REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO. E051 OF 2023

IN THE MATTER OF THE ESTATE OF THE LATE GIDEON BOEN KIMARTA (DECEASED)

THROUGH

ISAAC BETT KIPNG'ETICH ..... 3RD PETITIONER/APPLICANT

=VERSUS=

NAUM CHEPKUTO BOEN ..... 1ST PETITIONER/RESPONDENT

TRUPHOSA CHELIMO BOEN ..... 1ST PROTESTOR/RESPONDENT

ANNA JEPKOSGEI SAMOEI ..... 2ND PROTESTOR/RESPONDENT

Coram: Justice R. Nyakundi

M/s Bitok & Sambu Advocates

M/s Terer & Company Advocates

RULING

1. Before this Court for determination is summons dated 27th October, 2025 expressed under the provisions of Art. 50(1) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 45 Rule 1,2 of the Civil Procedure Rules, sections 48 and 76 of the Law of Succession Act and Rules 49 and 73 of the Probate and Adminstration Rules, 1980. The applicant seeks orders as follow:

a. Spent.

b. That this honorable Court be pleased to grant stay of execution of the judgment and certificate of confirmation of grant dated

13th October, 2025 and all the consequential orders pending the hearing and determination of this application interpartes.

c. *That this honorable Court be pleased to set aside the judgment dated 13th October, 2025 and all the consequential orders thereof, ex debito justiciae.*
d. *That the Certificate of confirmation of Grant issued on 13th October, 2025 pursuant to the aforesaid judgment be revoked and/or annulled.*
e. *That the summons for confirmation of Grant and all the affidavits of protests be set down for hearing viva voce.*
f. *That costs of this application be provided for.*

2. The application is based on grounds that:

a. This honorable Court delivered judgment on 13th October, 2025 where it confirmed the grant based on a model allegedly made by Naum Chepkuto Boen on 29th September, 2025.
b. That the applicant and other beneficiaries are aggrieved by the stated mode of distribution which was made in complete disregard of the rules of natural justice.
c. That the said mode of distribution was drawn by a firm of advocates that was clearly conflicted in the matter as they have been acting and on record for the protestors herein.
d. That the said affidavit is alleged to have been sworn in Nairobi yet Naum Chepkuto Boen has never stepped out of her homestead in the recent past including on 29th September, 2025.
e. That besides, the affidavit was sworn and filed on a date when the matter had been scheduled for ruling on 30th September, 2025 a day before then and was not served upon the applicants advocates.
f. That the filing of the aforesaid affidavit of Naum Chepkuto Boen is suspicious and the applicant ought to have been given an opportunity to respond.

g. That Naum Chepkuto Boen had also sworn another affidavit on 11th September, 2025 where she had made another separate proposal on the distribution of the estate.
h. That Naum Chepkuto Boen had also propose another mode of distribution in the summons for confirmation of Grant dated 24th January, 2025 which had not been formally withdrawn.
i. That as at the time of the delivery of the Ruling Naum Chepkuto Boen had three different modes of distribution before the Court which were clearly conflicting.
j. That the Court should not allow the protestors to put words in the mouth of Naum Chepkuto Boen and purport that this was her preferred mode of distribution.
k. That as such there is need for fairness and adherence to the rules of natural justice on the right to be heard before the Court could distribute the estate of the deceased in the manner in which it did.
l. That the Naum Chepkuto Boen is a 92-year-old widow and she cannot be dragged into this sought of litigation.
m. That there is therefore an error on the face of the record given that there were 3 modes of distribution proposed by one party who is of advanced age and who the protestors clearly took advantage of.
n. That besides the filing of the 3rd affidavit dated 29th September, 2025 on the eve of the ruling and without service was clearly an attempt to steal a match against the applicants in an adversarial system of law.

3. I have perused through the record and I have not been able to find any response. I have however taken note of written submissions dated 8th December, 2025. It is important to highlight that submissions cannot take the place of pleadings.

