be done without security from the police as the Objectors are in possession of the estate.
- k. That the OCS Kesses police station and Lessos police station have already verified that the ruling and the certificate of confirmation is legitimate but they directed that the Petitioners/Applicants obtain a court order directing that they provide security during the sub division process.
- l. That unless this application is allowed, the Objectors/Respondents will continue to interfere with the land parcel numbers Tulwet/Tulwet BLOCK 7(TERIGE)/25, NANDI (LESSOS SETTLEMENT)/347 and Tulwet/KOISAGAT BLOCK 1 (Sochoi)/67 and that shall render the orders of the court nugatory and subvert the course of justice and the rule of law.
- m. That Section 83 of the Law of Succession Act the administrators of the estate of the deceased should within six months from the date of confirmation of the grant, or 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; and such the Petitioners/Applicants are seeking the above orders to enable them discharge their duties as administrators.

27. This Court vide its ruling dated 16<sup>th</sup> May 2025 stated as follows: -

- 14. In light of the foregoing, I make the following orders:
  - a. That the OCS, Lessos Police Station and OCS Kesses Police Station, together with their officers, are hereby directed to provide security during the execution of the orders issued by this Honourable Court on 24<sup>th</sup> December, 2024, and to ensure compliance with the said orders.
  - b. That the police officers shall specifically provide security during the subdivision process of land parcels Tulwet/Tulwet Block 7(terige)/25, Nandi (lessos Settlement)/347, And Tulwet/koisagat Block 1 (Sochoi)/67.
  - c. That the costs of this application together with the facilitation expenses for the police officers who shall be assigned by the OCS to necessitate the execution of this order shall



be met by the estate itself. I have in mind fuel expenses and other incidental for the security which shall be involved in implementing the civil process of this court.

- d. That any matters arising from the OCS perspective with the compliance of this order shall be communicated directly to the Deputy Registrar of the High Court to ensure that any barriers are mitigated against these decreed directions of this court.
- e. That in executing this order the OCS is put on notice that it is all about ensuring the fair administration of justice notwithstanding that the orders have been issued under the realm of civil law.
- f. That the costs of this application shall be borne by the Estate.

It is so ordered.

28. When the present application which is pending before this Honourable Court was filed, this Honourable Court gave the following directions dated 6<sup>th</sup> Day of October 2025 and stated as follows: -

4. The Court's recent ruling delivered in May 2025 addressed the practical reality that court orders require not merely pronouncement but effective implementation. The request for police security during the execution of court orders and subdivision of estate property brought out the unfortunate circumstance that voluntary compliance has not been forthcoming.
5. The fundamental issue that emerges from this extended litigation is the need of finality in judicial proceedings. The justice system functions effectively only when judgements or rulings, once duly rendered and absent valid grounds for their suspension, are treated as binding and executable. Unless the metrics of transmission suffers from error apparent on the face of record, a mistake of error of law should not be subject to re-litigation over and over again without sufficient cause. When orders become subject to indefinite deferral through successive applications and assertions of rights that are not substantiated through proper procedure, the administration of justice in my view suffers.
6. Having said that, it is important that the parties appear before this Court on 7<sup>th</sup> October 2025 at 2.00PM for purposes of conferencing on this matter. Let the parties be duly notified of this date.

29. The Applicants further filed an Application seeking the following orders: -

- a. Spent
- b. That pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue conservatory orders restraining the Petitioners/Respondents, their agents, servants or assigns from subdividing, transferring, disposing of, or in any way dealing with the estate of the deceased comprising the following properties: Tulwet/koisagat (Sochoi) Block 1/67, Tulwet/Tulwet Block 7 (terige) 25, Lessos Settlement Scheme Keben Block Phase Three No 347, Plot At Lesson Centre No 85, Plot At Koisagat Trading Centre.
- c. That upon granting prayer 2 above, the application dated 21<sup>st</sup> May 2025, be set down for hearing of priority basis.

30. This Honourable Court vide its Ruling and/or Directions dated 12<sup>th</sup> June 2025 stated as follows: -

2. These proceedings on distribution of the estate were initiated on 23.9.2013. However, the sad story is litigation on devolution of the estate remains a pipe dream to the beneficiaries. There are more interlocutory applications than a decision tailored to vindicate the rights of the heirs.



