

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPSABET
SUCCESSION CAUSE NO. 22 OF 2021
[FORMERLY ELDORET SUCCESSION CAUSE NO. 299 OF 2014]
IN THE MATTER OF THE ESTATE OF EZEKIEL KIPLELEI
BARNGETUNY:::::DECEASED

BETWEEN
AISHA MUTHONI
KIRONGO:::::1ST APPLICANT

VERSUS

OGLA JEMELI
BARNGETUNY:::::1ST
RESPONDENT

EDNA JEPTUM
SANG:::::2ND
RESPONDENT

ERICK KIPKEMBOI
BARNGETUNY:::::3RD RESPONDENT

LEO KIPKENY
BARNGETUNY:::::4TH
RESPONDENT

RULING

1. On the 9th September 2025, this matter was placed before the High Court at Eldoret under a certificate of urgency regarding the chamber summons dated 8th September 2025. Accordingly, the matter was certified urgent and fixed for

directions before this court on 7th October 2026, when the matter was scheduled for mention on the way forward in relation to the summons for confirmation of grant dated 29th April 2025, filed herein by the fourth administrator, **Ogla Jemeli Barngetuny** on the basis of the grant for letters of administration intestate issued by this court on 7th December 2023, appointing her **[Ogla], Erick Kipkemboi Barngetuny, Edna Cheptum Sang** and **Leo Kipkeny** as the administrators of the estate of the Late **Ezekiel Kiplelei Barngetuny** [Deceased].

2. In the ruling of this court made on 7th December 2023 the four administrators were directed to take necessary steps to determine the actual estate property available for distribution and the actual true beneficiaries of the estate whether or not included as such in the previous revoked grant dated 24th October 2014, and thereafter take out necessary summons for confirmation of the first grant within a period of six [6] months from the date of the grant or any shorter period that the parties deemed fit. It was against the foregoing background that the summons for confirmation of grant dated 24th January 2024, was taken out by the fourth administrator in the first instance.

3. But, an affidavit of protest against the summons for confirmation dated 24th January 2024 was filed herein on 23rd February 2024 by **Aisha Muthoni Kirigo** [Objector]

claiming to be a daughter of the deceased entitled to a share of the estate property of the deceased. In the meantime, the first administrator **[Erick]** took out a second summons for confirmation of grant dated 11th May 2024.

The protest dated 24rd February 2024 was heard by this court and a ruling rendered on 23rd October 2024 upholding the protest and disallowing the two summons for confirmation of grant dated 29th January 2024 and 11th May 2024, respectively for want of maturity or both being premature.

4. In the ruling, this court concluded by stating as follows: -

“ultimately, for all the reasons foregoing and in particular that this court is not satisfied as to the respective identities and shares of all persons beneficially entitled to the estate of the deceased and in terms of the proviso to Section 71 [2] of the Succession Act the impugned grant dated 7th December 2023 cannot be confirmed at this juncture in any manner.....”

An application dated 22nd November 2024 for the review of the ruling by the First and Third Administrators was heard and dismissed by this court on 13^h March 2025. This meant that the Administrators of the estate and other beneficiaries had to agree on the property available for distribution and on

the identities and shares of all persons beneficially entitled to the estate property before the grant is confirmed.

5. Accordingly, the Fourth Administrator **[Ogla]** filed the fresh summons for confirmation of grant dated 29th April 2025, which was due for mention before this court on the 7th October 2025, on the way forward. It was on the same date that the application vide the chamber summons dated 8th September 2025 was fixed also for mention for directions.

So, on the 7th October 2025, the Administrator and some of the beneficiaries appeared in court for the mention. In the process, it transpired that the Third Administrator had filed an application dated 29th September 2025 for stay of proceedings and that the parties had a consent to record on the application dated 8th September 2025 by the Fourth Administrator.

6. The application was effectively made vide the chamber summons dated the 8th September 2025, in which the Applicant was the First Administrator **[Ogla]** and the Respondent was **Aisha Muthoni Kiringo**. The First Administrator **[Erick]** and the Second Administrator **[Edna]** were the First and Second Interested Parties respectively.

