

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**SUCCESSION CAUSE NO. 16 OF 2018**

**IN THE MATTER OF THE ESTATE OF MARK KIPTARBEI TOO (DECEASED)**

MARY JEPKEMBOI TOO.....1<sup>ST</sup> ADMINISTRATOR  
SOPHIA JELIMO CHEMENGEN.....2<sup>ND</sup> ADMINISTRATOR

VERSUS

MOSES KIPROTICH TOO.....1<sup>ST</sup> OBJECTOR  
CHEPKOECH TOO.....2<sup>ND</sup> OBJECTOR/APPLICANT  
SAMMY WAKI MULILI AKA KIPLAGAT TOO.....3<sup>RD</sup> OBJECTOR  
ALI MARK KIPTARBEI TOO.....4<sup>TH</sup> OBJECTOR  
ARAFAT MOHAMMED BAKARI.....5<sup>TH</sup> OBJECTOR/APPLICANT

&

ELIZABETH JEPKOECH TOO.....1<sup>ST</sup> INTERESTED PARTY  
JENNIFFER JEBET TOO.....2<sup>ND</sup> INTERESTED PARTY  
DANIEL KIPCHICHIR TOO.....3<sup>RD</sup> INTERESTED PARTY  
SANDRA JEROP TOO.....4<sup>TH</sup> INTERESTED PARTY  
KEVIN KIPKEMEI TOO.....5<sup>TH</sup> INTERESTED PARTY  
SHARON JEPCHUMBA TOO.....6<sup>TH</sup> INTERESTED PARTY

&

CHARTERHOUSE INVESTMENT LIMITED.....7<sup>TH</sup> INTERESTED PARTY  
BIN (NAIROBI) SERVICES LIMIT.....8<sup>TH</sup> INTERESTED PARTY  
FANKIWA LIMITED.....9<sup>TH</sup> INTERESTED PARTY  
KINGWAL HOLDINGS LIMITED.....10<sup>TH</sup> INTERESTED PARTY  
BLUETOUGH GROUP LIMITED.....11<sup>TH</sup> INTERESTED PARTY

**RULING**

1. This is latest of a series of Rulings that I, and before me, several other Judges, have delivered in this protracted and seemingly unending litigation over the estate of the wealthy, prominent and influential politician, and business guru, the late **Mark Kiptarbet Too**, who died on 31/12/2016 leaving behind two widows, the 1<sup>st</sup> Administrator (2<sup>nd</sup> house) and 2<sup>nd</sup> Administrator (1<sup>st</sup> house) referred to above, and in respect to whose estate this Court issued a Grant of Letters of Administration Intestate on 12/07/2021. To date, almost 5 years later, the tussle still continues, and although a partial distribution and/or confirmation of the Grant has now been realized, the main Summons for Confirmation of Grant dated 21/10/2021 filed herein still remains in limbo.
2. This Ruling is now in respect to two Applications which arise from two events that arose in the course of the proceedings, and which therefore form the basis thereof.

3. The first event is that the 2<sup>nd</sup> Objector had earlier procured a DNA test conducted against her sample and that of the 5<sup>th</sup> Objector, **Arafat Mohamed Bakari**, her half-brother, who is a known child of the deceased and the results she presented indicated that the same came out positive, as it established that the 5<sup>th</sup> Objector and herself shared a father. It appears that some parties however challenged the results claiming that the test was not conducted with their participation. For this reason, and due to what she termed as her continuous exclusion by the Administrators from being identified as a biological daughter of the deceased and a beneficiary of his estate, she filed the Application dated 28/02/2022 seeking orders for conduct of a fresh DNA test, which Application the Court (**Ogola J**), by the Ruling delivered on 22/09/2022, allowed and ordered that such DNA test be conducted on the 5<sup>th</sup> Objector against other known children of the deceased to establish whether she is a biological child of the deceased. It was therefore ordered that the deceased's identified children, namely, the 1<sup>st</sup> Objector, and the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Interested Parties, present themselves at the **Kenya Institute of Medical Research (KEMRI)** within 7 days at a date and time so directed for the harvesting of DNA samples for matching and comparisons, and all proceedings in this matter stayed pending conclusion of the DNA testing process. Dissatisfied with the decision, the 2<sup>nd</sup> Administrator moved to the Court of Appeal and applied for stay of the orders pending Appeal. The Application, filed as **Eldoret Court of Appeal Civil Application No. E011 of 2022**, was however dismissed by the Court of Appeal on 26/10/2023. The 2<sup>nd</sup> Administrator has disclosed that pursuant to the said dismissal, she abandoned the intention to appeal.
  
