



**In re Estate of Kiptogom arap Bor alias Kiptogom Bor alias Kiptogom Korgoren Bor
(Deceased) (Succession Cause E001 of 2021) [2025] KEHC 5893 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE E001 OF 2021**

JK NG'ARNG'AR, J

MAY 12, 2025

**IN THE MATTER OF THE ESTATE OF KIPTOGOM ARAP BOR ALIAS
KIPTOGOM BOR ALIAS KIPTOGOM KORGOREN BOR (DECEASED)**

BETWEEN

WILLIAM KIPKEMOI TOGOM PETITIONER

AND

ESTHER CHEPNGETICH CHERIRO 1ST PROTESTOR

GRACE CHELANGAT TOWETT 2ND PROTESTOR

EVALINE CHEMUTAI BOR 3RD PROTESTOR

RULING

1. The Petitioner petitioned for Letters of Administration Intestate for the estate of Kiptogom Arap Bor (deceased.) The Petitioner stated that he petitioned for the Letters of Administration Intestate as the son of the deceased. A Grant in the name of the Petitioner was issued on 6th July 2021.
2. The Petitioner filed Summons for Confirmation of Grant dated 31st March 2022 where he stated that the beneficiaries of the deceased's estate had agreed that he would acquire the entire estate of the deceased's estate that comprised of Kericho/Cheson/105 and Kericho/Cheson/106.
3. Esther Chepngetich Cheriho (deceased's daughter) filed an Affidavit of Protest dated 18th July 2022 indicating that she was opposed and had not consented to the Petitioner's preferred mode of distribution. She stated that she was allocated and currently resided Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 (1.7 acres) by the deceased in his lifetime and the Petitioner had registered himself as the proprietor. She further stated that the deceased in his lifetime had allocated the Petitioner Kericho/Ndaraetta/1004 (9 acres) which he registered in his name. That the Petitioner having already received 9 acres now proposed to allocate himself the remainder of the deceased's estate.



4. It was Esther's case that her sister, Evaline Chemutai Bor received Kericho/Cheson/24 (10 acres) from the deceased during his lifetime and registered it in her name. It was her further case that Kericho/Cheson/105 and Kericho/Cheson/106 (total of 29 acres) be divided equally between herself and the Petitioner as some dependants had renounced their right to inherit.
5. A second Affidavit of Protest dated 19th October 2022 was sworn by Grace Chelangat Towett (deceased's daughter). She stated that was opposed and did not consent to the Petitioner's proposed mode of distribution. Her averments in the Affidavit of Protest mirrored the averments in the 1st Protest by Esther Chepngetich Cheriro that the deceased in his lifetime had allocated the Petitioner Kericho/Ndaraetta/1004 (9 acres), the 1st Objector, Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 (1.7 acres) and her sister Evaline Chemutai Bor, Kericho/Cheson/24 (10 acres). Grace proposed that the remainder of the deceased's estate be distributed equitably among the deceased's beneficiaries save for those who renounced their rights to inherit.
6. The matter was referred to Mediation on 25th July 2022. A Mediation Settlement Agreement dated 4th October 2022 was filed in court and the same was adopted as an order of the court on 15th March 2023. The Agreement stated among others, that Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 (1.7 acres) that was registered in the name of the Petitioner was allocated to Esther Chepngetich Cheriro and should transfer it to her. It further stated that Leah C Tuiya, Elizabeth C. Lewenei, Grace Towett and Elizabeth Siele renounced their rights to inherit the deceased's estate.
7. The Petitioner filed Summons for Confirmation of Grant dated 24th July 2024 stating that the deceased's estate comprised of Kericho/Cheson/24, Kericho/Cheson/105 and Kericho/Cheson/106. His proposed mode of distribution was as follows: -
 - Kericho/ Cheson/24
 - Evaline Chemutai Bor 3 acres
 - Grace Towett 3 acres
 - Esther Chepngetich Cheriro 3 acres
 - Kericho/ Cheson/105
 - Leah C. Tuiya 3 acres
 - Elizabeth C. Lewenei 3 acres
 - Elizabeth Siele 3 acres
 - Christine C. Barchor 3 acres
 - Emily C. Chepkosiom 3 acres
 - William Kipkemoi Togom 8.5 acres
 - Kericho/Cheson/106
 - William Kipkemoi Togom 3.25 acres
8. Being dissatisfied with the Petitioner's proposed mode of distribution, Esther Chepngetich Cheriro filed an Affidavit of Protest dated 7th October 2024 reiterating her earlier averments in her Affidavit of Protest dated 18th July 2022. That the Petitioner and her sister, Evaline had been allocated Kericho/Ndaraetta/1004 and Kericho/Cheson/24 respectively by the deceased during his lifetime.