4. The submissions as filed by the parties are summarized as hereunder:

Applicant's written submissions

5. Learned Counsel Mr. Sambu filed written submissions on behalf of the 3rd Petitioner/Applicant dated 29th January, 2026 in which he raised five broad issues, namely: whether the affidavit of Naum Chepkuto Boen dated 29th September, 2025 was properly before the Court; whether the said affidavit was served upon the Applicant's advocates; whether the judgment was regularly obtained; whether the Protestors' advocates were conflicted in the matter; and whether the rules of natural justice were observed in the distribution of the estate.

6. It is submitted for the Applicant that the judgment delivered on 13th October, 2025 was arrived at on the basis of an affidavit that was filed after the close of pleadings and was never served upon the Applicant's advocates, there being no Affidavit of Service on record to demonstrate otherwise. It is further submitted that the said affidavit was purportedly sworn in Nairobi on 29th September, 2025, yet Naum Chepkuto Boen, a widow of advanced age approximately 92 to 93 years had not stepped out of her homestead in the recent past, casting serious doubt on the authenticity of the document. It is the Applicant's submission that the affidavit was filed on the eve of the ruling scheduled for 30th September, 2025 without notice to or service upon the Applicant's advocates, and that this amounted to an attempt to steal a match against the Applicant in an adversarial system of law.

7. Learned Counsel submitted that submitted for the Applicant that Naum Chepkuto Boen had by that time sworn three separate and conflicting affidavits proposing different modes of distribution of the estate, including one dated 11th September, 2025 and another embedded in the Summons for Confirmation of Grant dated 24th January, 2025, neither of which had been formally withdrawn. It is submitted that the existence of these three conflicting proposals rendered it irregular for the Court to act on one of them without affording the parties an

opportunity to be heard on the question of distribution, and that in doing so, the Court allowed the Protestors to impose their preferred mode of distribution on a party who had not been heard.

8. On the question of conflict of interest, it is submitted for the Applicant that the firm of M/s Terer & Company Advocates, which drew the affidavit relied upon by the Court, was on record as acting for the Protestors and therefore could not properly act for the 1st Petitioner/Respondent at the same time, as this offended the fundamental principle that justice must not only be done but must be seen to be done.

9. In support of the proposition that a judgment obtained without proper service is irregular and must be set aside as a matter of right, learned Counsel placed reliance on the decision of the Court of Appeal in **Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR)**, wherein the Court held that where a judgment is irregular in the sense that service was not effected, or the judgment was improperly or prematurely entered, such a judgment must be set aside as a matter of right, without the need to demonstrate a defence on the merits.

10. It is further submitted for the Applicant that the right to be heard is sacrosanct and is constitutionally guaranteed under Article 50 of the Constitution of Kenya, 2010, and that Article 25 thereof renders that right non-derogable. It is the Applicant's position that the Respondents did not file any Replying Affidavit in response to the application, rendering it uncontroverted and unopposed, and that the application ought therefore to be allowed and the judgment set aside so as to place all parties on an equal footing for the expeditious determination of the question of distribution.

Respondents' submissions

11. Learned Counsel Mr. Terer filed written submissions on behalf of the Respondents dated 8th December, 2025 in opposition to the Applicant's Notice of Motion. The submissions identify two issues for determination, namely: whether the Applicant has established sufficient grounds to warrant the setting aside of the judgment; and whether the Applicant has met the statutory threshold to justify revocation of the Certificate of Confirmation of Grant.

12. On the first issue, it is submitted for the Respondents that the Applicant has not met the threshold for setting aside the judgment delivered by this Honorable Court, and that the Court cannot arrogate unto itself jurisdiction that it does not have. In this regard, learned Counsel placed reliance on the decision in **Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others [2018] eKLR**, wherein the Court of Appeal held that the setting aside of a judgment is not a right of a party but an equitable remedy available only at the discretion of the Court, and that there are several factors the Court ought to take into account before exercising that discretion. It is submitted for the Respondents that all parties on record were directed to file affidavits on the mode of distribution, and that the advocate then on record for the 1st Petitioner orally made an application to withdraw all initial modes of distribution. It is further submitted that the matter was fully litigated and each party was accorded an opportunity to be heard, before the Court determined the question of distribution based on the statutory position under the Law of Succession Act, which mandates equal distribution among beneficiaries of the same class. It is the Respondents' position that this Honorable Court was therefore perfectly entitled, and indeed duty-bound, to apply the law as enacted and order equal distribution of the estate.