4. The second event is that this Court on 20/11/2024 referred this matter to Court Annexed Mediation in a bid to facilitate the parties to explore the possibility of reaching an amicable resolution of the matters herein. The Mediation culminated into partial settlement by way of two respective consent agreements dated 6/02/2025 executed by the parties, and also by their Counsel. The first consent agreement was in respect to the 5<sup>th</sup> Objector, **Arafat Mohamed Bakari**, and the second was in respect to the 4<sup>th</sup> Objector, **Ali Mark Kiptarbei Too**, the current Applicant. Under the consents, the 4<sup>th</sup> Objector and the 5<sup>th</sup> Objector were, in full and final settlement of their Objections filed herein, awarded several tracts of land and also cash payments, and consequently, their Objections were duly marked as withdrawn. I however suspended adoption of the consent relating to the 4<sup>th</sup> Objector when the matter came up in Court on 17/03/2025 as the 4<sup>th</sup> Objector personally appeared in Court and opposed adoption thereof. As regards the 5<sup>th</sup> Objector however, there being no challenge against it, I duly adopted it as an order of the Court and a Partial Confirmation of Grant arising therefrom has since been issued by the Court.

5. The first Application the subject of this Ruling is the Summons dated 29/08/2024 filed by the 2<sup>nd</sup> Objector, **Chepkoech Too**. The Application is filed through **Messrs Judy Thongori & Co. Advocates**, and seeks orders as follows:

- i) [Spent]
- ii) **THAT** this Honourable Court be pleased to order that the Respondents comply with the Court orders issued on 22<sup>nd</sup> September 2022 within 14 days of this order.
- iii) **THAT** this Honourable Court be pleased to declare the Applicant as a biological daughter of the deceased based on the DNA results obtained from samples tested against that of **Arafat Mohammed Bakari** should the Respondents fail to comply with the Court orders issued on 22<sup>nd</sup> September 2022 within the prescribed period.
- iv) **THAT** this Honourable Court be pleased to give any further order/directions as it may deem fit in the circumstances.
- v) **THAT** the costs of this Application be in the Cause.

6. The Application is supported by the Affidavit sworn by the 2<sup>nd</sup> Objector who reiterated the background I have already recounted above and deponed that the Respondents have to date, not taken any steps to comply with the orders issued on 22/09/2022 directing conducting of the DNA tests as aforesaid

7. The second Application is the Summons dated 14/04/2025 filed by the 4<sup>th</sup> Objector, **Ali Mark Kiptarbei Too**. The Application is filed through **Messrs Jepchirchir & Co. Advocates**, and seeks orders as follows:

- i) **THAT** this Honourable Court be pleased to grant leave to the firm of **Messrs Jepchirchir & Co. Advocates** to come on record for the 4<sup>th</sup> Objector/Applicant.
- ii) **THAT** the consent dated 6<sup>th</sup> February, 2025 held in abeyance by this Honourable Court in these proceedings, be expunged from the record and not be adopted or relied upon in the determination of the distribution of the estate of the deceased
- iii) **THAT** the Honourable Court be pleased to issue directions for the fair and just hearing of any objections, protests or further proceedings in this matter, without reliance on the said consent.

- iv) **THAT** the Honourable Court be pleased to issue directions that the 4<sup>th</sup> Objector be referred back to the ongoing negotiation process to ensure that he is fully involved in determining a fair and equitable settlement.
- v) **THAT** the mediated upon by a different Mediator other than the one previously assigned.
- vi) **THAT** the costs of this Application be in the Cause.

8. The Application is supported by the Affidavit sworn by the 4<sup>th</sup> Objector who deponed that he did not give it voluntarily, informedly or with full understanding of its legal implications, reasons whereof he had reconsidered his position. He deponed that the conduct of his previous Advocates, **Messrs Rioba & Co.**, did not align with the responsibilities expected of a Counsel in Court Annexed Mediation process as the Advocates did not explore with him the available settlement options, failed to adopt an advisory role, instead taking full control of the negotiations without his input, and failed to ensure his presence and active management in the Mediation discussions. He deponed further that prior to the Mediation session of 6/02/2025, he was handed a pre-drawn document without being fully informed of its contents, he was not given an opportunity to object or propose any changes thereon, that he was pressured into signing the consent, a fact which renders it unenforceable, and that the consent was therefore obtained by undue influence, duress and misrepresentation. He also deponed that he realized later that the consent had been drafted prior to the Mediation session by the law firm of **Prof. Ojienda & Associates**, Advocates for the 2<sup>nd</sup> Administrator, which firm had therefore already negotiated on his behalf rendering the Mediation process a mere formality. He also contended that his former Advocates, **Messrs Rioba Omboto & Co.** disclosed and continues to disclose his privileged information given in confidence thereby compromising his legal position and violating his Advocate-Client privilege, that he was not given an opportunity to discuss or challenge the valuation of the estate allocated to him under the consent, and that he was allocated an unfairly small portion of the estate despite being an heir.

9. When the matter came up for directions on 16/09/2025, **Ms. Chebet**, representing the law firm of **Z. K. Yego Law Offices**, acting for the 1<sup>st</sup> Objector and 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, stated that they were not opposed to the 2<sup>nd</sup> Objector's Summons dated 29/08/2024 (DNA Application), save that Advocates be granted liberty to attend when samples are taken and the test conducted. She also disclosed that, as earlier agreed in Court on 30/07/2025, her firm

had circulated a consent to the Application to all the parties but only the firm of **Tom Ojienda & Associates** had executed it.

