

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
SUCCESSION CAUSE NO. E001 OF 2022

IN THE MATTER OF THE ESTATE OF MERKOI CHELONGO -
DECEASED.

GRACE MERKOL
APPLICANT

- V E R S U S -

KIZITO MERKOL & ANOTHER.....
RESPONDENT

RULING.

The application dated 11/11/2025 is a summons seeking order that: -

- (a) Leave be granted to the applicant to appoint a private Surveyor at her expense to visit the land comprised in land parcel No. West Pokot/Siyoi 'B'/11 with a mandate to ascertain the boundaries put in place by the late Merkol Chelongo, when he shared his land parcel No. West Pokot/Siyoi 'B'/11 among his three (3) wives, and then confirm the acreage of the land given to each wife;**

- (b) That the surviving elders who were present when the boundaries were fixed by the later Merkol Chelongo do point out to the surveyor, the said boundaries. They include Fred Lorema the current Chief, Siyoi Location, Kenneth Alisoreng and Ywarakeris Losili;**
- (c) That the Surveyor do file his report to court within 30 days.**

The application is premised on grounds found in the body of the application and an affidavit sworn by the applicant dated 11/11/2025. She deponed that the Respondents are her co-wives; that during the lifetime of their deceased husband, he distributed his land to the three (3) wives with the 1st widow getting thirty (30) acres, Margaret Rotuno got twenty five (25) acres and she was given thirty (30) acres; that the first widow took three (3) acres of her land which she sold to one Musa who occupies it but that deceased did not approve of the sale; that the 2nd widow also took two acres from her land and made it part of hers and she was hoping to get back her five acre once the acreage issue was resolved; that the deceased identified the boundaries of the lands in the presence of witnesses and

she attached copies of the minutes; that on 5/6/2025, the advocates agreed that the land be surveyed to ascertain the acreage based on the boundaries the deceased had made. The applicant denied knowing of what Counsel had agreed on 5/6/2025; that on 22/10/2025 she was informed on phone that Surveyors were going to the land on 23/10/2025, which was surprising to her because the case had not been heard and she had not been asked to pay the Survey fees. She rushed to see her Advocates in Kitale, who filed an application to stop the survey work; that her Counsel did not inform her of the consent or survey and that had she been present during the survey, she would have shown the Surveyor the land that had been hived off hers. That is why she makes this application to have the Survey in her presence is that the boundaries can be rectified. She is ready to pay for a private surveyor to undertake the process in her presence.

Margaret Rotuno (2nd Respondent) filed a joint replying affidavit with the 1st Respondent dated 19/11/2025 on her own behalf and that of the 2nd Respondent and she deponed that in 2023, the applicant presented to the other wives a summons for confirmation of grant; that they agreed that a private

Surveyor do visit the land to determine the acreage but the applicant changed her mind claiming that the private surveyor may be compromised and preferred a County Surveyor; that they recorded a consent on 5/6/2025 and agreed on a County Surveyor to visit the property to ascertain the boundaries and they were informed of the costs; that by 25/9/2025 the Survey had not been done because the applicant had not paid her share and that is when they decided to proceed with the Survey and recover the costs from the estate; that the applicant was aware of the costs and failed to pay her share deliberately; that the other parties, together with the OCS, area Chief and the applicant were informed of the Survey exercise; that the applicant deliberately failed to attend the Survey exercise and instead proceeded to file an application to stop the exercise and that the allegation that she was unaware of the process is not true; that the consent recorded on 5/6/2025 has not been set aside and that the applicant is trying to frustrate the process; that the elders that the applicant wants to be present were present on 23/10/2025 when the survey was done; that the elders were aware of the boundaries and it is unnecessary

to repeat the process. It was her view that a private surveyor is likely to be influenced and compromised by the applicant.

Applicants Submissions.

Kiarie Advocate Counsel for the Applicant filed submissions dated 13/3/2026. Counsel submitted on three issues namely: -

- 1. Whether the survey conducted on 23/10/2025 was procedurally fair;**
- 2. Whether the applicant was accorded a fair opportunity to participate in the survey exercise;**
- 3. Whether the court should allow an independent survey to ensure justice is done.**

On the first issue of procedural fairness, Counsel reiterated the averments in the affidavits. The averment that the applicant was never served with the letter dated 13/10/2025 hence the survey was done in her absence denying her a chance to point out the boundary and raise objection to the exercise if any; that as a result her entitlement was reduced to 24.26 acres, and has lost about five (5) acres in the process.

As to whether the consent recorded in court on 5/6/2025 binds the applicant, Counsel submitted that the same can be set

aside if entered into without the knowledge or authority of the client and that the court can determine where prejudice has been suffered.

