



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 395 of 2014

REGINE BUTT 1ST PETITIONER

ROSELINDER GUDRUN OSTERTAG 2ND PETITIONER

-AND-

HAROON BUTT 1ST INTERESTED PARTY

AKHTAR BUTT 2ND INTERESTED PARTY

CONSOLIDATED WITH

SUCCESSION CAUSE NO. 301 OF 2014

REGINE BUTT.....1ST PETITIONER

ROSELINDE GUDRUN OSTERTAG.....2ND PETITIONER

AND

HAROON SHAHID BUTT 1ST INTERESTED PARTY

AKHTAR SHAHID BUTT 2ND INTERESTED PARTY

CONSOLIDATED WITH

HIGH COURT CIVIL CASE NO. 8 OF 2014 (O.S)

REGINE BUTT PLAINTIFF

-VERSUS-

HAROON BUTT 1ST RESPONDENT

AKHTAR BUTT 2ND RESPONDENT

IN THE MATTER OF THE ESTATE OF SHAHID PERVEZ BUTT (DECEASED)

(Coram: E. Ogola, P.J.O. Otieno, & N.Mwangi, JJ)

JUDGMENT

1. This is a Ruling for the consolidated causes herein in which the main cause of action regards the estate of the deceased. There are three applications considered in this consolidated cause and for purposes of clarity, we will deal with them in the order in which they were filed. Following the consolidation, the Court directed that the consolidated causes be heard as Succession Cause No. 395 of 2014.

2. The deceased, a businessman in Mombasa died intestate of 11th July, 2014. At the time of his death, he was married to two wives, Akhtar Shahid Butt (the 2nd Interested Party, hereinafter, called Akhtar) and Regine Bradler Butt (the 1st Petitioner, hereinafter, called Regine) and had the following children, Haroon Shahid Butt (the 1st Interested Party, hereinafter, called Haroon), Taseen Shahid Butt, and Aleena Shahid Butt (both minors).

3. Pursuant to his death, Succession Petition No. 301 of 2014 was filed by Regine and Roselinde Gudrun Ostertag (2nd Petitioner) praying for Letters of Administration Ad Coligenda Bona under Section 67 of the Law of Succession Act.

4. Further, Regine in HCCC No. 8 of 2014 (O.S) vide an application dated 8th September, 2014 sought to know whether house no. 1 situated of Mombasa/MN/1371 Mkomani Road Mombasa (hereinafter, referred to as 'Mkomani house') was matrimonial home for the deceased and Regine and whether she could be lawfully evicted from that house by the interested parties.

5. Further, on 16th September, 2014 a Petition for Grant of Letters of Administration Intestate was filed by the Petitioners in this cause (Succession Cause 395 of 2014).

6. Clearly, these causes raise similar issues with the common denominator being the deceased and his estate. These causes have given rise to three Applications, the subject of this determination. The Applications, in the order of their filing, are as follows: -

i. The Originating Summons dated 28th April, 2016 (hereinafter, '1st application') filed by Akhtar Shahid Butt seeking the following orders: -

a) *Spent;*

b) *Spent;*

c) *A declaration that the 2nd interested party is the rightful and beneficial owner of half of the estate of Mr. Shahid Pervez Butt (deceased) acquired prior to July 2009;*

d) *The Honorable Court be pleased to allocate half of the Estate of the Late Mr. Shahid Butt (Deceased) acquired prior to July 2009 to the 2nd interested party and the balance, therefore, be distributed to the beneficiaries within the applicable laws;*

e) *The honourable court be pleased to issue any such orders it may deem appropriate in the circumstances; and*

f) *Costs of this application be provided for.*

7. The Originating summons was premised on the grounds set out on the face of the Summons and the Supporting Affidavit of Akhtar. The gist of the application is that Akhtar was married to the deceased during which marriage they established a business together that grew into a corporate entity (Modern Coast Builders Company Limited) which in turn helped finance the incorporation of other companies. To the Applicant, those companies in which the deceased held shares are separate and distinct from the deceased, not part of his estate, and that the shares of the deceased in the companies and any other property owned by the deceased is matrimonial property the acquisition of which she contributed hence, there are matrimonial property, to which she is entitled to half share.

8. It was submitted by Akhtar that this Application was not opposed and that it should be granted as prayed. However, Mr. Kaluma, learned counsel for the Petitioners objected to that Submission stating that they had filed a response in opposition to the same dated 2nd March, 2020. We have had the liberty to peruse the files before the Court and we have failed to sight the said response save for Further Submissions on the Application for review and the Matrimonial Property action filed on the same date. In our views, however, the issues raised in this application are adequately covered by the totality of documents filed in this cause.

ii. The Interested parties filed a Notice of Motion application dated 1st November, 2017 (hereinafter, '2nd Application') under Civil Cause No. 8 of 2014 (O.S). They seek the following orders: -

a) *Spent;*

b) *The honorable Court be pleased to review, vary and/or set aside the ruling and orders made by the Honorable Lady Justice Thande on 18th February, 2016;*

c) *The Honorable Court be pleased to issue such other or further orders as it shall deem just in the circumstances; and*

d) *The costs of this application be provided for.*

9. The application is premised on the grounds on the face thereof and the Supporting Affidavit of Akhtar in which it is averred that the orders of the Court were made on the basis that the interested parties had in disobedience of the Court orders carried out the demolition of the house

erected on the suit property MN/1/1371 Mkomani. According to the interested parties, the Court failed to take into account that the County Government of Mombasa had confirmed having demolished the subject house as such it was clear that the applicants did not carry out the said demolition; further that the Court failed to consider that the Mkomani house is registered in the name of a third party by the name Blue Bells Properties Limited and therefore, in making the order for reconstruction of the said premises, the Court failed to consider that, the owner of the Mkomani house is Blue Bell properties Limited who has to engage an architect and an engineer to prepare the architectural and structural drawings which require approval by the County Government of Mombasa, the National Environment and Management Authority who would consider the Environmental Impact Assessment and other relevant agencies.