10. **Ms Awuor**, representing **Messrs Tom Ojienda & Associates** acting for the 2<sup>nd</sup> Administrator and the 3<sup>rd</sup> – 6<sup>th</sup> Interested Parties, confirmed that indeed her firm had executed the circulated consent acceding to the 2<sup>nd</sup> Objector's said Summons dated 29/08/2024 (DNA Application) as they now agree that the 2<sup>nd</sup> Objector is indeed a daughter of the deceased.
11. **Ms. Ndirangu** representing **Messrs Judy Thongori & Co. Advocates**, acting for the 2<sup>nd</sup> Objector, stated that her client will not be participating in the 4<sup>th</sup> Objector's Summons dated 14/04/2025 (setting aside of consent).
12. **Mr. Mburu**, representing **Messrs J.M. Waiganjo & Co. Advocates** acting for the 1<sup>st</sup> Administrator and the 1<sup>st</sup> Objector, stated that their clients will not be participating in the 2<sup>nd</sup> Objector's said Summons dated 29/08/2024 (DNA Application) as they are not opposed to it as long Advocates are allowed to attend the DNA testing process. Regarding the 4<sup>th</sup> Objector's Summons dated 14/04/2025 (setting aside of consent), he stated that they will not be filing any response but will rely on the 4<sup>th</sup> Objector's Affidavit thereon.
13. **Mr. Luseno**, representing **Messrs Majanja Luseno & Co. Advocates** acting for the 7<sup>th</sup> – 11<sup>th</sup> Interested Parties, stated that their clients will not be filing any response to the 2<sup>nd</sup> Objector's Summons dated 29/08/2024 (DNA Application) as long Advocates are allowed to attend the DNA testing process.
14. **Mr. Ngeru**, representing **Messrs Sam Ngeru & Co. Advocates** acting for the 5<sup>th</sup> Objector stated that his client was not opposed to the 2<sup>nd</sup> Objector's Summons dated 29/08/2024 (DNA Application) and will not be filing any response thereto as his client agrees that the 2<sup>nd</sup> Objector is indeed a daughter of the deceased.
15. In response to the 4<sup>th</sup> Objector's Summons dated 14/04/2025 (setting aside of consent), **Messrs Rioba Omboto & Co. Advocates**, appearing for itself, filed the Replying Affidavit sworn on 23/10/2025 by **David Rioba Omboto**, who introduced himself as practicing in the name and style of the said law firm. He termed the Application frivolous, full of falsehoods, and an abuse of the Court process. He then deponed that the firm of **Jepchirchir & Co.** is not properly on record as it has not sought consent from his law firm to come on record, and that the Application is an afterthought and only meant to delay the finalization of this Cause.

He deponed further that the impugned Mediation agreement was reached in accordance with the instructions of the 4<sup>th</sup> Objector who was present together with him. He denied disclosing any privileged or confidential information as alleged by the 4<sup>th</sup> Objector, and urged that it the new Advocate who is misleading the 4<sup>th</sup> Objector by failing to disclose what he (**Mr. Omboto**) has done for the 4<sup>th</sup> Objector, including receiving from **Mr. Omboto**, stipends and house rent, and also the sum of Kshs 5,000,000/- from the estate of the deceased. He also faulted the new Counsel for not having the courtesy to contact him to give her the history of the matter, or the file in his possession, before drawing misleading and uncouth averments, conduct which he termed unprofessional and unethical.

16. In response to the 4<sup>th</sup> Objector's Summons dated 14/04/2025 (setting aside of consent), **Messrs Majanja Luseno & Co. Advocates**, acting for the 7<sup>th</sup> – 11<sup>th</sup> Interested Parties filed the Grounds of Opposition dated 16/05/2025, in which it was pleaded that the Application is hopelessly incompetent as the 4<sup>th</sup> Objector has already derived a benefit from the impugned consent, and the Application has not met the threshold set in the **Flora Wasike vs Destimo Wamboko** case to warrant granting of the orders sought. It was also urged that the jurisdiction of the Court as invoked is not aimed at relitigating matters otherwise settled by consent, that there is unreasonable delay in invoking the jurisdiction of the Court, and the Application is an abuse of the Court process.