Article 159[2] of the Constitution together with Rules 63 and 73 of the Probate and Administration Rules were invoked as the enabling provisions for the application which sought

basic orders against **Aisha Muthoni Kiringo** [Objector/Respondent] to the effect that: -

- (i) The Respondent Aisha Muthoni Kiringo do abide by the consensus mutually agreed upon M/s. Doreen Jerotich Barngetuny M/s Pauline Chepkemboi Barngetuny, M/s Oгла Jemeli Barngetuny and M/s Aisha Muthoni verbally and/or orally on the 14th day of July 2025 and 23rd day of July 202 requiring themselves to submit to a deoxyribonucleic Acid [DNA] test to determine paternity.**
- (ii) An order do issue to the Respondent to present herself at a Government Laboratory at a date to be agreed upon in any event within fourteen [14] days of the ruling of this Honourable Court for extraction of her DNA samples for testing to ascertain paternity and whether she is a biological child of the late Ezekiel Kiplelei Barngetuny now deceased pursuant to a consensus agreement amongst Ms. Doreen Jerotich Barngetuny, Ms. Pauline Chepkemboi Barngetuny, Ms. Oгла Jemeli Barngetuny and Ms. Aisha Muthoni Kiringo.**
- (iii) An order to issue that the samples of the Applicant or M/s Doreen Jerotich Barngetuny**

or M/s Pauline Chepkemboi Barngetuny already extracted at the Government Chemist, Kenyatta Hospital be utilized for purposes of conducting Deoxyribonucleic Acid [DNA] test on the Respondent instead of exhuming the body of the Late Ezekiel Kiplelei Barngetuny who died more than ten [10] years ago.

The foregoing are prayers [2], [3] and [4] of the Chamber Summons.

7. The application was compromised by the consent recorded in court on 7th October 2025 as follows: -

- 1. That an order be and is hereby issued that Aisha Muthoni Kiringo and Pauline Chepkemboi Barngetuny do undergo a DNA test at the Government Chemist, Kenyatta National Hospital Nairobi County within 45 days from this date hereof.**
- 2. That, Edna Jeptum Sang, Oгла Jemeli Barngetuny, Doreen Barngetuny and Erick Kipkemboi Barngetuny to present themselves for purposes of extraction of the DNA samples to be used to ascertain the paternity of Aisha**

**Muthoni Kiringo and Pauline Chepkemboi
Barngetuny.**

3. The Estate to bear the costs of the DNA test:

The matter was then fixed for mention for further orders on the 1st December 2025

8. In the meantime, the application vide the summons dated 31st October 2025 was filed by **Aisha Muthoni Kiringo** against all the Four Administrators seeking essentially review and/ or setting aside orders respecting the consent order said to be dated 23rd October 2025, instead of 7th October 2025. The former date is actually the date of the formal issue of the consent order. It is the date when the order was formally extracted.

Be that as it may, the main prayer in the summons is prayer [3] to the effect that: -

“This court be pleased to review and/or set aside its consent order dated 23rd October 2025 [sic] directing the Protestor/ Applicant herein Aisha Muthoni Kiringo, to undergo a DNA test within 45 days from the date hereof.”

The rest of the prayers that follow are hinged on this main prayer, hence their fate or otherwise is dependant on the determination of the main prayer.

9. Being that the Application is for review and/or setting aside of the court order made on 7th October 2025, the relevant provisions of the **Civil Procedure Act** and Rules have been invoked by dint of **Rule 63 of the Probate and Administration Rules.**

It is instructive to note that the consent effectively compromised and settled the application dated 8th September 2025 with a view to expediting the distribution of the estate property amongst the actual and properly identified beneficiaries in terms of the proviso to **Section 71 [2] of Law of Succession Act.**

10. The parties to the application included the Objector/ Respondent **[Aisha]**, the Applicant/ Fourth Administrator **[Ogla]**, the First Interested Party/ Second Administrator **[Erick]** and the Second Interested Party/ Second Administrator **[Edna]**. Save the Objector, all were present in court on 7th October 2025 when the consent order was made.

According to the affidavit of service dated 7th October 2025 filed herein by the Applicant the Objector was duly and properly served through her advocate on record i.e. **Messrs. Mbiyu Kamau & Company Advocates** with the necessary mention notice. She was therefore aware of the mention

date but failed to appear in court either personally or through her advocate or together with her advocate.

The Applicant/ Fourth Administrator appeared in person and confirmed having served all the parties with necessary notice. The Objector's failure to appear despite being aware of the mention was never explained thereby implying that she was not opposed to the application or any orders arising therefrom or was determined to delay this matter, hence the expeditious distribution of the estate property and the discharge of the administrators from their obligations under the material grant of letters of administration intestate dated 7th December 2023, two years or so down the line.

