



**Butt & another v Butt & another (Succession Cause 395 of 2014)
[2023] KEHC 25804 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 395 OF 2014
G MUTAI, J
OCTOBER 13, 2023**

BETWEEN

REGINE BUTT 1ST APPLICANT

ROSELINDER GUDRUN OSTERTAG 2ND APPLICANT

AND

HAROON BUTT 1ST RESPONDENT

AKHTAR BUTT 2ND RESPONDENT

RULING

1. The deceased Shahid Pervez Butt died intestate on 11th July 2014. At the time of his death, he had two wives Regine Bradler Butt (the 1st Petitioner/Applicant) (hereafter “Regine”) and Akhtar Shahid Butt (the 2nd Interested Party/Respondent) (hereafter “Akhtar”). He had two children with Regine, TSB and ASB (both minors).
2. The estate of the deceased person was the subject of severe contestation that saw three different causes, which gave rise to three applications that were the subject of the judgment by a three-judge bench of this Court, which was delivered on 25th March 2022 by Justices E. Ogola, PJ Otieno and M. Njoki Mwangi. The said judgment had the following orders: -
 1. It confirmed that the grant of letters of administration intestate made to Regine and Haroon Butt on 3rd November 2017;
 2. It ordered that the deceased estate be distributed among his dependants, who were identified as being his widows, Akhtar and Regine, and children, Haroon, T and A, in accordance with Islamic law in the result that:-



- a. In the eight companies whose existence could be verified, the deceased's shares were distributed to the dependants, with Akhtar, Regine, Haroon, T and A getting 6.25%, 6.25%, 35%, 35% and 17.5% shares, respectively;
 - b. Parcels of land in which the deceased had a personal interest (Malindi Plot Nos. 7114, 7118, 7119, 7120, 7121, 7122 and 7124) the deceased 2% share was distributed with Akhtar, Regine, Haroon, T and A getting 6.25%, 6.25%, 35%, 35% and 17.5% shares respectively;
 - c. Investment under contract No. 3576350 with Friends Life Services Limited, P.O Box 1810, Bristol, BS99 5SN Pixham End, Dorking, Surrey, RH4-1QA, UK in the name of Shahid Pervez Butt; was distributed with Akhtar, Regine, Haroon, T and A getting 6.25%, 6.25%, 35%, 35% and 17.5% shares respectively; and
 - d. Motor vehicle registration numbers KBE 927L and KBV 303U were apportioned with Akhtar, Regine, Haroon, T and A getting 6.25%, 6.25%, 35%, 35% and 17.5% shares, respectively;
3. In accordance with Islamic law, the Court appointed Regine Butt and Haroon Butt to be the trustees of the bequests made in the judgment in favour of ASB and TSB (who were then and still are minors);
 4. It stated that any assets discovered after the judgment as belonging to the deceased would be distributed in accordance with Muslim law subject to the ratio applicable to the other properties and already indicated above;
 5. The administrators were directed to ensure the transmission of all the shares to the beneficiaries within 90 days of 25th March 2022.
3. Although the decision of the Court was very clear as to what was to be done, the administrators failed to transfer the shares to the beneficiaries within the stipulated time. Being aggrieved by the said failure, the 1st Petitioner/Applicant, vide an application dated 17th October 2022, sought the following orders: -
 - a. Spent;
 - b. PriceWaterhouseCoopers LLP be appointed and authorized to manage, collect, receive, trace and account for the assets of the estate to enable the distribution as decreed herein;
 - c. Haroon Butt be removed as trustee to TSB and ASB;
 - d. Kes. 20,000,000.00 be paid out of the estate towards the maintenance and upkeep of Regine Butt, T Butt, and A Butt pending distribution hereof;
 - e. Any other or further directions as the honourable Court shall deem fit to issues in the circumstances; and
 - f. Costs.
 4. The motion was supported by the affidavit of the 1st Petitioner/Applicant, the grounds in the body of the application as well as by her supporting affidavit. In her affidavit, the Regine deposed that she was appointed jointly with the 1st Interested Party to be the administrators of the estate. While the matter was pending judgment, the 2nd Interested Party died, which event was not disclosed to the Court by the 1st Interested party. In its judgment the Court distributed the estate and directed that the transmission of each beneficiaries' shares be done within 90 days. The 1st Interested party had failed to cooperate



with the 1st Petitioner so as to bring about the conclusion of transmission. In the meantime, the 1st Interested party has been dissipating the estate, receiving its incomes without being accountable and was reinvesting the same outside the country. He was frustrating the 1st Petitioner/Applicant to such an extent that she and her children had been rendered destitute. She deposed that it was necessary to appoint an independent firm of co-administrators to immediately effect the transmission of the shares ordered, to manage the estate and to collect, receive, trace and account for and avail the net estate for distribution as ordered by the Court.