17. In response to the 4<sup>th</sup> Objector's Summons dated 14/04/2025 (setting aside of consent), **Messrs Tom Ojienda & Co. Advocates**, acting for the 2<sup>nd</sup> Administrator and also and the 3<sup>rd</sup> – 6<sup>th</sup> Interested Parties, filed the Replying Affidavit sworn by her on 21/08/2025, in which she deponed that the Application is incompetent for failure to seek leave prior to filing the same contrary to the requirements of **Rule 39(1)** of the **Civil Procedure (Court Annexed Mediation) Rules**. It was also urged that the grounds for consideration in setting aside an order arising from a settlement agreement do not include undue influence, or coercion, or duress, which grounds can only be canvassed with leave of the Court. She deponed further that any order made in the presence and with the consent of Counsel is *prima facie* binding on all parties to the proceedings, and as such, cannot be varied or discharged unless obtained by fraud, collusion, or through an agreement contrary to the policy of the Court, or without sufficient material facts. She deponed further that the said grounds have to specifically proved by evidence, which the 4<sup>th</sup> Objector has failed to do, and that the 4<sup>th</sup> Objector being an adult of sound mind possessed the capacity and opportunity to object or raise any concerns or decline to append his signature to the consent. She also contended that the 4<sup>th</sup> Objector participated in all stages of the Mediation proceedings, and was at all times aware

of the consent, and that his attempt to attribute blame to his Advocate does not fall within the narrow and exceptional circumstances under which the Court may set aside the consent. She disclosed that pursuant to the consent, she had already made steps to actualize it by, *inter alia*, transferring a sum of Kshs 5,000,000/- on 7/02/2025 to the 4<sup>th</sup> Objector in partial fulfilment thereof, that execution of the consent has therefore commenced and the Applicant having already received money pursuant thereto is estopped from alleging reconsideration of his position thereon. She contended further that the estate has many beneficiaries and the 4<sup>th</sup> Objector's claim that the properties allocated to him are "small" as compared to the total value of the estate is an indication of selfishness and greed.

18. The 4<sup>th</sup> Objector then filed the Supplementary Affidavit she swore on 18/06/2025 in support of her Application seeking to set aside the consent, contents whereof I do not deem it necessary to recount as it simply, but unnecessarily, reiterated and repeated the same averments already deponed in her main Affidavit.

19. I then gave the parties the liberty to file written Submissions. Pursuant thereto, Submissions were filed, chronologically, as follows:

<b>Date of Submissions</b>	<b>Advocates filing the Submissions</b>
<b>22/06/2025</b>	<b>Rioba Omboto &amp; Co. Advocates</b>
<b>26/06/2025</b>	<b>Jepchichir &amp; Co. Advocates</b>
<b>22/09/2025</b>	<b>Prof. Tom Ojienda &amp; Associates</b>
<b>30/09/2025</b>	<b>Prof. Tom Ojienda &amp; Associates</b>
<b>6/10/2025</b>	<b>Morris Maina &amp; Co. Advocates</b>
<b>6/10/2025</b>	<b>Judy Thongori &amp; Co. Advocates</b>

20. I have also come across a physical copy, in the Court file, of Submissions dated 6/10/2025 drawn by the firm of **Z. K. Yego Law Offices**. The same does not however appear in the **Judiciary Case Tracking System (CTS)** online platform, as now required by the relevant rules. In the circumstances, I will not consider the same as it is deemed not to form part of the record.

**Submissions on the Application dated 29/08/2024 (DNA test)**

21. Counsel for the 2<sup>nd</sup> Objector-Applicant, representing **Messrs Judy Thongori & Co. Advocates**, in her Submissions in support of the Summons seeking conduct of the DNA tests, urged that the 1<sup>st</sup> Administrator, who represents the 2<sup>nd</sup> house having conceded that the 2<sup>nd</sup> Objector is a child of the deceased, there is no longer any need for a DNA test to be

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conducted as she also executed the consent acceding to the Summons. She pointed that it is the 2<sup>nd</sup> Administrator who appears to be of a different mindset as her household insists that DNA testing must be conducted with samples being taken from all known children of the deceased, including the children of the 2<sup>nd</sup> house. Counsel also pointed out that there was no concurrence on who should meet the cost of the DNA testing despite the 1<sup>st</sup> house pushing for all known children of the deceased to be tested, and urged that a google search shows that the DNA test costs an estimate of Kshs 15,000/-Kshs 20,000/- per person, which would cost (7 x Kshs 20,000/-) Kshs 140,000/-, which the estate is unwilling to meet. She submitted that it would not make sense to conduct DNA tests on persons that were no longer disputing the 2<sup>nd</sup> Objector's paternity as it would go against the provisions of **Article 24 of the Constitution**, which protects parties' right to privacy and dignity. She cited the case of **ANM & RMM (suing in their own behalf and on behalf of AMM (minor) as parents and next friend) v FPA & Attorney General (Constitutional Petition 10 of 2017) [2019] KEHC 7369 (KLR)**. She urged further that as earlier stated, the Court of Appeal had already considered that the 2<sup>nd</sup> Objector and the 5<sup>th</sup> Objector were half-siblings on account of the DNA testing conducted using their samples, that no reason had been given by the 1<sup>st</sup> house as to why the DNA results cannot be used to confirm the 2<sup>nd</sup> Objector as a child of the deceased, particularly, because the 5<sup>th</sup> Objector's paternity was never contested. She submitted further if the Court were to factor the costs of travel of the parties from Eldoret to Nairobi for the DNA testing, and also factor that one of the members of the 2<sup>nd</sup> house resides out of the country and would need to travel for be testing, it is only fair that prayer 2 of the Summons be allowed as the same would save time and money and allow the parties to move on to confirmation of the grant. In conclusion, she pointed out that none of the parties having filed any Grounds of Opposition or Affidavits in support or against the Application, it would be in the best interest of the estate that prayer 3 of the Summons be allowed and the results attached thereto, dated 27/01/2021 from the Government Chemist, be adopted as conclusive evidence that indeed the 2<sup>nd</sup> Objector is a daughter of the deceased, and be therefore recognized as a dependent of the deceased.