10. This application was opposed by Regine vide her Further Affidavit in support of the Summons for Confirmation. The Petitioners urged the Court to dismiss the Application being an abuse of the Court since the matter was already before the Court of Appeal, and this Court no longer has the jurisdiction in the matter. The Petitioner aver that if the interested parties face any challenges in complying with the Court Order for the reconstruction of the Mkomani house, the issues should be placed before the Court of Appeal.

iii. The Petitioners filed summons for confirmation of grant dated 16th January, 2018 (hereinafter, '3rd Application') seeking orders that: -

a) *The grant of letters of administration intestate made to Regine Butt and Haroon Butt on 3rd November 2017 be confirmed;*

b) *This Honourable Court distributes the deceased's estate among the children and dependents;*

c) *Roselinde Gudrun Oestertag and Regine Butt be appointed trustees of such fair bequests as shall be made in favour of Aleena Shahid Butt (5 years) and Taseen Shahid Butt (7 years). The deceased's children herein;*

d) *Such other or further orders as the Honourable Court will deem fit and just to secure the ends of justice between those beneficially entitled to the estate in the circumstances of this cause; and*

e) *Costs.*

11. The grounds of the Summons are contained in the affidavit of Regine, in which she depones that on 3rd November, 2017 a Grant of Letters of Administration of the estate was made to her and Haroon. She deposed that the deceased is survived by dependents; Aleena Shahid Butt, the deceased's daughter, Taseen Shahid Butt, the deceased's son (both minors), Haroon, the deceased's son, Akhtar the deceased's separated wife and Regine, the deceased's wife. The deponent asserts that until his death on 11th July, 2014, the deceased last known residence was the Mkomani house. She further deposed that on 13th June, 2009 she got married to the deceased in the Mkomani house and that is where they established their matrimonial home and that she did not know Akhtar, as she had separated from the deceased in 2005.

12. Regine further deposed that in the course of her marriage to the deceased, she learnt that there had been disputes between the deceased and Akhtar which disputes were litigated in; **Mombasa Kadhis Court Civil Suit No. 63 of 2005, Akhtar Butt vs. Shahid Pervez Butt and Rokaya Esmail, Mombasa High Court Civil Suit No. 93 of 2006 (O.S), Winding up Cause No.2 of 2006, In the matter of Blue Bell Properties Ltd, Akhtar Butt vs. Shahid Pervez Butt and Rokaya Esmail, and Winding up Cause No. 3 of 2005, In the matter of Modern Coast Builders and Contractors Ltd**, that went up to the Court of Appeal. According to Regine, these cases have been determined, and the deceased was ordered to maintain Akhtar and in so doing to pay her housing rent, medication, clothing, and a provision of a car. She averred that the deceased complied with the Court Orders until his death.

13. Regine deposed that during the subsistence of her marriage, she occasionally lived with Haroon, who at that time was a student in London. She averred further that she also extensively renovated the Mkomani house into an ultra-modern property.

14. According to Regine, the deceased had acquired, taken possession of, and developed LR No. 209/6209, Kitui Road Industrial Area, Nairobi to use as his workshop, offices and yard in Nairobi but the deceased died before a transfer was complete. It was alleged that the value of this property is Kshs. 500,000,000.00. She added that the deceased decided that Haroon, who had by then returned to Kenya, was to relocate to Nairobi to assist with the family business. Consequently, the deceased purchased an apartment unit on plot No. LR. Numbers 209/12938 and 209/6438, Parklands, Nairobi in which Haroon was to live with his wife.

15. Regine states that when she got married to the deceased, he was already engaged in long-haul goods transportation business using trucks and banked with Equatorial Commercial Bank Limited with which he had loans secured by his assets/motor vehicles registered in the names of his companies. The companies are as follows: - *Modern Coast Express Ltd, Modern Coast Courier Ltd, Modern Coast Builders & Contractors Ltd Vantage Road Transporters Ltd, Vantage Point Clearing & Forwarding Ltd, Blue Bell Properties Ltd, Pirbhai Jivanjee and Company Limited, Modern Coast Road Transporters Limited and Premac Properties Ltd.*

16. Regine states that although the deceased died a tycoon, he had no bank accounts or property registered in his own personal name. Instead, the deceased registered his properties in the names of his companies or close relatives and used them as personal property without restrictions. The following are the alleged companies.

Blue Bell Properties Limited (C577833)

17. According to Regine, this company was acquired on 18th February, 1994 in order to hold the Mkomani house but the company did not trade and the deceased purchased shares from the original subscribers, allocated one share to Akhtar and one other share to himself. She added that in the deceased Affidavit sworn on 6th October 2006 in opposition to Winding Up Petition No. 2 of 2006: In the Matter of Blue Bell Properties Ltd brought by Akhtar, the deceased deposed that he solely purchased the shares in the company and assigned them as above without any contribution from Akhtar and that Akhtar never met and did not even know the person whose share in the company the deceased

had purchased. She deposed that the annual returns in respect of Blue Bell Properties Limited were made for the last time on 17th December 2009 and showed the shareholding structure to be; the deceased- 51 shares; Akhtar- 12 shares; Haroon- 25 shares; and Rokaya- 12 shares.