5. She proposed the firm of PriceWaterhouseCoopers LLP as it has international reach, capacity and necessary experience to receive manage and liquidate estates of such diversity and magnitude.
6. The 1st Petitioner deposed that unless the application was allowed, there would be no estate available for distribution to the beneficiaries.
7. Regine annexed to her affidavit a demand note dated 14th October 2022 from Braeburn Mombasa International School for Kes.2,344,575.00 being school fees arrears, images of cheque no. 497 issued by Haroon Shahid Butt to Braeburn Mombasa for Kes.716,995.00 and a fee statement.
8. The application was opposed. The Interested party/Respondent filed a replying affidavit sworn on 16th May 2023. Prior thereto, he had filed a preliminary objection dated 14th November 2022. Submissions were filed on 31st July 2023.
9. The Interested party deposed that the application before the Court has no merit as it seeks to appeal the judgment of a 3-judge bench of the High Court before a single judge of the same Court. He argued that the application was likely to stall the process of distribution of the estate, which is the only matter outstanding. He denied that he had defrauded the estate. He, therefore, prayed that the instant application be dismissed with costs.

Submissions by the Parties

10. This Court gave directions on 29th May 2023. The parties were directed to file Written Submissions which would thereafter be highlighted. The submissions were highlighted before me on 1st August 2023.

The Submissions of the 1st Petitioner/Applicant

11. The Hon. Kaluma, learned counsel or the 1st Petitioner/Applicant, submitted that the three-judge bench of this Court delivered its judgment 25th March 2022. The said judgment confirmed the grant and ordered that the estate of the deceased person be distributed to the dependants and the beneficiaries. The administrators were ordered to transmit shares within 90 days. This order has, however, not been effected; the 1st Interested Party has refused to cooperate. It was submitted that since the deceased died, the companies that were under his control have been in exclusive control of the 1st and 2nd Interested Parties. Effecting transfer of shares requires their cooperation. The Hon. Kaluma further submitted that the 2nd Interested Party is deceased.
12. It was further submitted that the deceased companies were at risk of being run down completely and might be shell companies, with nothing in their names by the time distribution of the estate is completed. Hon. Kaluma prayed that Messrs. PriceWaterhouseCoopers LLP, Certified Public Accountants, be appointed to conduct a forensic audit of the estate and to trace lost assets. He also prayed that the 1st Interested Party be removed as an administrator as he had failed to comply with section 83 of the [Law of Succession Act](#). Concerning the trusteeship of the deceased's two children, TSB



and ASB, the Hon. Kaluma urged that the 1st Interested Party had failed to pay their school fees and must thus be removed from the said capacity.

13. It was submitted that it is necessary to release Kes.20,000,000 to the 1st Petitioner. In addition to the foregoing all pending school fees reckoned to be Kes.2,000,000.00 be paid immediately. Mr. Kaluma urged that Regine’s house was demolished and that this, per M. Thande J, ordered that Kes.250,000.00 per month be paid to her until the house with restored. In his view Kes. 5,000,000.00 is outstanding as the house had not been rebuild. Further, he sought payment of Kes.130,000.00 per month for education and Kes.150,000.00 for maintenance. Lastly, he prayed that I order the Registrar of Companies to effect the transfer of shares. The Hon Kaluma was categorical that they weren’t before me for review of the judgment of the 3-judge bench, but rather for its enforcement. He thus urged that I allow the application as prayed.

Submissions of the Respondent

14. Mr. Agwara opposed the application. He referred the Court to the Replying Affidavit sworn on 16th May 2023, and filed on 23rd May 2023, the preliminary objection dated 14th November 2022, and the written submissions dated 26th July 2023. He submitted that the application was without basis. It was his submission that the prayers that were being sought had already been determined by the 3 judge bench. This Court, it was urged, couldn’t sit on appeal against their decision. He submitted that the 1st Interested party was ready and willing to effect the transfer of shares. That hadn’t been done however as there are requirements by the Registrar of Companies that must be adhered to that called for the cooperation of all the concerned parties.
15. On the proposal to appoint PriceWaterhouseCoopers LLP to conduct a forensic audit, Mr Agwara submitted that it wasn’t necessary to do so as the Court’s judgment had settled the extent of the estate. He further submitted that no evidence had been provided showing that the estate was being depleted.
16. Mr Agwara urged that all the beneficiaries had identifiable shares that had been set out in the court’s judgment. There was, therefore, no basis for this Court to order payments of Kes.20,000,000.00. It was denied that the estate had been depleted. It was urged that the distributors had not been completed as Regine had not cooperated with the 1st Interested Party/Respondent. Counsel also denied that the 2nd Interested Party/Respondent was deceased.
17. The 1st Interested thus submitted that the application should be dismissed.