22. Counsel representing **Messrs Tom Ojienda & Co. Associates**, in support of the 2<sup>nd</sup> Objector's Summons dated 29/08/2024 (DNA Application), pointed out that the Court of Appeal, in determining the Application for stay pending Appeal referred to earlier, by its Ruling delivered on 22/03/2024, already found that the 2<sup>nd</sup> Objector's DNA sample had been tested against that of the 5<sup>th</sup> Objector, who had already been confirmed as a child of the deceased, and the tests confirmed that indeed the 5<sup>th</sup> Objector was the 2<sup>nd</sup> Objector's biological half-sibling on account of sharing the same father, a fact that had not been

contested. Counsel thus expressed shock that the first family is purporting to demand for DNA of all known children of the deceased. Counsel faulted this proposal for the reason that the paternity of the 2<sup>nd</sup> Objector has since been established and the issue is now moot, that there is no Application questioning paternity against the children of the 2<sup>nd</sup> Administrator, and it will be a waste of resources in terms of time and money to insist on another DNA test. She cited the case of **ER v MW (Appeal E110 of 2022) [2025] KEHC 647 (KLR) (Family) (31 January 2025) (Judgment)**. She then termed the proposal by the 1<sup>st</sup> family as a circus and baseless, and submitted further that DNA is an extremely intrusive process that violates one's privacy that should only be conducted when there is absolute need. In conclusion, she urged that should the Court opt for the direction of subjecting the 2<sup>nd</sup> Objector to the DNA test, then it should be limited to the first family as it is the one contesting it.

23. Counsel representing **Messrs Morris Maina & Co. Advocates**, filed one set of composite Submissions addressing both Applications. In the portion supporting the 2<sup>nd</sup> Objector's Summons dated 29/08/2024 (DNA Application), he submitted that the orders directing that the DNA test be conducted having been unsuccessfully challenged at the Court of Appeal, cannot be reviewed. He therefore urged the Court to allow the Application.

**Submissions on the Application dated 14/04/2025 (setting aside of consent Application)**

24. Counsel representing **Messrs Jepchirchir & Co. Advocates**, in her Submissions in support to the 2<sup>nd</sup> Objector's Summons seeking aside of consent, basically reiterated the arguments already captured in her client's Supporting Affidavit. She however cited the case of **Mamta Peeush Mahajan v Yashwant Kumari Mahajan [2017] eKLR**, which, she submitted, recognized that a consent agreement can be set aside, and also the case of **Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485**, which, she submitted, recognized that a Court will only adopt a mediation settlement where the parties understand the consequences thereof. Counsel also reiterated the contention that the former Advocate had, in breach of his professional expectations, in breach of **Section 134** of the **Evidence Act**, and **Rule 25** of the **Civil Procedure (Court Annexed Mediation) Rules**, disclosed the 2<sup>nd</sup> Objector's privileged and confidential information to third parties.
25. **Mr. Omboto**, representing **Messrs Rioba Omboto & Co. Associates**, in his Submissions in opposition to the 2<sup>nd</sup> Objector's Summons seeking setting aside of consent, too, basically reiterated the matters already contained in his Replying Affidavit. He reiterated that his law firm acted under clear and consistent instructions from the 4<sup>th</sup> Objector, the allegations of conflict of interest, breach of privilege, or misrepresentation are vague and unsupported by **Eldoret High Court P&A Succession Cause No. 16 of 2018**

any documentary evidence. He submitted that the 4<sup>th</sup> Objector raised no objection at the time of signing the consent, nor immediately thereafter, and also participated in the aftermath. He pointed out that the 4<sup>th</sup> Objector's own Affidavit confirms that the 4<sup>th</sup> Objector was present at the Mediation session and signed the consent agreement, and that not only was he represented by Counsel but was also accompanied by his mother and uncle who were present throughout the negotiations until he signed the agreement. He reiterated that thereafter, the 4<sup>th</sup> Objector received the payment of Kshs 5,000,000/-, that he cannot now approbate and reprobate, and the doctrine of estoppel and waiver applies.