Modern Coast Builders & Contractors Ltd (C63540)

18. This company was incorporated on 24th February, 1995 to engage in long-haul transportation business with Mombasa/Block XII/2, Lumumba Road, registered in the name of Pirbhai Jivanjee and company Limited, as its registered office. Regine stated that at the time of incorporation of the company, the deceased assigned 500 shares to Akhtar and the other 500 shares to himself. The last annual returns filed in respect of the company were made on 14th August, 2013 and showed the shares structure as follows; the deceased- 350 shares, Akhtar- 100 shares; Haroon- 150 shares. Regine pointed out that in the deceased's Further Affidavit sworn on 8th June, 2005 in opposition to Winding Up Petition No. 3 of 2006: In the Matter of Modern Coast Builders & Contractors Ltd brought by Akhtar, Akhtar was allocated shares merely to meet the requirement of the repealed Companies Act and did not contribute anything towards the shares in the company.

Pirbhai Jivanjee and Company Limited (C1531)

19. According to Regine, the company was acquired on 1st June, 1995 by purchase of all shares from its incorporators but it did not trade or do any business but was only used to acquire and hold the plot known as Mombasa/Block XII/2, Lumumba Road which the deceased used as the registered office and official address for the companies. Upon acquisition of the company, the deceased assigned 295 shares to himself and 5 shares to Akhtar. Regine further deposed that the last annual returns were made on 30th November, 2012 where the share structure appear as follows: the deceased- 280 shares; Akhtar- 5 shares, Rokaya- 5 shares; Harun Shahid Butt (Non- Director Shareholder)- 10 shares.

Vantage Point Clearing and Forwarding Ltd (C84258)

20. According to Regine, this company was incorporated on 29th January, 1999 to engage in clearing and forwarding business and the shareholding upon incorporation was as follows: the deceased- 95 shares and 5 shares to one Javed Iqbal. She further deposed that in the last annual returns the shareholding structure was as follows: the deceased- 748 shares, Akhtar- 5 shares, Rokaya- 45 shares, Haroon- 200 shares, Mohamedarif Ahmed -1 share, Osman Addulaziz Esmail- 1 share.

Modern Coast Road Transporters Limited (C113549)

21. Regine deposed that this company was incorporated on 25th October, 2004 and upon incorporation, the deceased assigned shares as follows: - the deceased- 585 shares, Harun Butt-10 shares, Dhaniram Dogra- 5 shares.

Vantage Road Transporters Ltd (C113386)

22. Regine further deposed that this company was incorporated on 10th November, 2004. The deceased used the company to acquire and hold Mombasa/Block XII/4, Lumumba Road, that he used as a parking yard for company vehicles. Upon incorporation, the deceased assigned shares as follows: the deceased- 585 shares, Harun Butt- 10 shares, Dhaniram Dogra-5 shares. Regine deposed that in the last annual returns the shareholding was as follows: the deceased- 585 shares; Harun Butt -10 shares, Dhaniram Dogra- 5 shares, Rokaya -5 shares, Mohamed Malik -5 shares.

23. As per Regine's deposition, Plot MN/VI/49, Port Reitz, Mombasa was acquired on 8th June, 2011 in the name of Vantage Road Transporters Limited and before his sudden demise, the deceased had personally negotiated a settlement with the National Land Commission (NLC) towards the compulsory acquisition of the property and was only awaiting receipt of payment of compensation which had been allegedly agreed at Kshs. 245,000,000.00. She deposed that immediately after the brutal killing of the deceased, the records in respect of the title to the said plot was altered to show that it was now owned by the deceased and Haroon. According to Regine, Haroon hastily proceeded to claim and receive the payment from the National Land Commission, before succession proceedings. Regine further claims that Haroon has retained this payment and is seeking to disinherit and deprive the estate of what belongs to it for the following reasons:- that the deceased purchased the plot in the year 2011 when Haroon was settling back in the country and had no money of his own to purchase or contribute towards the purchase of the plot; that in 2012 when the purported transfer of the property was done from Vantage Road Transporters to the deceased and Haroon, the shareholding and directorship of Vantage Road Transporters Ltd was and remains as earlier mentioned; that the records from the department of lands show alterations were made thereon to insert '(1)', and, '(2)' and 'As Joint' in the Entry 18 in which it is purported that the deceased and Haroon owned the said plot; that if at all, Haroon holds the plot then he does so in trust for the deceased, the deceased's children and the deceased's lawful dependents.

Modern Coast Express Ltd (C145511)

24. According to Regine, this company was incorporated on 2nd October, 2007 to engage in luxury passenger transport business across East Africa. Upon incorporation, the share structure of the company was as follows: the deceased -85 shares, Haroon -13 shares, Mohamed Arif Ahmed-1 share, Osman Abdulaziz Esmail -1 share.

Modern Coast Courier Ltd (C151918)

25. Regine further deposed that this company was incorporated on 2nd May, 2008 to engage in courier business across East Africa. The deceased used vehicles registered in the name of this company to do his businesses and only registered a few vehicles/motorcycles in the name of this company for local deliveries. Upon incorporation the share structure was as follows; the deceased- 90 shares, Haroon- 7 shares, Mohamedarif Ahmed- 1 share, Osman Abdulaziz Esmail- 1 share, Mohamed Ahmed Malik- 1 share.