3. The ink on the distribution scheme has not even dried before the instant application raising some underlying issues and as such even at this ex-parte stage this court has got to assess whether granting interim injunction or withholding it is more likely to produce a just result or at the end of it all render the pending application nugatory.
4. Having been involved in presiding over these proceedings of quite some time, the approach I take is to grant interim temporary injunction to preserve status quo against any beneficiary or administrators not to do something else touching on the Certificate of Confirmation of Grant so as to improve the chances of the court being able to do justice by adjudicating the pending application on the merits.

### **Analysis and Determination**

31. This succession cause presents yet another chapter in a protracted litigation that has spanned close to thirteen (13) years having been instituted in the year 2013. This Succession Cause was initially commenced and consistently prosecuted on the footing that the estate of the late James Kimarta Ruto (deceased) was intestate. Over the years, the Court has rendered several substantive and interlocutory rulings, issued and confirmed a Grant of Letters of Administration Intestate, supervised compliance proceedings, addressed applications for revocation and even sanctioned police assistance to ensure implementation of its orders.
32. The present Summons for Revocation of Grant dated 21<sup>st</sup> May 2025 introduces a fundamental shift in the character of this Succession Cause. For the first time, the Court is invited to consider the estate as allegedly testate, on account of a written Will dated 26<sup>th</sup> September 2011, said to have been discovered long after confirmation of the Grant and after delivery of several rulings. The Court is acutely aware of the need for finality in litigation, particularly in succession causes where prolonged disputes defeat the very purpose of orderly administration and transmission of estates. However, finality must never be pursued at the expense of justice, nor should procedural rigidity override the constitutional duty of the Court to hear and determine disputes fairly and substantively within the confines of the overriding objective.
33. Having carefully considered the Summons, the affidavits on record, the extensive historical background and the rival submissions of the respective Counsel, this Honourable Court highlights the following key issues for determination at this stage: -
  - a. Whether the Applicants have established sufficient Grounds for revocation of the Grant dated 27<sup>th</sup> September 2021?
  - b. Whether the introduction of a written Will dated 26<sup>th</sup> September 2011 constitutes new and compelling evidence warranting preservation of the estate.
  - c. Whether the Court should stay further dealings with the estate and the Certificate of Confirmation of Grant.



**Whether the Applicants have established sufficient Grounds for revocation of the Grant dated 27<sup>th</sup> September 2021?**

34. The jurisdiction of this Honourable Court to entertain this application is provided for in section 47 of the Law of Succession Act as read with Rule 73 of the Probate and Administration Rules. Section 47 of the Law of Succession Act provides as follows: -

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

35. The law relating to Revocation or annulment of a Grant is stipulated in section 76 of the Law of Succession Act which provides as follows: -

76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.

36. In the case of *Jamleck Maina Njoroge Vs Mary Wanjiru Mwangi* [2015] eKLR the court set out the circumstances under which a grant may be revoked as follows: -

“The circumstances that can lead to the revocation of grant have been set out in Section 76, law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of



a false statement or by or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

37. A grant may be revoked upon production of evidence proving the grounds in Section 76 *Law of Succession Act*, whereupon the court will exercise its discretion and revoke the grant. In the case of *Albert Imbuga Kisigwa Vs Recho Kawai Kisigwa* [2016] KEHC 1528 (KLR), Mwita J (as then he was) made pertinent remarks on principles for the revocation of a grant as follows;

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

38. In the case of *Matheka & Another Vs Matheka* [2005] KLR, the Court of Appeal set out the guiding principles for revocation of a Grant as follows; -

“From the foregoing, it is clear that a grant may be revoked either by application by an interested party or on the Court’s own motion. But even when revocation is by the Court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. The grant may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.”

39. From the above case law and statutory provisions, the power of this Court to revoke or annul a grant of representation is donated by section 76 of the *Law of Succession Act*. The provision is couched in permissive terms and empowers the Court to revoke a grant at any time if it is satisfied that any of the statutory grounds have been established. These grounds include, inter alia, that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by concealment of something material; that the grant was obtained by means of an untrue allegation of a fact essential in point of law; or that the grant has become useless and inoperative through subsequent circumstances. However, the mere invocation of section 76 of the *Law of Succession Act* does not automatically warrant revocation. The jurisdiction is discretionary and the burden lies squarely upon the party seeking revocation to strictly demonstrate that the facts of the case fall within the statutory parameters. Courts have consistently held that revocation of a confirmed grant is a drastic remedy which should not be exercised lightly, particularly where substantial steps towards administration and transmission of the estate have already been undertaken.