9. Esther Chepngetich Cheriro stated that her sisters, Emily Chemutai Chepkosiom, Elizabeth Chepngeno Lewenei and Christina Sigei were deceased and that the children of her deceased's sisters had renounced their rights to inherit. Her proposed mode of distribution was as follows: -

Kericho/ Cheson/24

Evaline Chemutai Bor 8.9acres

Kericho/ Cheson/105

Leah C. Tuiya 3 acres

Elizabeth Siele 3 acres

William Kipkemoi Togom 3 acres

Esther Chepngetich Cheriro 10 acres

Grace Chelangat Towett 3.23 acres

Evaline Chemutai Bor 1 acre

Kericho/Cheson/106

Grace Chelangat Towett 3.21 acres

10. In response to the Protest, the petitioner filed a Replying Affidavit dated 27th October 2024 and stated that his sister, Evaline Chemutai Bor was aware that Kericho/Cheson/24 was family property and was available for distribution and had consented to having the title she had illegally procured cancelled. That he was the registered owner of Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 and Kericho/Ndaraetta/1004 and the said parcels were not available for distribution.
11. It was the Petitioner's case that he ought to get a larger share of the deceased's estate as he had numerous responsibilities as the administrator of the deceased's estate which included payment of legal fees and other related expenses.
12. Evaline Chemutai Bor filed an Affidavit of Protest dated 9th December 2024 stating that she was opposed to the Petitioner's proposed mode of distribution. She stated that the deceased in his lifetime had allocated to her Kericho/Cheson/24 and had been residing on the said parcel. That the said parcel was not available for distribution.
13. It was Evaline's case that the deceased in his lifetime had allocated Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 to her sister, Esther Chepngetich Cheriro and she currently resided there. That the Petitioner proceeded and transferred the said parcel to his name. It was her further case that the Petitioner was allocated Kericho/Ndaraetta/1004.
14. Evaline stated that the children of her deceased's sisters had renounced their rights to inherit. Her proposed mode of distribution was as follows: -

Kericho/ Cheson/24

Evaline Chemutai Bor 8.9acres

Kericho/ Cheson/105

Leah C. Tuiya 3 acres

Elizabeth Siele 3 acres



William Kipkemoi Togom 2 acres
Esther Chepngetich Cheriro 10 acres
Grace Chelangat Towett 3.23 acres
Evaline Chemutai Bor 2 acres
Kericho/Cheson/106
Grace Chelangat Towett 3.21 acres

15. In response to the 2nd Protest, the petitioner filed a Replying Affidavit dated 17th March 2025 and stated that Kericho/Cheson/24's title was revoked on 22nd October 2024 as she had acquired the title without undergoing succession proceedings. That the said order of revocation had not been appealed. The petitioner stated that he was the registered owner of Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 and Kericho/Ndaraetta/1004 and the said parcels were not available for distribution.

The Petitioner's written submissions

16. Through his submissions dated 11th March 2025, the Petitioner submitted that the orders of 22nd October 2024 that cancelled the title to Kericho/Cheson/24 had not been appealed. That the 3rd Protestor irregularly acquired the said title and the cancellation meant that the title reverted to the deceased's name. The Petitioner further submitted that Kericho/Cheson/24 was therefore available for distribution. He relied on re estate of the late Epharus Nyambura Nduati (Deceased) [2021] KEHC 867 (KLR).
17. It was the Petitioner's submission that Kericho/Kipkelion/CHEPSEON B/1 (Kibiemit) 97 did not form part of the deceased's estate as he owned the same. It was his further submission that he was the deceased's son and the fact that he owned land did not mean that he be excluded from being a beneficiary of the deceased's estate.
18. The Petitioner submitted that the two protests were ill advised and were afterthoughts.

3rd Objector's written submissions

19. In her submissions dated 4th March 2025 the 2nd Objector submitted that that the vide an Application dated 26th July 2024, the Petitioner sought to cancel the title of Kericho/Cheson/24 that was registered in her name. She further submitted that the she was not served with the Application and the consent obtained was flawed. That the title was cancelled without involving her.
20. It was the 3rd Objector's submission that this court did not have jurisdiction to cancel the title to Kericho/Cheson/24 as the same lay with the Environment and Land Court. She relied onre Estate of Michael Baraza Oscar (Deceased) [2020] KEHC 8369 (KLR). She further submitted that a succession court could only invoke jurisdiction to cancel titles that were created through orders made by a probate court in proceedings initiated within its jurisdiction. That Kericho/Cheson/24 was not registered through orders made by a probate court.
21. The 3rd Objector submitted that Kericho/Cheson/24 was not available for distribution and that the said consent order should be vacated. That the Petition for Letters of Administration had not been amended to include Kericho/Cheson/24 and thus it did not form part of the deceased's estate. She relied on section 42 of the *Law of Succession Act*. She submitted that she was entitled to the entire share of Kericho/Cheson/24. That she was the deceased's unmarried daughter and had been allocated the



said parcel by the deceased during his lifetime and the same was confirmed by the Mediation Agreement dated 4th October 2022