Premac Properties Ltd

26. Regine deposed that this company was acquired to engage in real estate business but did not carry out any business.

27. Regine deposed that the directors of the aforesaid companies were either the deceased relatives or employees, and that the deceased determined the shareholding and directorship of the companies each time at will without adhering to corporate formalities. She further alleged that the deceased caused each person he had assigned as a shareholder in the companies to sign a blank Share Transfer Form in his favour. She further contends that at the beginning of operation of the passenger transport and courier delivery firms, bus fares and incomes were being delivered to the deceased at his Mombasa office from all branches/offices of the companies and with time the deceased opened bank accounts at all branches where the companies operated to facilitate easy depositing of incomes from the said businesses. Hence, the deceased was the owner, sole controlling hand, and majority shareholder of the aforementioned companies. According to Regine, the records delivered by the Registrar of Companies and filed in Court in respect of the companies confirm that Haroon and Akhtar aided by their Advocates attempted to alter the shareholding and directorship of the companies immediately after the deceased died to diminish the estate's shareholding and stake in the companies and thereby undermine the interest of those beneficially entitled.

28. Regine deposed that the deceased invested and purchased several properties in the names of Haroon and Taseem Shahid Butt (minor) as follows: -

- i. Plot No. 7114 (Original Number 538/35) and Plot No. 7117 (Original Number 538/38), Malindi Municipality, Kilifi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) both measuring 1.1980 hectares.
- ii. Plot No. 7118 (Original Number 538/39) Malindi Municipality, Malindi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.6130 hectares
- iii. Plot No. 7119 (Original Number 538/40) Malindi Municipality, Kilifi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.3817 hectares
- iv. Plot No. 7120 (Original Number 538/41) Malindi Municipality, Kilifi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.3817 hectares
- v. Plot No. 7121 (Original Number 538/42) Malindi Municipality, Kilifi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.6224 hectares
- vi. Plot No. 7122 (Original Number 538/43) Malindi Municipality, Malindi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.6319 hectares
- vii. Plot No. 7124 (Original Number 538/45) Malindi Municipality, Malindi District; purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.3817 hectares
- viii. Kilifi/Kawala "A" Kadzonzo/32: purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%), measuring 4.05 hectares
- ix. Apartment in Taarifa Suites on LR. Numbers 209/12938 and 209/6438, Parklands, Nairobi
- x. Apt.3, Behrendstr/Glinkastr.10117 Berline-Mitte purchased in the name of Haroon Butt from Ari Property UG (haftungsbechrant, Berlin) purchased on 15th August, 2011 at 291,281.00 Euros.
- xi. Frakonia Euroban VersAM Stadtpalais behenstrape gmbh purchased in the name of Haroon Butt from Ari Property UG, Berlin and transaction completed on 27th July, 2014 at 122,500.00 Euros.
- xii. Apartments with Living 106; Berline Capital Investments
- xiii. Investment Policy No. xxxxxx; Account No. xxxxxxxxxx(USD) with Royal London 360, Royal London House, Isles of Man Business Park, Cooil Road, Douglas, Isle of Man, IM2 2SP, British Isles in the name Shahid Pervez Butt and Haroon Shahid Butt.
- xiv. Monies/Investments in Account No. xx-xxxx-xxxxxx held in Sun Life Financial Investments(Bermuda) Ltd, Victoria Hall, 2nd Floor, 11 Victoria Street, Hamilton HM 11, Bermuda, in the names of Shahid Pervez Butt and Haroon Shahid Butt

29. Regine deposed that Haroon had not worked and had no means from which he could have purchased the properties, and Taseem Shahid Butt was 3 years old. She stated that the monies held in the above accounts, the investments, and properties comprise the estate of the deceased. According to Regine, Haroon and Taseem Shahid Butt were mere trustees thereof for the benefit of the deceased's lawful dependents.

30. Further to these, Regine deposed that the deceased operated several bank accounts including: -

- i. Kenya Shillings Account No. xxxxxxxxxx: Standard Chartered Bank: Modern Coast Express Ltd, Treasury Square Branch, Mombasa

- ii. Kenya Shilling Account No: xxxxxxxxxxxx: Standard Chartered Bank: Modern Coast Express Ltd, Treasury Square Branch, Mombasa.
- iii. Euro Account No. xxxxxxxxxxxx: Standard Chartered Bank: Modern Coast Express Ltd, Treasury Square Branch, Mombasa.
- iv. Kenya Shillings Account No. xxxxxxxxxxxx: Standard Chartered Bank: Modern Coast Builders & Contractors Ltd, Treasury Square Branch, Mombasa.
- v. Dollar Account No. xxxxxxxxxxxx: Standard Chartered Bank: Modern Coast Builders & Contractors Ltd, Treasury Square Branch, Mombasa.
- vi. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Express Ltd (KES).
- vii. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Total Petrol Station(KES)
- viii. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Couriers Ltd (KES).
- ix. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Builders and Contractors Ltd (KES).
- x. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Builders and Contractors Ltd(USD)
- xi. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Vantage Point Clearing and Forwarding Company Ltd(KES)
- xii. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Vantage Point Clearing and Forwarding Company Ltd(USD)

31. According to Regine, from the year 2010, the deceased would convert income from his businesses into foreign currency for the purchase of plants, machinery, vehicles, and investments outside the country, and by the year 2013, the deceased's foreign investments had greatly increased as he would send out at least US\$50,000.00 each month into bank accounts in his name with Haroon or in the name of Haroon alone. The monies would then be put into real estate and other financial investments, mainly through international banks and insurance firms. Regine contends that Haroon has continued this trend upon the demise of the deceased. She has listed some of the accounts used in the investments transacted as follows:-