26. Counsel representing **Messrs Tom Ojienda & Co. Associates**, in her second set of Submissions in opposition to the Summons seeking setting aside of consent, too, basically reiterated the arguments conveyed in her client's Replying Affidavit, save for citing several authorities. In summary, Counsel reiterated that the Application is fatal, the 2<sup>nd</sup> Objector having failed to seek leave from the Court, and also, that the consent is binding since no justifiable grounds had been demonstrated to warrant setting it aside, the allegations of fraud, coercion or undue influence not being contemplated as proper grounds, and the same not having been proved, in any event.

27. Counsel representing **Messrs Morris Maina & Co. Advocates**, in his composite Submissions, in the portion opposing of the Application seeking setting aside of the consent agreement, termed the Application as actuated by malice and falls short of the requirements for setting aside a consent order. He submitted that the 4<sup>th</sup> Objector freely entered into the consent subsequent to which he benefitted from, including receiving the sum of Kshs 5,000,000/- from the estate, all pursuant to the consent. He submitted that the 4<sup>th</sup> Objector has not tendered any evidence that the consent was illegally or irregularly or fraudulently obtained.

### **Determination**

28. There are two issues that arise for determination in this matter as follows:

- i) Whether the orders made previously herein directing that DNA tests be conducted to establish the 2<sup>nd</sup> Objector's paternity should now be implemented.**
- ii) Whether the Court should decline to adopt the consent agreement reached at the Court Annexed Mediation proceedings on the ground that the same was obtained without the 4<sup>th</sup> Objector's full understanding its consequences, and/or was obtained under duress, or undue influence.**

29. In response to the 4<sup>th</sup> Objector's Application seeking setting aside of consent agreement, **Messrs Rioba Omboto & Co. Advocates**, filed the Replying Affidavit sworn on 23/10/2025 by **David Rioba Omboto**, in which he contended that the firm of **Jepchirchir & Co.** is not properly on record as it has not sought consent from his law firm to come on record. The challenge is predicated on **Order 9 Rule 9** of the **Civil Procedure Rules**, which provides as follows:

**“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —**

**a) upon an application with notice to all the parties; or**

**b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”**

30. I am reluctant to accept **Mr. Omboto's** argument for the reason that the **Law of Succession Act** is a self-regulating statute with its own rules and procedures of application, and **Order 9 Rule 9** above is not one of the provisions of the **Civil Procedure Rules** expressly imported into the **Law of Succession Act** under **Rule 63(1)** of the **Probate and Administration Rules** provides thereof. It may therefore not be applicable in this matter. Secondly, **Mr. Omboto** has not demonstrated that there is a **“judgment”** that **“has been passed”** to justify application of **Order 9 Rule 9** above. I therefore overrule the challenge.

31. Regarding the first issue, namely, whether the orders directing that DNA tests be conducted to establish the 2<sup>nd</sup> Objector's paternity should now be implemented, the 2<sup>nd</sup> Objector has, in prayer 2, asked this Court to order that the concerned parties comply with the same within 14 days. In prayer 3, the 2<sup>nd</sup> Objector has, in the alternative, asked the Court to declare her as a biological daughter of the deceased based on the DNA results obtained from samples tested against that of the 5<sup>th</sup> Objector, **Arafat Mohammed Bakari**, should the concerned parties fail to comply with the orders within the prescribed period.

32. The first item I note is none of the other parties in this Cause has opposed the Application, and some have even expressly supported it. As aforesaid, I came across Submissions drawn by the firm of **Z. K. Yego Law Offices**, representing the 1<sup>st</sup> Objector and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, which though not opposing the Application, proposed that the list of beneficiaries identified to supply samples for the DNA test be expanded. As aforesaid, I

have declined to consider the Submissions as the same is not filed in the CTS and thus does not form part of the record.

33. In any event, when this matter came up for directions on 16/09/2025, **Ms. Chebet**, representing the said firm of **Z. K. Yego Law Offices**, stated that they were not opposed to the Application, save that Advocates be granted liberty to attend when samples are taken and the test conducted. She also disclosed that, as earlier agreed, her firm had circulated a consent to the Application to the parties but only Messrs **Tom Ojienda & Associates** had executed it.
34. As also correctly pointed out by Counsel for the 2<sup>nd</sup> Administrator, the Court of Appeal, in **Eldoret Civil Application No. E011 of 2022**, while dismissing the Application for stay pending Appeal, in its Ruling delivered on 22/03/2024, found as follows:

**“Regarding the contention by the Applicants that the Court failed to establish a nexus between the 1<sup>st</sup> Respondent and the deceased, it is our view that there was ample evidence that the 1<sup>st</sup> Respondent had taken the initiative to have her DNA sample tested against that of the 5<sup>th</sup> Respondent who had been confirmed as a child of the deceased and the said tests had indeed confirmed that the 5<sup>th</sup> Respondent was his biological half sibling on account of sharing the same father, a fact that the Applicants have again not contested”**