40. In the present succession cause, there is no dispute that a Grant of Letters of Administration Intestate was issued and subsequently confirmed, culminating in the issuance of a Certificate of Confirmation of Grant dated 27<sup>th</sup> September 2021, which remains valid and subsisting on record. The estate has, to a significant extent, been administered pursuant to that certificate of Confirmation of Grant and the Court has previously sanctioned enforcement measures to ensure compliance with its orders. The Applicants anchor their plea for revocation principally on the alleged existence of a written Will dated



26<sup>th</sup> September 2011, which they contend was discovered after the grant had been confirmed. While the discovery of a Will may, in appropriate circumstances, constitute a basis for revoking a grant, the Court must be careful to distinguish between grounds that justify revocation ab initio and circumstances that properly fall within the realm of review of a judgment or order on account of new and compelling evidence.

41. At this juncture, the Court is not persuaded that the statutory threshold for revocation under section 76 has been met. The Applicants do not allege nor has it been demonstrated that, at the time the grant was issued and confirmed, the Court was seized of evidence proving the existence of a Will dated 26<sup>th</sup> September 2011 which was deliberately concealed and whose authenticity is beyond dispute. On the contrary, the very subject of contention before this Court is whether the alleged Will is genuine, valid and capable of being admitted to probate. That question remains unresolved and is yet to be tested through evidence. Where, as here, a judgment of the Court has already crystallized in the form of a Certificate of Confirmation of Grant and a party subsequently seeks to introduce what is alleged to be new and compelling evidence, the proper procedural course is not immediate revocation, but review of the Court's orders so that the new evidence may be interrogated. This is particularly so because revocation presupposes the existence of proven defects, fraud or material non-disclosure, none of which can be conclusively established before the authenticity and provenance of the alleged Will are determined.
42. The Court therefore finds that, at this stage, revocation of the grant dated 27<sup>th</sup> September 2021 would be premature and would risk frustrating subsisting court orders without a firm evidentiary foundation. The justice of this matter demands a more measured approach one that preserves the estate, safeguards the integrity of prior judicial determinations and at the same time affords the Applicants an opportunity to place their alleged new evidence before the Court through a procedurally sound mechanism.

**Whether the introduction of a written Will dated 26<sup>th</sup> September 2011 constitutes new and compelling evidence warranting preservation of the estate.**

43. There is no dispute that this Succession Cause has followed a long path. From the issuance and confirmation of the Grant on 27<sup>th</sup> September 2021, through revocation proceedings in 2022, compliance orders in 10<sup>th</sup> September 2024, adverse findings in December 2024, appellate proceedings culminating in the ruling of 16<sup>th</sup> May 2025 and subsequent enforcement proceedings, the Court has consistently treated the estate as intestate. The emergence of an alleged Will dated 26<sup>th</sup> September 2011, albeit at a late stage radically alters the substratum of the dispute. Whether the Will is ultimately found to be genuine, valid or enforceable is not the issue at this juncture. What matters is that its existence, on its face, raises a triable and substantive question that goes to the very foundation upon which the confirmed Grant was issued.
44. A Will, if valid is not a peripheral document in a succession cause; it is the supreme expression of the deceased's testamentary intention. Its presence or absence determines whether intestate or testate succession applies, the identity of beneficiaries and the mode of distribution. To ignore such a document without interrogation would risk sanctioning a distribution potentially inconsistent with the law and the wishes of the deceased. Article 50(1) of *the Constitution* of Kenya guarantees every person the right to have any dispute resolved in a fair and public hearing before an independent and impartial court. This right encompasses not merely the opportunity to be heard, but the opportunity to present and challenge evidence that is material to the dispute.



45. The Applicants contend that the Will dated 26<sup>th</sup> September 2011 constitutes new and compelling evidence discovered after confirmation of the grant and after delivery of the impugned rulings. Whether this assertion withstands scrutiny is a matter for determination after evidence is tested. However, Article 50 of *the Constitution* demands that where such evidence is presented and is prima facie relevant, the Court must afford parties an opportunity to ventilate it in a procedurally fair manner. The Respondents have strongly urged the doctrine of *functus officio* and finality of litigation. While these doctrines are vital to the integrity of judicial proceedings, they are not absolute. Succession proceedings by their very nature are continuing proceedings until full administration and distribution is completed. Moreover, section 76 of the *Law of Succession Act* expressly empowers the Court to revisit a grant “at any time” where circumstances so warrant.