22. It was the 3rd Objector's submission that the deceased's wishes should be considered during distribution and relied on *Joseph Wairuga Migwi v Mikielina Ngina Munga* [2016] KEHC 6110 (KLR) and *re Estate of the Late Siwanyang Ngilotochi (Deceased)* [2021] KEHC 5918 (KLR).
23. It was the 3rd Objector's submission that her proposed mode of distribution in her affidavit dated 9th December 2024 was fair and just
24. I have gone through the entire court record, the Petitioner's written submissions dated 11th March 2025 and the 3rd Objector's written submissions dated 4th March 2025. I sieve two issues for my determination: -
 - i. Whether Kericho/Cheson/24 formed part of the deceased's estate.
 - ii. What was the just mode of distribution of the deceased's estate.

Whether Kericho/Cheson/24 formed part of the deceased's estate.

25. From the pleadings, the ownership of Kericho/Cheson/24 was in contention, with the Petitioner claiming that it was part of the deceased's estate while the 3rd Petitioner claimed that she was allocated the said parcel by the deceased in his lifetime. This court cannot determine the owner of the said parcel as it is bereft of such jurisdiction but what this court will determine was whether the said parcel formed part of the deceased's estate.
26. Esther Chepngetich Cheriro (1st Objector) and Grace Chelangat Towett (2nd Objector) through their Affidavits of Protests dated 18th July 2022 and 19th October 2022 stated that their sister Evaline Chemutai Bor (3rd Objector), had been allocated Kericho/Cheson/24 by the deceased during his lifetime. Evaline Chemutai Bor reiterated the same position in her Affidavit of Objection dated 9th December 2024.
27. The Petitioner filed an Application dated 26th July 2024 seeking to cancel the title to Kericho/Cheson/24 that was registered in the name of the 3rd Objector stating that the title was acquired illegally and unprocedurally. On 22nd October 2024, Ms. Sang Advocate appeared on behalf of the Protestors and Mr. Mugumya appeared on behalf of the Petitioner. Both parties agreed by consent to allow the Application dated 26th July 2024. The consent was adopted as an order of the court. I have carefully gone through the trial court record and I have noted that this order has not been reviewed or appealed against and it was therefore a valid order that was in force which meant that Kericho/Cheson/24 stood cancelled.
28. The 3rd Objector impugned the manner in which the consent was obtained stating that she was not served with the Application and further that this court did not have jurisdiction to cancel a title that did not emanate from succession proceedings. First of all, the 3rd Petitioner was represented by counsel as Ms. Sang appeared on behalf of all the Objectors. It was therefore fallacious for the 3rd Objector to state that she was not served with the Application.
29. The 3rd Objector impugned the consent entered on 22nd October 2024 through written submissions as opposed to moving the court in the proper way. The place of submissions was stated by the Court



of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR) where it held: -

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.” (Emphasis mine)

30. Similarly, I find persuasion in Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa (suing as Administrator of the Estate of Pamela Agola Apopa) deceased [2020] KEHC 3120 (KLR) where Aburili J. held: -

“My finding is that submissions are not evidence and cannot be substitute of pleadings or evidence adduced before a trial court. Before the trial court, the parties are expected to adduce credible evidence to establish/prove their respective assertions or contentions and the court is expected to analyze that evidence and arrive at a conclusion. Submissions however well-choreographed cannot take the place of evidence in a trial court, unlike before an appellate court where submissions take the place of arguments for or against the respective grounds of appeal.” (Emphasis mine)

31. Setting aside of a consent is akin to impugning the validity of a contract. The Court of Appeal in InterCountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] KECA 928 (KLR) held: -

“The principles that appertain to setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

And in the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”



Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.....”