Counsel relied on the case of **Flora N. Wasike -V- Destimo Wamboko (1988) eKLR** where the court set out the grounds upon which a consent may be set aside; that having been absent in court when the consent was recorded and the advocate having failed to inform her of it, she was denied a chance to participate in the

survey which was prejudicial to her and the court should intervene so that the court can know the true position on the ground; that the court will still have an opportunity to evaluate both reports.

Counsel also relied on the case of **Onyango Oloo -V- A.G (1986 -1989) EA 456** where the court held that a decision arrived at in breach of rules of natural justice is void. In the case of **RE-Estate of Gitau (Deceased) (2002) 2 KLR 430** it was held that in succession matters the court has to ensure that the deceased's estate is distributed fairly among the beneficiaries.

Counsel therefore urged the court to intervene to avoid the applicant suffering injustice of being deprived of her entitlement.

Ms. Chebet, Counsel for the Respondent did not wish to file submissions. The court has considered the application, affidavits in support, that in reply and applicant's submissions.

On 5/6/2025 when the parties entered into an agreement to have a survey of the deceased's land undertaken to ascertain the acreage as per the boundaries put in place by the deceased. Ms. Arunga, then the applicant's Counsel was present in court and was party to the consent. The Counsel was still on record even at the time the survey was done. It means that the applicant was duly represented by her advocate, who was an agent of the applicant. The applicant deponed that once she learnt on 22/10/2025 morning that survey was going to take place on 23/10/2025, she went to see her advocate who filed a summons under certificate of urgency seeking to stop the survey. The said application was filed by Ms. Arunga, the applicant's Advocate. The reason given in the said application dated 22/10/2025 for wanting to stop the

survey, was that the Respondents intended to allocate themselves larger portions.

The reason was not because the applicant was not aware of the consent agreed upon by the Counsel representing the parties. In that application the applicant had not also indicated that she had not been made aware of the upcoming survey.

After this application was made, it seems the applicant fell out with her former Counsel and engaged her new Counsel Mr. Kiarie. The former Counsel has not filed any affidavit to confirm or deny the averments of the applicant.

The applicant was aware of the survey process on 22/10/2025 early morning. She did not disclose how she came to know of it, and there is really no reason disclosed why she did not attend the survey. From the averments in the application dated 22/10/2025,

it seems she had already made up her mind that the process would not be fair by alleging that the 1st and 2nd respondents intended to take a bigger share of the land. How did the applicant know this when the process had not taken place? This court is persuaded and believes that the Respondent's

averments that the applicant was aware of the consent and survey process all along and for reasons known to her, refused to attend the process on 23/10/2025.

The court of Appeal in **Flora Wasike case Supra** did consider the grounds upon which a court may set aside a consent which are grounds that would justify setting aside a contract and they are fraud, mistake or misrepresentation.

The court said **“a consent order has contractual effect and can only be set aside on grounds which would justify setting aside a contract for example fraud, mistake or misrepresentation”**

I find that the applicant has not demonstrated any of the above because she was duly represented and the decision was not made in breach of rules of natural justice.

The applicant’s Counsel also submitted that in succession matters, the court has to ensure that the deceased’s estate is distributed fairly. In **Re Estate of Gitau Supra** the court said **“the duty of the court in succession matters is to ensure that the estate of the deceased is distributed fairly among the beneficiaries.”**

The applicant contends that the deceased had shared his land in terms of the document annexed as GM1 and dated 4/10/2003 where the deceased's land was distributed to his widows. The consent dated 5/10/2025 also alluded to boundaries having already been fixed by the deceased which the Surveyor was supposed to establish or determine. The applicant complains that her entitlement in the acreage has been reduced. The Respondents did not respond to this allegation. In my considered view, it is in the interest of justice that the survey be revisited to determine the issue of boundaries and acreage, once and for all before confirmation of the grant can be undertaken. The court will of course take into account both the County Surveyor's report and the Private Surveyor's report.

In the exercise of the court's discretion therefore, I do allow the application dated 11/11/2025 as follows: -

- (a) Leave is hereby granted to the applicant to engage a qualified Private Surveyor to ascertain the boundaries put in place by the late Merkol Chelongo, when he shared his land parcel No. West Pokot/Siyoi 'B'/11 among his three (3) wives, and**

then confirm the acreage of the land given to each wife;

(b) That the surviving elders who were present when the boundaries were fixed by the later Merkol Chelongo do point out to the surveyor, the said boundaries. They include Fred Lorema the current Chief, Siyoi Location, Kenneth Alisoreng and Ywarakeris Losili;

(c) The applicant will bear all the costs incidental to the survey;

(d) the surveyor do file his report within thirty days of today's date.

Ruling delivered, dated and signed in open court at Kapenguria on this 13th day of May, 2026.

**R. WENDOH
JUDGE**

In the Presence of:-

Mr. Kiarie & Co Advocates for Applicant - absent

Ms. Sugut holding brief for Ms. Chebet for 3rd petitioner - present

Juma/Hellen-Court Assistants