Analysis and Determination

18. I have read the application as well as the response by the 1st Interested Party/Respondent. The judgment of the three judge-bench of this Court was comprehensive and addressed all the issues in dispute between the parties herein and gave very pertinent directions.
19. This Court is thus of the opinion that it can only address issues arising out of the said judgment. In doing so, it must not be seen to be sitting on appeal against the same.
20. As the Interested Parties/Applicants have raised a preliminary objection, I must consider what the scope of such an objection is and whether, in the circumstances of this case, the objection is warranted.
21. A preliminary objection must be on a point of law. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 Law JA, as he then was, said:-

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may



dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 of the said decision Sir Charles Newbold, P. added the following:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

22. Based on the above decision, I do not think that the preliminary objection raised herein has merit. I dismiss the same. I do not, in any event, see how an application seeking to enforce a judgment can be said to be an appeal against the said judgment.
23. As earlier stated the judgment would appear to me to have settled all the matters that were hitherto outstanding between the applicants and the respondents. In my view, that includes the question as to whether the 1st Petitioner/Applicant is entitled to compensation following the destruction of her house.
24. Should I appoint PriceWaterhouseCoopers LLP to conduct a forensic audit of the deceased's estate? In my view, this would be premature. Section 83 of the *Law of Succession Act* requires administrators, at the end of the administration process to provide accounts of the estate. The said section provides as follows:-

Personal representatives shall have the following duties-

- (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.



- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

25. [*In re Estate of Julius Mimano\(Deceased\)*](#) [2019] eKLR Musyoka J discussed the scope of the said section and observed that:-

“.....section 83 of the Act has imposed a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries.”

26. The distribution of the estate of the deceased person herein is not complete at this point. Once the deceased’s estate is fully distributed, the administrators will have the duty of providing this court with a statement of account. In the event that the statement discloses misconduct on the part of the 1st Administrator/Respondent, the court, at that point, would be justified to order a forensic audit. For that reason I decline to grant prayer (b) of the application.
27. The judgment of the Court was delivered on 25th March 2022. In accordance with paragraph 241 (vii), shares in the companies the deceased had interests in were meant to have been transmitted within 90 days. Nothing of the sort has been done. In my view, the blame for this would appear to be on the interested parties. As the people in effective control of the said assets, they ought to have effected the transfers within the timeline ordered by the Court. I have not seen a reasonable explanation for their failure. In any case, had there been a difficulty they had the option of applying to this Court for an appropriate remedy. They failed to do so.
28. Even if one were to ignore for a moment the clear directions of the court, section 83 of the [*Law of Succession Act*](#) required the administrators to complete administration within six months. More than a year has elapsed since their appointment. This failure would appear to me to be attributable to the 1st Interested Party/Respondent as he has effective control of the same.



29. During the hearing of the application, the Court noted that the 1st interested party/respondent had been paying school fees with considerable difficulty. As a matter of fact, the fee balance was paid when the matter was pending hearing. There was at least one occasion where the 1st interested party/respondent, Haroon Butt, issued a cheque that was dishonoured upon presentation. There was no explanation for the failure on the part of the 1st Respondent, as the trustee of the two minor children, to meet his obligation. His conduct prejudiced the children's education and welfare and was not in their best interest. The children would appear to me to be leading precarious lives and must be protected by the court. Although the conduct of the 1st interested party/respondent justifies his removal as the children's trustee, the Court will give him a second opportunity to redeem himself.
30. Based on the foregoing, and in the interests of justice, I order as follows: -
1. Pursuant to the judgment of this Court's 3-judge bench, delivered on 25th March 2022, I order that the estate of the deceased be distributed to the beneficiaries within 60 days of the date of this ruling. In the event that this is not done, the 1st Interested Party/Respondent will be removed as an administrator of the estate;
 2. I order that pending the conclusion of the distribution of the estate of the deceased, the 1st Petitioner/Applicant be paid Kes.250,000.00 per month by the 1st Interested Party/Respondent for her upkeep and maintenance as well upkeep and maintenance of her children;
 3. I further order that all school fees arrears be paid in full forthwith;
 4. The cause will be mentioned to ascertain progress and for further orders on 27th November 2023; and
 5. Each party shall be at liberty to apply.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Agwara for the 1st & 2nd Interested Parties/Respondent;

Ms. Samba for the 1st and 2nd Petitioners/Applicants; and