46. Order 45 Rule 1 of the Civil Rules provides as follows: -

1.

(1) Any person considering himself aggrieved

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

47. However, under Order 45 of the Civil Procedure Rules this Court must ascertain whether the evidence met the criteria in law. The legal bar being that ‘...the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed....’ The Supreme Court in *Col. Tom Martins Kibisu Vs Republic Supreme Court Petition No. 3 of 2014 (2014) eKLR* dealt with a Petition on retrial of a criminal case which Petition had been filed under the provisions of Article 50(6)(b) of *the Constitution*. The said provision states that;

A person who is convicted of a criminal offence may petition the High Court for a new trial if-

(a) .....

(b) new and compelling evidence has become available.

48. The Court interpreted the words ‘new and compelling evidence’ as follows: -



- (42) We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, a prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person." (emphasis added).
49. To me the words 'new and compelling evidence' used in Article 50(6)(b) of *the Constitution* carry similar purport to the words 'the discovery of new and important matter or evidence' used under Order 45 Rule 1(1)(a) of the Civil Rules. The question whether the alleged Will dated 26<sup>th</sup> September 2011 constitutes new and compelling evidence must be approached with caution, sobriety and a clear appreciation of the procedural posture of this cause. This Court is not persuaded that the issue can be answered in the abstract or by mere assertion from the bar. On the one hand, the existence of a Will if ultimately proved to be authentic, duly executed and reflective of the true testamentary intentions of the deceased would go to the very root of these proceedings. It would fundamentally alter the basis upon which this estate has, for over a decade, been treated as intestate. In that sense, the Will is not peripheral evidence; it is potentially decisive. Viewed from that perspective alone, the Will is capable of qualifying as new evidence of considerable weight.
50. On the other hand, the Court cannot ignore the surrounding circumstances under which the Will has been introduced. This Cause has been actively litigated since 2013. The grant was confirmed, enforcement orders issued and appellate processes invoked, all without the Will being placed before the Court. Its production at this late stage, without prior judicial scrutiny, raises legitimate questions which this Court cannot gloss over. A document does not become "compelling" merely because it is labelled as a Will; it becomes compelling only after its existence, provenance and integrity are satisfactorily explained. At this stage, therefore, the Court is prepared to accept that the alleged Will prima facie constitutes new evidence, in the sense that it was not previously on the record and could not have been considered when the Certificate of Confirmation of Grant was issued. However, whether it is compelling evidence is a question that can only be answered after the Court has interrogated, through evidence, when the Will came into existence, how it was preserved, why it was not disclosed earlier and whether its execution and contents meet the legal threshold set by the *Law of Succession Act*.
51. In short, the Will stands at a crossroads. It is neither dismissed nor accepted at this stage. It is sufficiently weighty to justify the Court's intervention to preserve the estate and to reopen limited proceedings for its examination. At the same time, it is not yet so conclusive as to warrant immediate disruption of subsisting orders through revocation of the confirmed grant. It is for this reason that the Court considers a trial within a trial to be the most prudent and just course. That process will allow the Court to determine whether the alleged Will moves from being merely new evidence to being truly compelling evidence capable of reshaping the final outcome of this succession cause.

#### **Whether the Court should stay further dealings with the estate and the Certificate of Confirmation of Grant.**

52. On the question of stay of proceedings, the Court is required to exercise its discretion judiciously, having carefully weighed the merits of the matter and assessed the potential impact such an order would have on the overarching obligation to ensure that justice is ultimately served. The exercise of the court's discretion must be grounded on judicious principles as the Hon. Justice Ringera held in the case of



“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

53. In the same vein, I wholly align myself with the principles governing applications for stay of proceedings as articulated in Halsbury’s Laws of England, 4th Edition, Volume 37 at pages 330 and 332, which principles I now proceed to restate hereunder;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

54. Further, in the case of Kenya Wildlife Services Vs Jane Mutembi (2019) eKLR, the Court held as follows: -

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

55. The Court has carefully considered the principles elucidated from the above case laws with regards to stay of proceedings and the material placed before it. Having regard to the peculiar circumstances of this succession cause and in light of the serious questions raised concerning the alleged Will which, if proved, would fundamentally alter the character of the estate, the Court is persuaded that it would be prudent to momentarily halt further proceedings. Proceeding without first resolving that issue risks rendering any subsequent determinations nugatory and may occasion prejudice that cannot be adequately remedied at a later stage.