11. It was after the consent was made and served upon the Objector that the present application dated 31st October 2025 was made, even though the matter had been slated for 1st December 2025, for further orders. Nonetheless, on the 6th November 2025, the present application was also fixed for directions and/or further orders on the same 1st December 2025, when all the parties save the Objector appeared in court. Again, the Objector did not give any explanation and/ or reasons for her failure to appear in any manner on that 1st December 2025.

12. It was indicated on that date that samples for DNA test were supplied to the Government Chemist and the necessary

report was to be forwarded to the court. It was also indicated that the Objector declined to provide her samples contrary to what she had agreed, but later changed her mind. It was suggested that she be given a further twenty one [21] days to comply with the order for DNA samples. After considering all that was stated by the parties the court fixed the matter for further mention on 4th February 2026 for directions on the Objectors application dated 31st October 2025 and the 4th Administrator's application dated 8th September 2025, which was compromised and settled by the consent order of the 7th October 2025. The DNA report dated 1st December 2025 was filed on 18th December 2025.

13. On 4th February 2026, the Objector and her advocate yet against failed to appear in court for directions on their application dated 31st October 2025. It was therefore directed by the court that the application be heard by way of affidavit evidence and written submissions on 16th March 2026, on which date the parties appeared including the Applicant/ Objector through her advocate, **M/s Wayego**, who appeared virtually and indicted that their submissions had already been filed and that they were fully relying on them.

14. The court ordered that the Objector's submissions be served upon the other parties for their responses and the

ruling on the application be fixed on 9th April 2026 which is today.

After due consideration of the application on the basis of the supporting grounds and those in opposition thereto as may be deciphered from the rival submissions, it clearly became apparent to this court that the basic issue for determination was whether the Applicant/ Objector demonstrated herein sufficient and credible grounds for exercise of this court's discretion in her favour to review and/or set aside, dismiss or invalidate the impugned consent order dated 7th October 2025.

15. The enabling provisions of the law for review of any order under the law of **Succession Act** include **Order 45 Rule 1** of the **Civil Procedure Rules** and **Rule 73** of the **Probate and Administration Rules** in so far as it provides for the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The exercise of the court's discretion in granting or refusing orders sought under the foregoing provisions must be undertaken judicially and not arbitrarily or capriciously nor should it be exercised on the basis of sentiment or sympathy.

16. In the **English Case of Sharp Vs. Wakefield [1891] AC 173**, it was stated that judicial direction must be exercised: -

“..... according to rules of reason and justice not according to private opinion: [Rookes Case 48 LJ MC 38]; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular.”

Order 45 Rule 1 of the Civil Procedure Rules, specifies grounds upon which a review application such as the present application can be made.

- 17.** Such grounds include: -
- (i) Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an Applicant at the time the decree was passed;**
 - (ii) Where there is a mistake or error apparent on the face of the record and;**
 - (iii) For any other sufficient reason.**

In **Shah Vs. Mbogo & Another [1967] EA 116**, the Court of Appeal stated that the court has unfettered discretion to review, vary or set aside its decision to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.

- 18.** The Objector was herein required to demonstrate discovery of new and important evidence or a mistake or error apparent on the face of the record or any other

sufficient reason in order that the court's discretion be exercised in her favour. Such are the parameters for which this application may succeed or fail. In that regard, the Objector seems or is actually suggesting in her submissions that the impugned consent order should be reviewed and set aside altogether on account of an error apparent on the face of the record.

19. She [**Objector**] contends that the chamber summons dated 8th September 2025 was compromised in her absence or that of her counsel, thus the subsequent consent order ought not apply to her. That, this is an error appearing on the consent order without the Respondents raising no reasonable opinion to the contrary. That, the application of a consent order to a Third Party is an error on a substantial point of law staring one in the face and there could reasonably be no two opinions that amount to an error apparent on the face of the record.

20. The Objector further contends that the consent order was made in her absence and/or her counsel and should not be binding on her. That, under the doctrines of "*functus-officio*", "*res-judicata*" and "*res-sub judica*" the court lacked jurisdiction to hear or determine the application dated 8th September 2025, hence could not adopt the compromise in respect thereof. All the foregoing factors according to the Objector amount to a mistake or error apparent on the face

of the record for this court to exercise discretion in her favour by granting an order of review of the impugned consent order.