- i. Monies in Account No. xxxxxxxx, Standard Chartered Limited, Jersey Branch, P.O Box 841,15 Castle Street, St. Helier, Jersey, Chanel Islands in the name of Shahid Butt and Haroon Butt.
- ii. Investments under contract No. xxxxxx 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.
- iii. Savings in Standard Chartered Bank Account No. xxxxxxxxxxxx, Treasury Square Mombasa in the Name of Shahid Pervez Butt &/ OR Haroon Shahid Butt.
- iv. Monies/Investments in Account No. xx-xxxx-xxxxxx held in Sun Life Financial Investments (Bermuda) Ltd, Victoria Hall, 2nd Floor, 11 Victoria Street, Hamilton HM 11, Bermuda, in the names of Shahid Pervez Butt and Haroon Shahid Butt.
- v. Apt. 3, Behrendstr/Glinkastr. xxxx Berline- Mitte purchased in the name of Haroon Butt from Ari Property UG (haftungsbechrant, Berlin) purchased on 15th August, 2011 at 291,281.00 Euros.
- vi. Frankonia Euroban VersAM Stadtpalais behrenstrape gmbh completed in the name of Haroon Butt from Ari Property UG, Berlin on 27th July, 2014 at 122,500.00 Euros.
- vii. Investments Policy No. xxxxxxxx; Account No. xxxxxxxxxxxxxx(USD) with Royal London 360, Royal London House, Isles of Man Business Park, Cooil Road, Douglas, Isle of Man, IM2 2SP, British Isles in the name Shahid Pervez Butt and Haroon Shahid Butt.
- viii. HSBC Bank, Account No. xxxxx-xxxxxx: Haroon Shahid Butt, 27, Gloucester, London, WIU 8HU.
- ix. Savings and investments in xxxxxxxxxxxxxx in the Name of Haroon Butt.
- x. Monies in Account No. xxxxxx, COMMERZBANK in the name of Haroon Shahid Butt.

32. Regine deposed that due to criminal investigations against the deceased sometime in 2013, local banks were reluctant to maintain accounts with the deceased, and some accounts were forcefully closed. So, in order to operate his businesses unhindered, the deceased operated other bank accounts in the names of his companies and close relatives. The accounts are listed as follows:-

- i. Account No. xxxxxxxxxxxx, National Bank of Kenya, Nkrumah Branch: Modern Coast Builders and Contractors Ltd (KES).
- ii. Account No. xxxxxxxxxxxx, National Bank of Kenya, Nkrumah Branch: Modern Coast Builders and Contractors Ltd (USD).
- iii. Account No. xxxxxxxxxxxx, Imperial Bank Ltd in the name of Shahid Pervez Butt and Regine Butt;
- iv. Account No. xxxxxxxxxxxx, Imperial Bank, Nyali Cinemax Branch in the Name of Haroon S. Butt &/ or Ameera Butt;
- v. Account No. xxxxxxxxxxxx, Standard Chartered Bank in the name of Haroon Shahid Butt;
- vi. Account No. xxxxxxxxxxxx, Standard Chartered Bank, Treasury Square Mombasa in the Name of Shahid Pervez Butt&/ or Haroon Shahid Butt.
- vii. Account No. xxxxxxxxxxxx, HSBC Bank: Haroon Shahid Butt,27, Gloucester, London, WIU 8HU

33. Regine further listed credit cards that the deceased took out in his name and in the name of Haroon. They are as follows: -

- i. Savings in Platinum Card: Membership No. xxxxxxxxxxxxxx with American Express in the name of Shahid Butt.
- ii. Savings in Platinum Card: Membership No. xxxx-xxxx-xxxx with American Express in the name of Haroon Butt.
- iii. Credit Card No. xxxxxxxxxxxxxxxx: Cooperative Bank in the name of Shahid P. Butt
- iv. Credit card No. xxxx xxxx xxxx xxxx with HSBC Bank, London in the name of Haroon Butt.

34. Regine further listed six motor vehicles that the deceased bought in his name, her name and/or Haroon's name. Regine deposed that after the death of the deceased, Haroon and Akhtar used the incomes of the estate to acquire eleven new motor vehicles for themselves. Further to these, Regine deposed that prior to his death, the deceased had negotiated the purchase of 30 brand new buses and 20 trucks with Scania East Africa Limited and had subsequently paid one half of the purchase price, with the balance of the purchase price to be settled thereafter. The deceased and Haroon signed the contract with Scania on behalf of Modern Coast Express Ltd and Vantage Road Transporters Ltd. Regine deposed that she has since learnt that only a few of the said buses and trucks were registered in the names of the deceased's companies, but instead, Haroon incorporated four companies, namely; *-Modern Coast Coaches Ltd, Modern Truckers Ltd, Modern Mail Ltd and Hadar Express Limited into which these buses and trucks have been registered.*

35. According to Regine, Modern Coast Coaches Limited (C185992) was incorporated on 16th April, 2015 with the following shareholding: - Haroon- 80 shares; Akhtar-10 shares; Ameera Rahil Butt (Haroon's wife)- 10 shares.

36. Modern Truckers Limited (C188671) was incorporated on 4th May, 2015 with the following shareholding: - Haroon -800 shares; Akhtar-100 shares; Ameera - 100 shares.

37. Modern Mail Limited (xxxxxx) was incorporated on 11th August, 2015, with the following shareholding: - Haroon- 800 shares; Akhtar-100 shares; Ameera- 100 shares.