13. It is submitted for the Respondents that the Applicant has neither alleged nor demonstrated any fraud, misrepresentation, lack of jurisdiction, breach of natural justice, or material irregularity in the

proceedings leading to the delivery of the judgment, and that in the absence of such exceptional circumstances this Honorable Court ought to be slow to interfere with its own final judgment. It is further submitted that mere dissatisfaction with the outcome of proceedings does not constitute a legal basis for setting aside a judgment, and that having been accorded a full opportunity to participate in the proceedings and present their case, the Applicant cannot now seek to re-open the matter on account of an unfavorable outcome.

14. On the second issue, it is submitted for the Respondents that the Applicant has failed to satisfy any of the statutory grounds set out under Section 76 of the Law of Succession Act, and that the Certificate of Confirmation of Grant faithfully reflects the judgment of this Honorable Court and cannot be impeached in the absence of proof of fraud, concealment of material facts, or any other ground recognized in law. It is submitted that the Applicant's attempt to invoke the drastic remedy of revocation amounts to a clear misuse of the succession process and an indirect attempt to overturn a valid judgment through the back door, which the law does not permit.

15. In conclusion, it is the Respondents' humble prayer that this Honorable Court dismiss the Applicant's application to set aside the judgment and revoke the Certificate of Confirmation of Grant with costs, and uphold the said judgment and Certificate of Confirmation of Grant as valid and lawful.

Analysis and determination

16. Having considered the application, the grounds relied upon, the written submissions filed by both Counsel, and the record of these proceedings as a whole, I am called upon to determine three main questions, namely: first, whether this Court has jurisdiction to review and set aside the judgment dated 13th October 2025 and, if so, what is the applicable legal standard; second, whether the applicant has

established sufficient grounds to warrant the exercise of that jurisdiction; and third, whether the consequential relief of revocation of the certificate of confirmation of grant is properly available on the facts of this case.

Whether Review or Setting Aside of the Judgment is available

17. It is now settled law that a Court of record has both statutory and inherent jurisdiction to review its own orders and judgments within defined and circumscribed limits. The jurisdiction to review is not equivalent to an appellate jurisdiction. It does not permit a party who is merely dissatisfied with the outcome of proceedings to seek a fresh determination of the same issues before the same Court on the same facts.

18. The statutory basis for review in civil proceedings is **Order 45 Rule 1** of the Civil Procedure Rules, 2010, which provides that:

> *"(1) Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.*
>
> *(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an*

appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review"

19. Kuloba J (as he then was) in ***Lakesteel Supplies v Dr. Badia and Anor*** **Kisumu [HCCC No. 191 of 1994]** opined that:

"The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The Court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the Court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every Court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not

within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

20. An applicant seeking to set aside a judgment under Order 45 must therefore establish one of three recognized grounds. First, the discovery of new and important matter or evidence not previously available upon the exercise of due diligence; second, some mistake or error apparent on the face of the record; or third, any other sufficient reason. As was emphasized by this Court's superior Court in **National Bank of Kenya Limited v Ndung'u Njeru [2008] 1 KLR 252**, the Court stated as follows:

> *"A review may be granted whenever the Court considers that it is 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 incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."*

21. A separate but related remedy is available under **Order 10 Rule 11** of the Civil Procedure Rules, which empowers the Court to set aside or vary any judgment or order where a party applies with sufficient cause shown. It is in **Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR)**, where the Court held that a judgment obtained where service was not effected, or which was improperly or prematurely entered, is irregular and falls to be set aside ex debito justitiae without the need to demonstrate a defence on the merits. The applicant relies heavily on this authority, contending that the judgment of 13th October 2025 was founded upon an affidavit that was not served upon the applicant's

advocates, thereby rendering it an irregular judgment liable to be set aside as of right. The Court in the said case stated as follows:

> *"What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the Court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise."*

22. The jurisdiction of this Court to examine whether the judgment of 13th October 2025 was regularly or irregularly obtained, and whether a sufficient cause for setting it aside has been demonstrated, is not in doubt. The question that remains, and to which I now turn, is whether the specific grounds advanced by the applicant, either individually or cumulatively, are sufficient to warrant the exercise of that jurisdiction in his favor.

Whether the Applicant has established sufficient grounds

23. The applicant's central complaint is that the judgment of 13th October 2025 was premised upon the affidavit of Naum Chepkuto Boen dated 29th September 2025 which was filed on the eve of the then scheduled ruling without being served upon the applicant's advocates. The applicant contends that this affidavit contained a new and decisive mode of distribution that materially differed from earlier positions, and that the applicant was denied the opportunity to respond to it before the Court made its determination.

24. Having perused the record carefully, I note that the ruling of 1st September 2025 expressly enlarged time by ten days for the filing of a

rejoinder on the proposed mode of distribution and directed that a final Status Conference be convened on 17th September 2025 for highlighting of differentia, minimum or maximum, to the proposed modes then on record. The record reflects that both Counsels were present at the mention of 17th September 2025, when the mode of distribution dated 1st April 2025 was formally marked as withdrawn. The parties thereafter filed their respective affidavits on the mode of distribution, as summarized in the judgment.

25. The affidavit of Naum Chepkuto Boen dated 29th September 2025, however, was filed subsequent to the Status Conference of 17th September 2025. It was filed a day before the then scheduled ruling date of 30th September 2025. There is no affidavit of service on record to demonstrate that this affidavit was served upon the applicant's advocates prior to its consideration by the Court. The respondents, in their submissions, contend that all parties on record were accorded the opportunity to be heard and that the matter was fully litigated. However, neither the respondents' submissions nor any other document on the record directly addresses or displaces the specific allegation that this particular affidavit was served upon the applicant's advocates before its filing.

26. The rule *audi alteram partem*, which is the right to be heard before a judicial decision is taken, is entrenched in Art. 50(1) of the Constitution, which guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or tribunal. Art. 25 of the Constitution categorizes this right as non-derogable. The constitutional imperative is clear. A Court of law may not determine a matter on the basis of material to which the adversely affected party has not had a reasonable opportunity to respond, regardless of whether the outcome of such determination might ultimately have been the same.

27. The present case was not of a default judgment entered in the absence of any participation by the applicant. The applicant was at all times on record, represented by Counsel, had filed affidavits on the mode of distribution, and had participated in the Status Conference of 17th September 2025. The alleged irregularity relates not to the initiation of proceedings but to a specific affidavit filed at a late stage in ongoing, fully contested proceedings.

28. Furthermore, and critically, the Court's judgment of 13th October 2025 did not simply adopt Naum Chepkuto Boen's 29th September affidavit without analysis. A reading of the judgment in its entirety demonstrates that the Court engaged in an extensive and independent analysis of the constitutional and statutory framework governing intestate succession. The Court invoked Article 27 of the Constitution, which guarantees equality and freedom from discrimination on the basis of gender or marital status, section 35 of the Law of Succession Act, which governs the entitlement of a surviving spouse and children to the net intestate estate and section 38 of the same Act, which enshrines the principle of equal distribution among surviving children irrespective of gender. The Court also drew guidance from the Maputo Protocol on the Rights of Women in Africa and the CEDAW, as well as from the Court of Appeal authority in *Mary Rono v Jane Rono & Another [2005] eKLR*. The equal distribution ordered by the Court was therefore not merely the product of Naum's affidavit. It was the product of the Court's own application of binding constitutional and statutory law.