32. The 3rd Petitioner should have moved the court to set aside the consent through an Application. Such Application needed to be heard on merit and between the Objectors and the Protestor and determined on merit. The 3rd Objector failed to move the court to set aside the consent and thus the consent adopted as an order of the court remained valid. It was also not reviewed or appealed against. It is therefore my finding that the title of Kericho/Cheson/24 issued in the 3rd Objector’s name was cancelled and reverted to the deceased’s name. The question that arises for this court’s determination is whether Kericho/Cheson/24 having reverted to the deceased’s name was now available for distribution or whether this court should honour the deceased’s wishes on the said parcel.
33. As earlier stated, the Mediation Agreement dated 4th October 2022 was adopted as an order of the court. It is salient to note that the order had neither been appealed or reviewed and was therefore valid, binding and enforceable. The Mediation Agreement stated that Evaline Chemutai Bor (3rd Objector) had inherited a parcel of land that was allocated to her by the deceased. I have also noted that the Petitioner attended the Mediation session and thumb printed the Agreement date 4th October 2022. This position was fortified by the 1st Objector through her Affidavit of Protest dated 18th July 2022 and the 3rd Objector’s Affidavit of Protest dated 9th December where they both stated that the 3rd Objector (Evaline Chemutai Bor) was allocated Kericho/Cheson/24 by the deceased during his lifetime.
34. It is my view that the court should consider the deceased’s wishes and intentions when determining whether Kericho/Cheson/24 formed part of the deceased’s estate. The Court of Appeal in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] KECA 650 (KLR) held: -

“Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust. (Emphasis mine)

35. Similarly, the Court of Appeal in *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] KECA 1053 (KLR) stated: -

“In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased’s estate but that the discretion must be exercised judicially on sound legal and factual basis.....It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”



36. I also concur with the sentiments of Odunga J. (as he then was) in re Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased) [2022] KEHC 1495 (KLR), where he held: -

“It is therefore clear on judicial authority that the strict application of section 40 of the Law of Succession Act may well lead to an absurdity and I associate myself with the opinion of the Court of Appeal that the said section only provides a general provision for the distribution of the estate of a polygamous deceased person. However, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.....”

37. Flowing from the above, it is therefore my finding that the deceased had allocated Evaline Chemutai Bor (3rd Objector) Kericho/Cheson/24 during his lifetime and the same was not available for distribution.

What was the just mode of distribution of the deceased's estate

38. The mediation Agreement dated 4th October 2022 stated that the deceased was survived by the following dependants: -

- i. William Kipkemoi Sang Son
- ii. Leah C. Tuiya Daughter
- iii. Elizabeth C. Lewenei Daughter (deceased)
- iv. Grace Towett Daughter
- v. Elizabeth Siele Son
- vi. Esther Chepngetich Cheriro Daughter
- vii. Evaline Chemutai Bor Daughter

39. The Mediation Agreement dated 4th October stated that Leah C. Tuiya, Elizabeth C. Lewenei, Grace Towett and Elizabeth Siele had renounced their claims to the deceased's estate which only left the estate with three beneficiaries i.e. William Kipkemoi Sang (Petitioner), Esther Chepngetich Cheriro (1st Objector) and Evaline Chemutai Bor (3rd Objector). This Mediation Agreement as I have earlier noted was adopted as an order of the court and the same has not been appealed or reviewed. The Mediation Agreement was a valid and enforceable order and it is therefore my finding that Leah C. Tuiya, Elizabeth C. Lewenei, Grace Towett and Elizabeth Siele renounced their claims to the deceased's estate.

40. This meant that the deceased's estate comprising of Kericho/Cheson/105 and Kericho/Cheson/106 was to be divided amongst the three beneficiaries.

41. Section 35 of the Law of Succession Act provides: -

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:
Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.



- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to—
 - (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. (Emphasis mine)

42. Article 27(3) of *the Constitution* of Kenya provides: -

Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

43. The law contemplates equal sharing of inheritance among the beneficiaries irrespective of any circumstances. Equality is guaranteed even in a scenario where the deceased left behind children but no spouse. Section 38 of the *Law of Succession Act* provides: -

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.



44. The Court of Appeal in *Stephen Gitonga M'murithi vs Faith Ngira Murithi* (2015) eKLR held: -
- “.....Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.....”
45. The court in *Re Estate of John Musambayi Katumanga – (Deceased)* (2014) eKLR held as follows: -
- “The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
46. Having stated the law and the authorities above, it is the finding of this court that the deceased’s estate comprised of Kericho/Cheson/105 and Kericho/Cheson/106 shall be shared equally between William Kipkemoi Sang (Petitioner), Esther Chepnetich Cheriro (1st Objector) and Evaline Chemutai Bor (3rd Objector).

RULING DELIVERED, DATED AND SIGNED THIS 12TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Ruling delivered in the presence of Mugumya for the Petitioner, Kipnetich for 3rd Protestor and Koech for 1st and 2nd Protestors . (Court Assistants).