35. Although the above statement was made in a Ruling on an Application for stay pending Appeal, and thus technically, at an interlocutory stage, it nonetheless captures the correct position in this case that the DNA tests already conducted, confirmed that the 2<sup>nd</sup> Objector and the 5<sup>th</sup> Objector, though having different mothers, were biologically half-siblings on account of sharing the same father - the deceased herein. My understanding, pursuant to the statement made in the 2<sup>nd</sup> Administrator’s Replying Affidavit is that she abandoned the intended formal Appeal after the Application for stay was dismissed by the Court of Appeal. The quoted observation by the Court of Appeal therefore, for all intents and purposes, closes the debate, if any, over the 2<sup>nd</sup> Objector’s paternity. In the circumstances, I do not find any justifiable reason why the second DNA test should still be insisted upon. What is it going to achieve which has not already been established? In my view, the issue whether the 5<sup>th</sup> Objector is a son of the deceased is basically now settled. This is also proven by the fact that the Application has not been opposed by any party and remains uncontested, ample signal that the issue of the 2<sup>nd</sup> Objector’s paternity is no longer in issue. Insisting on the second DNA test does not therefore seem to be a wise way of expending scarce resources, funds, and time.

36. As aforesaid, in prayer 2 of the Application, the 2<sup>nd</sup> Objector has, in the alternative, asked the Court to declare her as a biological daughter of the deceased based on the DNA results obtained from the samples already tested against that of the 5<sup>th</sup> Objector, **Arafat Mohammed Bakari**. I am minded to grant this prayer considering the circumstances cited above. To address the possible argument that may arise contending that allowing prayer 3 would be tantamount to reviewing the orders made on 22/09/2022, I will simply point out that the Application (including prayer 2) is uncontested, and secondly, the order was to be implemented within 14 days, which period has long lapsed noting that it is now about 4 ½ years later. Further, the 2<sup>nd</sup> Administrator who is then one, together with his children (1<sup>st</sup> house) who contested the order and moved to the Court of Appeal with the intention of challenging it has now confirmed her abandonment of the intention to Appeal. The Court has also been informed that to conduct the DNA test, some of the identified family members will have to travel from Eldoret to Nairobi for the testing, and also that one of the members of the 2<sup>nd</sup> house resides out of the country, and would need to travel to Kenya for be testing. Considering the findings already made herein above, it is only fair that prayer 2 be allowed as the same as doing so will save the parties time and money and allow the parties to move on to the stage of distribution of the estate and closure of this matter. Further, DNA is an extremely intrusive process that may *prima facie*, violate one's privacy and should therefore be only insisted upon where there is absolute need, which is no longer the case herein. The 2<sup>nd</sup> Objector has also exhibited copies of correspondence demonstrating that her Advocates pleas to the other concerned parties to co-operate in implementation of the order by turning up for harvesting of the samples, have not been acted upon. The Court cannot therefore be rendered helpless by the refusal by parties to co-operate, and has a duty to revert to its residuary powers to render justice. Under these circumstances, the Court obviously possesses the full justification to grant prayer 3, as I so do.

37. Regarding the second issue, namely whether the consent agreement reached at the Mediation should be set aside, I may first state that, in Kenya, the process of Court annexed mediation is governed by the **Civil Procedure (Court-Annexed Mediation) Rules, 2022**, otherwise referred to as the **Mediation Rules, 2022**. Mediation as an alternative dispute resolution mechanism in Kenya, is itself anchored in **Article 159 (2)(c)** of the **Constitution of Kenya**.

38. The effect of the execution or adoption of a Mediation Settlement Agreement was aptly captured by **Kamau J**, in the case of **Alios Finance Kenya Limited v Country Farms Limited (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR)**, in the following terms:

**“Any agreement filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of Court.”**

**Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. ....”**

**39.** Setting aside of a Court order adopting a Mediation Settlement Agreement is then governed by **Section 39** of the **Civil Procedure (Court Annexed Mediation Rules)** which provides as follows;

**(1) No Application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of court.**

**(2) An Application for leave under sub-rule (1) shall be supported by an affidavit detailing the grounds upon which the Applicant intends to rely in setting aside the order or decree.**

**40.** The above Rules therefore clearly envision the seeking of leave to set aside as a separate stage from the filing of the substantive Application. The Rules also envision setting aside of the order arising from the Settlement Agreement, and not the Settlement Agreement itself. Setting aside of a Mediation Settlement Agreement is therefore a completely different issue altogether. To this extent, I overrule the argument by Counsel for the 2<sup>nd</sup> Administrator that the Application is fatal for failure by the 2<sup>nd</sup> Objector-Applicant to seek leave before filing it. In this case, adoption of the agreement was held in abeyance when the 2<sup>nd</sup> Objector appeared in Court and raised objections against it. The agreement is therefore yet to be adopted by the Court and for this reason, it is yet to assume the status of a formal order or a decree of the Court. **Rule 39(1)** above does not therefore apply.