29. The implication of the foregoing is significant for the purposes of this application. Even if it were to be found that the affidavit in question ought not to have been considered in the absence of proof of service, the substantive outcome of the judgment, being the confirmation of the grant on a basis of equal distribution among all beneficiaries regardless of gender, would remain compelled by the law itself. Section 35(5) of the Law of Succession Act is unambiguous in directing

that the whole residue of the net intestate estate shall, on the death or re-marriage of the surviving spouse, be equally divided among the surviving children. Article 27 of the Constitution is unambiguous in prohibiting discrimination on the basis of sex or marital status. The proposed mode of distribution advanced by the applicant, which excluded the daughters from the Moiben/Moiben Block X (Kabiyet)/10 parcel, is irreconcilable with this mandatory statutory and constitutional position. No Court of law could have confirmed such a distribution, and setting aside the present judgment would only serve to postpone, not alter, the legal outcome.

30. The applicant's contention that three conflicting modes of distribution were simultaneously pending before the Court at the time of judgment, and that the Court erred in acting upon one without affording parties an opportunity to address the conflict, does not withstand scrutiny upon a careful examination of the record. The first proposed mode, annexed to the Summons for Confirmation of Grant dated 24th January 2025, together with the administrators' affidavit of 1st April 2025, was formally marked as withdrawn at the Status Conference of 17th September 2025 in the presence of Counsel for both sides; a document formally withdrawn before a Court of record ceases to exist as a live pleading and cannot thereafter be resurrected to manufacture a conflict. What remained before the Court were, in substance, two affidavits: the affidavit of Isaac Bett Kipngetich dated 11th September 2025 proposing unequal distribution, and the affidavit of Naum Chepkuto Boen dated 29th September 2025, which at paragraph 5 thereof expressly and unambiguously withdrew any previous positions that may have suggested unequal distribution and declared full support for equal distribution among all beneficiaries. There was accordingly no irreconcilable conflict before the Court.

31. On the allegation of a conflict of interest, the allegation that M/s Terer & Company Advocates was simultaneously on record for the protestors

and drew the affidavit relied upon by Naum Chepkuto Boen is a matter of serious professional concern, if proven. However, a finding of professional misconduct, even if established, does not by itself render a judgment irregular within the meaning of Order 45 or Order 10 of the Civil Procedure Rules, especially where the judgment reached is independently supported by the law. This ground does not, in and of itself, justify the setting aside of the judgment.

32. The applicant further seeks, under section 76 of the Law of Succession Act, the revocation and annulment of the certificate of confirmation of grant issued pursuant to the judgment of 13th October 2025. Section 76 of the Law of Succession Act provides, in substance, that a grant may be revoked or annulled if it appears to the Court that the grant was obtained fraudulently by the making of a false statement, or by concealing from the Court something material to the case, or that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, that the person to whom the grant was made has failed to comply with any condition of the grant, or that the grant has become useless and inoperative. This Court finds that none of these grounds has been established on the present application. There is no allegation, and certainly no proof, of fraud, false statement, concealment of material fact, or any other ground recognized under section 76. The certificate of confirmation of grant faithfully reflects and implements the judgment of this Court and cannot be impugned in the absence of such proof. The prayer for revocation is therefore misconceived in the circumstances of this case.

33. In conclusion, I find that while the applicant has raised procedural concerns of some weight, particularly with respect to the service of the 29th September affidavit, those concerns do not ultimately establish grounds sufficient to warrant the setting aside of the judgment. The applicant's proper remedy, if aggrieved by the manner in which the

proceedings were conducted or the conclusion reached, lies in an appeal to the Court of Appeal.

34. In the circumstances, the application is hereby dismissed in its entirety and the following orders shall abide:

a. *The judgment and certificate of confirmation of grant dated 13th October 2025 remain valid and operative.*
b. *The Administrators of the estate are directed to resume and complete the distribution of the estate in accordance with the confirmed mode within the timelines already directed by the Court.*
c. *This being a family succession matter, each party shall bear its costs.*

35. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 28TH DAY OF APRIL, 2026

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R. NYAKUNDI

JUDGE