21. In **Nairobi City Council Vs. Thabit Enterprises Limited [1997] eKLR**, the Court of Appeal defined a mistake or error apparent on the face of the record as follows: -

“.....error on the face of the record is not what can be described as any incorrect exposition of the law, a failure to apply the appropriate law, an omission to raise or discuss appropriate legal issues or taking of an erroneous view of the law on debatable points.....with reference to what is an error simpliciter or what is an error, on the face of the record, Mulla, having admitted that the difference was a slim one, went on to opine that: -

“it can be said of an error that it is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established.”

22. In Muyodi Vs. Industrial and Commercial Development Cooperation & Another [2006] EA 243,

an error apparent on the face of the record was described in the following terms: -

“.....an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very, nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error or substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the record would be made out. An error which has to be established by long drawn process of reasoning or on point where there may conceivably be two opinion, can hardly be said to be an error apparent on the face of the record. Again if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view and is certainly no grounds for a review although it may be for an appeal.”

23. In National Bank of Kenya Limited Vs. Ndungu Njau [1997]KFCA 71 [KLR], the court stated that:-

“A review may be granted whenever the court considers that its necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.

And, in Francil Origo & Another Vs. Jacob Kumali Mungala [2005] KECA 356 KLR],

The Court of Appeal stated as follows: -

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the Appellants took the option of review rather than appeal they were

proceeding in the wrong direction. They have now come to a dead end.”

24. The present application in as much as it is grounded more on legal rather than factual grounds which in any event, do not demonstrate by clear and straight forward evidence the alleged mistake or error apparent on the face of the record does not accord with the principles set out in all the foregoing decisions of the Court of Appeal respecting an application for review of a disputed order.

At most, the grounds proffered herein by the Objector are clearly suitable for an appeal rather than a review application.

25. The Objector proceeded in the wrong direction the moment she opted to file the present application rather than file an appeal against the impugned order of this court based on a consent of the parties recorded as an order of the court in the presence of all the parties in the compromised application dated 8th September 2025 save the Objector who failed to appear in court despite being served with the necessary notice. It was indicated in the compromised application by the applicant fourth administrator that on the 14th July 2025, the Applicant together with the Objector and beneficiaries **Doreen Jerotich Barngetuny** and **Pauline Barngetuny** mutually agreed verbally and/ or orally to

submit themselves to a DNA test to determine their paternity and allay any doubts as to their disputed paternity and to have this matter settled once and for all.

26. It was further indicated that the Respondent/ Objector failed to show up for the test on 15th July 2025 at the Government Chemist at Kenyatta National Hospital Nairobi, but on being persuaded by the Applicant and the beneficiaries aforementioned when they visited her home in Malindi on or about the 21st July 2025 she showed up at the Government Chemist in Mombasa County on the 23rd July 2025 for the DNA test. However, she declined to have her sample extracted for the purposes of the test citing her advocate's advice in that regard.

27. The Objector did not deny the foregoing facts which clearly showed that she had consented to a DNA test and was very much aware of the compromised application and the date it was fixed for mention in court, but she failed to appear and made no attempts to explain or provide reasons for the omission.

The record clearly shows that the Objector failed to appear in court on several occasions without any reason until the 16th March 2026 when the application by herself dated 31st October 2025 was scheduled for hearing. She appeared through her counsel virtually.

28. The Objector's conduct prior to and after the filing of the compromised application and the issuance of the consent order was a clear demonstration of an intent to further delay the expeditious disposal of this matter and indeed, the distribution of the estate property available for distribution.

In the circumstances, she would not be deserving of this court's exercise of discretion in her favour for **Firstly**, her failure to demonstrate the alleged mistake and/or error apparent on the face of the record and **Secondly**, for abusing the process of this court by filing the present application without good reasons with a view to further delaying this matter.

29. In the end result, the application is hereby dismissed for want of merit and for being an abuse of the court process with orders that the Administrators of the estate move with speed to prosecute the summons for confirmation of grant dated 29th April 2025 in its current form or amended form. Short of this, the administrators may take out fresh summons for confirmation of grant and have it fixed for hearing within the shortest period of time from this date hereof. In any event, not later than thirty [30] days from this date.

Ordered accordingly.

Dated and Delivered this 9th day of April 2026

**HON. J. R. KARANJAH
JUDGE**