**41.** Back to the substantive issue, it is settled that a consent, once adopted as an order of the Court, becomes a binding agreement as between the parties, and cannot be set aside unless the party challenging it proves that there are justifiable grounds to warrant its setting aside. Such vitiating factors are similar to those applicable in setting aside of a contract and would basically be limited to fraud, misrepresentation, mistake, and coercion/undue influence, and if the agreement is found to be contrary to the policy of Court. In reiterating this principle, the Court of Appeal, in the case of **Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR**, stated as follows:

**“The judgment arose from a Consent of the parties to the suit. The law pertaining to setting aside of Consent judgments or Consent orders has been clearly stated. A Court of law will not interfere with a Consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a Consent order or a Consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” (emphasis mine).**

42. The above principle was restated in the case of **Flora N. Wasike v Destimo Wamboko [1988] eKLR** in which, in which **Hancox, JA**, observed that:

**“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out”**

43. The same was also affirmed by Court of Appeal, in the case of **S M N vs. Z M S & 3 others [2017] eKLR**, in the following terms:

**“Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.”**

44. Generally, therefore, a consent order is binding and the Court may only be persuaded to set it aside if there is evidence that some material fact not in a party’s possession was invariably withheld or misrepresented from him, or he was mistaken about its import. In this case, the 4<sup>th</sup> Objector wants the Court to decline to adopt the Mediation Settlement Agreement signed by both him and his Lawyer on the ground that he did not fully understand its implication or consequences when signing it, and that he was pressurized into signing it. He blames his Lawyer for failing to fully or properly advise him before signing the consent, and for not giving him an opportunity to comment on the same, or to suggest amendments.

45. This, in view, and with due respect, is a hopeless Application, and I have no hesitation in terming it an abuse of the Court process. I say so because it is not in dispute that the 2<sup>nd</sup> Objector admittedly signed the consent, and that he never raised any objection at the time of **Eldoret High Court P&A Succession Cause No. 16 of 2018**

signing it, nor at any time immediately thereafter. Further, although the consent was signed on 6/02/2025, it was not until 29/04/2025, about 3 months later that he filed the instant Application, a clear indication that it was an afterthought. The 4<sup>th</sup> Objector's former Advocate, **Mr. Omboto**, also pointed out, in his Affidavit, that the 4<sup>th</sup> Objector was present at the Mediation session before even signing the agreement, and that he was accompanied by his mother and uncle who were present throughout the negotiations. Most damning is the disclosure, which the 4<sup>th</sup> Objector has not denied, that he has already received the down payment of Kshs 5,000,000/- in partial fulfilment of the consent, money that he has not returned or offered to refund. Under these circumstances, I agree with **Mr. Omboto** that the 4<sup>th</sup> Objector, having already derived a benefit from the consent, cannot now turn around and disown it. He cannot approbate and reprobate at the same time as the consent cannot only be "sweet" when it suits him, and "bitter" when it does not, he cannot "have his cake and eat it" at the same time. Clearly, the doctrine of estoppel and waiver applies against him in this matter, and he also failed to prove any of the grounds he has alleged. The Application has therefore not met the threshold set to warrant setting it aside, and as a consequence, it must fail.

### **Final Orders**

46. In the circumstances, I order and rule as follows:

- i) The Summons dated 29/08/2024 filed by the 2<sup>nd</sup> Objector, **Chepkoech Too**, is hereby allowed in terms of prayer 3 thereof.
- ii) Consequently, a declaration is hereby made that the 2<sup>nd</sup> Objector, **Chepkoech Too**, is a biological daughter of the deceased based on the DNA results obtained from samples taken from her body tested against that of the 5<sup>th</sup> Objector, **Arafat Mohammed Bakari**, a known child of the deceased, and which tests established that the 2<sup>nd</sup> Objector and the 5<sup>th</sup> Objector, though having different mothers, were biologically half-siblings on account of sharing the same father - the deceased herein.
- iii) The Summons dated 14/04/2025 filed by the 4<sup>th</sup> Objector is dismissed in its entirety.
- iv) Consequently, the Mediation consent agreement dated 6/02/2025 signed by the 5<sup>th</sup> Objector, **Ali Mark Kiptarbei Too**, is now hereby recognized and adopted as an order of the Court.
- v) Costs shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 27<sup>TH</sup> DAY OF FEBRUARY 2026**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Ms. Ndirangu for the 2<sup>nd</sup> Objector - Applicant**

**Ms. Jepchirchir for the 4<sup>th</sup> Objector - Applicant**

**Mr. Mburu for the 1<sup>st</sup> Administrator and 1<sup>st</sup> Objector**

**Ms. Awuor for the 2<sup>nd</sup> Administrator and 3<sup>rd</sup> – 6<sup>th</sup> Interested Parties**

**Mr. Mutunga h/b for Mr. Luseno for the 7<sup>th</sup> – 11<sup>th</sup> Interested Parties**

**Mr. Ngeru for the 5<sup>th</sup> Objector**

**Court Assistant: Brian Kimathi**