38. Regine deposed that Haroon solely depended on the deceased; that Akhtar has always been a housewife and was being maintained by the deceased. Therefore, the two had no means of acquiring assets to register in the names of the four companies aforementioned separate from the income from the deceased's estate. Further to these, Regine deposed that the deceased's employees for Modern Coast Express Ltd and Modern Coast Courier Ltd are the same persons running Modern Coast Coaches Ltd, Hadar Express Limited and Modern Mail Ltd; while the Deceased's employees running Modern Coast Builders and Contractors Ltd. Vantage Point Clearing and Forwarding Company Ltd and Vantage Road Transporters Ltd are the same persons running Modern Truckers Ltd.

39. Regine deposed that there are no new vehicles being purchased in the names of the deceased's companies, but instead, Haroon has been using income generated by the deceased's companies to purchase and register vehicles in the names of his four companies. According to Regine, Haroon and Akhtar have taken control of the deceased's companies and are unlawfully operating and using the vehicles, properties, employees, offices, address, trademarks and corporate brand of the deceased's companies. She deposed that Haroon and Akhtar have further caused the incomes, proceeds and profits of the deceased's companies to be deposited in bank accounts held and maintained in the names of Haroon's four companies, and in their own names, including but not limited to Stanbic Bank Account No. xxxxxxxxxxxx, Chiromo Branch: Modern Coast Coaches Limited. She deposed that Haroon and Akhtar are diverting and converting the funds and assets of the deceased's companies and concealing them from the estate.

40. Regine deposed that Haroon and Akhtar should disclose all bank accounts maintained in the names of Haroon's four companies and in their personal names, in Kenya, Uganda, Tanzania, Rwanda and other countries and render just and true accounts of all the estate so that the estate can be wholly collected and fairly distributed among those beneficially entitled.

41. She further deposed that Haroon and Akhtar have registered vehicles acquired by the deceased but delivered after his death and other vehicles purchased with income from the deceased's companies in the names of Haroon's four companies. She deposed that this is to divert, convert, and conceal from the estate, and disinherit the beneficiaries of the estate. According to Regine, Haroon and Akhtar have registered some of these vehicles in Uganda, Tanzania and Rwanda during the pendency of this succession cause and away from the notice of those beneficially entitled to the estate. She has listed the vehicles and their registration numbers as follows: - 29 motor vehicles registered in the

name of Modern Coast Coaches Ltd; 17 motor vehicles and 7 trailers registered in the name of Modern Truckers Ltd; 10 motor vehicles and 6 motorcycles registered in the name of Modern Mail Ltd; 36 motor vehicles registered in Uganda and Tanzania after the death of deceased. (See paragraph 73 of the Supporting Affidavit)

42. Regine deposed that on 18th February, 2015, this Court issued an interim grant of representation to Haroon, Akhtar, and herself for purposes of identifying and collecting the estate of the deceased and to report to Court thereon. She deposed that she experienced difficulties due to the deliberate acts of diversion, conversion, and concealment of the estate of the deceased by Haroon and Akhtar, hence, she has only been able to ascertain the following assets comprising of the estate pursuant to the interim Grant of representation: -

- i. Plot No. 1371/1/MN. Mkomani Mombasa
- ii. Mombasa/Block XII/4 Lumumba Road, Mombasa, registered in the name of Vantage Road Transporters Limited.
- iii. Mombasa/Block X11/2, Lumumba Road, Mombasa, registered in the name of Pirbhai Jivanjee & Company Limited.
- iv. Plot MN/VI/49, Port Retiz, Mombasa, measuring 4.28 acres/Kshs. 245,000,000.00 received and held by Haroon in proceeds from compulsory acquisition thereof.
- v. LR No. 2009/6209, Kitui Road, Nairobi.
- vi. Plot No. 7114 (Original Number 538/35) and 7117 (Original Number 538/38). Malindi Municipality, Kilifi District: purchased in the Names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%) both measuring 1.1980 hectares.
- vii. Plot No. 7118 (original Number 538/39) Malindi Malindi Municipality, Malindi District: purchased and the Names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.6130 hectares.
- viii. Plot No.7119 (Original Number 538/40) Malindi Municipality, Kilifi District: Purchased in the Names of Taseem Shahid Butt (49%) measuring 0.3817 hectares.
- ix. Plot N0. 7120 (Original Numbers 538/41) Malindi Municipality. Kilifi District: purchased in the Names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.3817 hectares.
- x. Plot No. 7121 (Original Number 538/42) Malindi Municipality, Kilifi District: purchased in the Names of Shahid Pervez Butt (2%), Haroon Butt (49%) and Taseem Shahid Butt (49%) measuring 0.6224 hectares.
- xi. Plot No. 7122 (Original Number 538/43) Malindi Municipality, Malindi District: purchased in the Names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%) both measuring 0.6319 hectares.
- xii. Plot No. 7124 (Original Number 538/45), Malindi Municipality, Kilifi District: purchased in the Names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%) both measuring 0.3817 hectares.
- xiii. Kilifi/Kawala "A" Kadzonzo/32: purchased in the names of Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseem Shahid Butt (49%), measuring 4.05 hectares.
- xiv. Ngumo Partsa/Mazeras/152, measuring 1.5 hectares.
- xv. Ngumo Patsa/Mazeras/156, measuring 5.16 hectares, registered in the name of Modern Coast Builders and Contractors Limited.
- xvi. Plot. No. Mnagoni/Mariakani/330.
- xvii. Maisonette on Plot No. 6562/1/Mainland North.
- xviii. Plot No. 3202, Nyali, Mombasa.
- xix. LR. 209/12060, Nairobi
- xx. L.R 209/21361, Nairobi
- xxi. Interest in. LR No. 209/2267, Cross Road Nairobi
- xxii. Interest in L.R No. 516, Jomo Kenyatta Avenue Mombasa.
- xxiii. Interest in Plot No. 5, Dewiton Street, Kampala
- xxiv. Apt. 3. Behrendstr/Glinkastr. 10117 Berline – Mitte purchased in the name of Haroon Butt from Ari Property UG (Haftungsbechrantk, Berlin) purchased on 15th August, 2011 at 291,281.00 Euros.