56. A stay of further proceedings is therefore granted, not as a determination on the merits, but as a holding measure to preserve the integrity of the process and the subject estate. This stay is limited in scope and duration and is intended solely to allow the Court to address the outstanding issues in an orderly and



just manner. The parties are accordingly directed to take the necessary steps to prosecute the pending issues with due diligence so that this matter may be brought to a final and conclusive determination.

57. Moreover, this Honourable Court is persuaded that the appropriate mechanism to address the competing claims regarding the Will is a trial within a trial. This approach allows the Court to isolate and determine as a preliminary issue the authenticity, due execution, testamentary capacity and integrity of the alleged Will. Such a process is firmly grounded in the *Evidence Act*. Under sections 107, 108 and 109 of the *Evidence Act*, the burden of proof lies on the party who asserts the existence and validity of a fact. The Applicants must therefore prove, on a balance of probabilities, that the Will was validly executed, free from suspicious circumstances and reflects the true testamentary intention and the wishes of the deceased herein.
58. The Court further observes that the purpose of directing a trial within a trial in the present cause is not merely to pronounce itself on the face-value validity of the alleged Will, but to interrogate the surrounding circumstances of its existence and production. Specifically, the Court must be satisfied as to when the Will came into existence, how it was kept or preserved, by whom it was held and the circumstances under which it was allegedly discovered. Equally important is the need for the Court to establish why the Will was not brought to the attention of the Court at the inception of these proceedings, nor during the petition for grant of letters of administration, confirmation proceedings, or the earlier applications for revocation. These questions go directly to the issues of credibility, good faith and material non-disclosure, which are central to the exercise of the Court's discretion under section 76 of the *Law of Succession Act*.
59. The interim conservatory orders issued on 12<sup>th</sup> June 2025 were granted for the sole purpose of safeguarding the subject matter of the dispute. The Court is persuaded that setting aside those orders at this stage, before the alleged Will has been subjected to judicial interrogation, would expose the pending application to the risk of being rendered nugatory and may occasion prejudice that cannot be adequately compensated by an award of costs. In the circumstances, the Court is satisfied that the balance of convenience plainly favours the preservation of the prevailing status quo.
60. This Court is alive to the fatigue occasioned by prolonged litigation and the legitimate expectation of beneficiaries to enjoy the fruits of succession. Nonetheless, justice must not only be done but must be seen to be done. In view of the foregoing, this Honourable Court makes the following orders:
- a. That the conservatory orders issued by this Court on 12<sup>th</sup> June 2025 are hereby extended in respect of the following properties:
    - a. Tulwet/Kiosagat(Sochoi) Block 1/67
    - b. Tulwet/Tulwet BLOCK 7 (Terige) 25
    - C. Lessos Settlement Scheme Keben Block Phase Three No. 347
    - D. Plot At Lessos Centre No. 85
    - E. Plot At Koisagat Trading Centre
  - b. That there shall be an interim freezing of all activities relating to the Certificate of Confirmation of Grant, including subdivision, transfer, transmission or distribution of the estate, pending further orders of this Court.
  - c. That a trial within a trial is hereby ordered for purposes of testing the authenticity, validity and due execution of the alleged Will dated 26<sup>th</sup> September 2011.



- d. That the present application dated 21<sup>st</sup> May 2025 shall be heard on a priority basis by way of viva voce evidence.
- e. That each party shall, within timelines to be agreed at the status conference file and exchange affidavit evidence and/or witness statements together with any documentary evidence intended to be relied upon at the trial.
- f. That any act of intermeddling with the estate contrary to the aforesaid orders shall be treated as contempt of court and dealt with accordingly.
- g. That the Area Chief of the locality where the estate properties are situated shall ensure compliance with the aforesaid orders above.
- h. That a status conference shall be held on 9<sup>th</sup> February 2026 for purposes of confirming compliance and taking directions on the hearing.
- i. That there shall be no orders as to the costs this being a family matter.

61. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 5<sup>TH</sup> FEBRUARY 2026**

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**R. NYAKUNDI**

**JUDGE**

