



REPUBLIC OF KENYA



**In re Estate of Khurshid Ahmed Butt (Deceased) (Succession Cause 693 of 2009)
[2022] KEHC 13405 (KLR) (Family) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 693 OF 2009

AO MUCHELULE, J

SEPTEMBER 28, 2022

IN THE MATTER OF THE ESTATE OF KHURSHID AHMED BUTT - (DECEASED)

BETWEEN

COL.(RTD) FAROOQ ASIF BUTT PETITIONER

AND

JAMESHED AHMED BUTT 1ST JUDGMENT DEBTOR

FEHMIDA BEGUM BUTT 2ND JUDGMENT DEBTOR

RULING

1. It is clear to me that on December 3, 2021 the firm of Osoro Mogikoyo & Co Advocates that was previously acting for the judgment debtors/applicants Jamshed Ahmed Butt and Fehmida Begum Butt entered into a consent (“DOO3”) to allow the firm of Hassan Bulle & Co Advocates to come on record for them in this matter. The respondent/judgement creditor Col (Rtd) Farooq Asif Butt had filed an amended statement of particulars and proposed terms of sale dated December 15, 2021 seeking the sale by public auction of Mombasa MS/Block 1/416 Likoni belonging to the applicants. There was a decree to recover Kshs 7,394,619/= being interest on costs that had been determined by the Taxing Officer. The applicants had paid the determined costs but had challenged the issue of interest on them. The Taxing Officer had found against them on the issue of interest, and therefore the respondent was levying execution.
2. The amended particulars and proposed terms of sale had been opposed by the applicants. When the application came for hearing on February 15, 2022 it was allowed on the basis that the applicants’ advocates were not properly on record, there being no consent from their previous advocates and there being no order to have the new advocates come on record. The opposition to the applicants’ advocates was raised by Mr Andati for the respondent. Mr Omondi holding brief for Mr Bulle for the applicants



was not aware of the consent between the firm of Hassan Bulle & Co Advocates and the previous advocates M/s Osoro Mogikoyo & Co Advocates. The consent dated 3rd December 2021 had on the same date been served on the respondent's advocates ("DOO4") who had acknowledged service. It was therefore misleading on the part of Mr Andati for the respondent to tell the court that the firm of Hassan Bulle & Co Advocates was not properly on record for the applicants. The court was therefore misled into allowing the application without affording the applicants an opportunity to be heard on their replying affidavit.

3. It is of fundamental importance that a party to a suit or cause be afforded a hearing before a determination is arrived at in the matter. The court was led into making the mistake of not hearing the applicants, and that mistake is correctable by review under order 45 rule 1 of the *Civil Procedure Rules (National Bank of Kenya -v- Ndungu Njau* [1997]eKLR).
4. Consequently, I review and set aside the orders of February 15, 2022 and reinstate for hearing the respondent's application dated December 15, 2021. The application dated February 21, 2022 by the applicants is allowed with costs.
5. On the application dated December 15, 2021, the respondent shall within 21 days file and serve written submissions. On service, the applicants shall file and serve theirs within 21 days. The matter shall be mentioned on November 30, 2022 for directions on ruling date.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022.

A.O. MUCHELULE

JUDGE