xxv. Frankonia Euroban VersAM Stadtpalais behrenstrape gmbh purchased in the name of Haroon Butt from Ari Property UG, Berlin and transaction completed on 27th July, 2014 at 122,500.00 Euros.

xxvi. Apartment in Taarifa Suites on LR. Numbers 209/12938 and 209/6438, Parklands, Nariobi.

xxvii. Investment Policy No xxxxxxxx: Account No. xxxxxxxxxxxxxx, (USD) with Royal London 360, Royal London House, Isle of Man Business Park. Cooil Road, Douglas, Isle of Man, IM2 2sp, British Isles in the name Shahid Pervez Butt and Haroon Shahid Butt.

xxviii. Monies/Investments in Account No. xx-xxxx-xxxxxx held in Sun Life Financial Investments (Bermuda) Ltd. Victoria Hall, 2nd Floor, 11 Victoria Street, Hamilton HM 11, Bermuda, in the names of Shahid Pervez Butt and Haroon Shahid Butt.

xxix. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya. Nkrumah Road Branch: Modern Coast Express Ltd Ltd (KES).

xxx. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Total Petrol Station (KES)

xxxi. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Couriers Ltd (KES).

xxxii. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Builders and Contractors Ltd (KES).

xxxiii. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Builders and Contractors Ltd (USD)

xxxiv. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Vantage Point Clearing and Forwarding Company Ltd (KES).

xxxv. Monies in Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya. Nkrumah Road Branch: Vantage Point Clearing and Forwarding Company Ltd (USD)

xxxvi. Monies in Account No. xxxxxxxxxxxx, National Bank of Kenya, Nkrumah Branch: Modern Coast Builders and Contractors Ltd (KES).

xxxvii. Monies in Account No. xxxxxxxxxxxx, National Bank of Kenya, Nkrumah Branch. Modern Coast Builders and Contractors Ltd (USD).

xxxviii. Saving in standard Chartered Bank Account No. xxxxxxxxxxxx, Treasury Square Mombasa in the Name of Shahid Pervez Butt & OR/Haroon Shahid Butt.

xxxix. Monies in Stanbic Bank Account No. xxxxxxxxxxxx, Chiromo Branch: Modern Coast Coaches Limited.

xl. Monies/Investments under Contract No. xxxxxx with Friends Life Service Limited, P.O Box 1810, Bristol, BS99 5SN: Pixham End, Dorking, Surrey, RH4-iQA, UK in the name of Shahid Pervez Butt.

xli. Monies in Account No. xxxxxxxxxxxx, COMMERZBANK in the name of Haroon Shahid Butt.

xlii. Monies in Account No. xxxxxxxx, Standard Chartered Limited, Jersey Branch, P.O Box 841, 15 Castle Street, St. Helier, Jersey, Chanel Island in the name of Shahid Butt and Haroon Butt.

xliii. Monies in Platinum Card: Membership No. xxxx-xxxx-xxxx with American Express in the name of Shahid Butt.

xliv. Monies in Platinum Card: Membership No. xxxx-xxxx-xxxx with America Express in the name of Haroon Butt.

xlv. Monies in Credit Card No. xxxxxxxxxxxx: Cooperative Bank in the name of Shahid P. Butt.

xlvi. Monies in Credit Card No. xxxxxxxxxxxxxxxxx with HSBC Bank, London in the name of Haroon Butt.

xlvii. HSBC Bank, Account No. xxxxx – xxxxxxxxxxxx: Haroon Shahid Butt, 27, Gloucester, London, WIU 8HU.

xlviii. Savings and Investments in xxxxxxxxxxxxxxxxx in the Name of Haroon Butt.

xlix. Savings in Account No. xxxxxxxxxxxx, Imperial Bank Ltd, Nyalı Cinemax Branch: Shahid Pervez Butt & Or Regine Butt.

- I. Savings in Account No. xxxxxxxxxxxx, Imperial Bank Ltd, Nyali Cinemax Branch: Haroon S. Butt &Or Ameera Butt.
- li. Savings in Account No. xxxxxxxxxxxx, standard Chartered Bank in the name of Haroon Shahid Butt.
- lii. 120 Motor vehicles
- liii. 48 Trailers
- liv. 6 Forklifts
- lv. 3 Rollers/grader/crane/combine harvester
- lvi. 12 Motorcycle
- lvii. All assets/funds held/registered in the name of Modern Coast Express limited.
- lviii. All assets/funds held/registered in the name of Modern Coast Builders and Contractors Limited.
- lix. All assets/funds held/registered in the name of Modern Coast Courier Limited.
- lx. All Assets/funds held/registered in the name of Modern Coast Road Transporters Limited.
- lxi. All assets/funds held/registered in the name of Vantage Road Transporters Limited.
- lxii. All assets held/registered in the name of Vantage Point Clearing and Forwarding Company Limited.
- lxiii. All assets/funds held/registered in the name of Blue Bell Properties Limited.
- lxiv. All assets/funds held/registered in the name of Pirbhai Jivanjee and Company Limited.
- lxv. All assets/funds held/registered in the name of Premac Properties Limited.
- lxvi. All assets/funds held/registered in the name of Hadar Express Limited of P.O Box 21078, Dar es Salaam.
- lxvii. All assets/funds held/registered in the name of Modern Truckers Limited.
- lxviii. All assets/funds held/registered in the name of Modern Coach Coast Coaches Limited.
- lix. All assets/funds held/registered in the name of Modern Mail Limited.
- lxx. Cash monies in Safes at home and in office.
- lxxi. Other assets, properties and vehicles as shall be ascertained in the course of these proceedings.

43. Regine deposed that there are no liabilities on the estate as of 11th July, 2014. She further deposed that Haroon and Akhtar attempted to transfer to themselves all the deceased's property known as Mnangoni/Mariakani/330, and have put notices for the sale of the deceased's property known as Plot No. 3020, situated at Nyali, Mombasa. She stated that immediately after the deceased demise, Haroon and Akhtar took forcible control of the businesses/offices of the deceased and took custody of all documents and information relating to the assets. These comprised the estate that the deceased kept at his office in the Mkomani house. She further deposed that Haroon and Akhtar have engaged in the unlawful operation of the deceased businesses, that the businesses generate income as bus fares and transport charges which Haroon and Akhtar have received from the time, they took control of the deceased's businesses. According to Regine, the passengers' transport businesses and couriers generate between Kshs. 800,000.00 (off-peak seasons) and Kshs. 1,500,000.00 (during peak seasons), the long-haul goods transportation businesses charge and generate income on contract. Regine averred that the said incomes need to be fully accounted for and the unlawful intermeddling in the estate by Haroon and Akhtar stopped to allow the estate to be wholly collected and distributed according to the law.

44. Regine further deposed that immediately after the demise of the deceased, Haroon and Akhtar evicted her from the Mkomani house, carted away her household goods and effects including beds and bedding, furniture, kitchen equipment, utensils, electronics, children's belongings, and effects. They also took away all clothing, articles of personal use and adornment of the deceased. She deposed that Haroon and Akhtar demolished the Mkomani house and have further refused to reconstruct the house despite the Court Orders in HCCC No. 8 of 2014 (O.S): Regine Butt v. Haroon Butt & Akhtar Butt.

45. In addition, she deposed that on 9th October, 2014 Haroon damaged the grave of the deceased which she had constructed for his remembrance and honor. She deposed that Haroon and Akhtar have engaged in unlawful and lavish expenditure that has depleted the estate. According to Regine, Haroon and Akhtar have made it a battle for her children and herself to survive. She deposed that the Court's records will confirm that she sought Court's intervention to secure enforcement of the orders for interim provision made herein and she has had to

keep fighting in Court for her children's school fees and maintenance to be paid in time. Haroon and Akhtar have refused to pay maintenance charges/costs for her car as ordered by the Court.

46. Regine deposed that any bequest, if made to Haroon and Akhtar, should be less the amount required to reconstruct the Mkomani house (Subject to survey and valuation) and the value of the goods standing at Kshs. 65,530,678.62.

47. Regine further deposed that Haroon has failed to faithfully administer the deceased's estate in accordance with the law, and has without any reasonable cause, failed to render just and true account thereof, and is, therefore, unfit to be an administrator of the estate.

48. Regine prays that Roselinde Gudrun Ostertag (her mother) and herself be allowed to hold in trust such fair bequests as shall be made in favour of the deceased's 2 young children; that the Court distributes the property/assets of the Estate thus: 33% to Aleena Shahid Butt and 32% Taseem Shahid Butt to be held in trust by Regine Butt and Roselinde Gudrun Ostertag, 20% to Regine 10% to Haroon and 5% to Akhtar. She deposed that the Court should take into account all relevant factors including depletion and concealment of the estate and benefits so far derived from the estate by Haroon and Akhtar since the demise of the deceased, the special needs of her two young children and the need to do equity to all beneficially entitled.

Response to the Summons for Confirmation of Grant

49. The Interested Parties responded to the application vide a Replying Affidavit dated 2nd May, 2018 and Further Affidavit dated 18th October, 2019 by Akhtar. She deposed that she believes that the estate of the deceased ought to be distributed to the beneficiaries. However, the subject application is ill-advised and cannot be lawfully considered as an application for confirmation of grant for the reasons that the application did not specify the law applicable in the estate considering the fact that the deceased and his beneficiaries are Muslim by faith; that the mode of distribution proposed in the application is unlawful; that the application seeks to distribute properties and assets which do not form part of the estate; that she is entitled to 50% of the estate; that the application comprised baseless allegations and false accusations designed to mislead the Court; that the issues of the estate cannot be determined through affidavit evidence but oral evidence due to the contested nature of the dispute.

50. Akhtar deposed that as per the consent dated 21st March, 2017 the issues to be determined by the bench include: - The applicable law for persons professing the Islamic faith; whether assets that vest in a spouse under and by operation of the Matrimonial Properties Act, 2013 are subject to succession upon the death of a spouse; the law applicable to properties held and registered in the name of a company.

51. She therefore contended that these are the only issues to be determined by this Court. In her view, this Court does not have the jurisdiction to distribute the estate at this stage and that this is not a matter that deserves constitution of a three-judge bench.

52. In further response to the Application, Akhtar deposed that at the time of the deceased demise, he was married to two wives, herself, and Regine; that the deceased had three children, Haroon, Teseen Shahid Butt, and Aleena Shahid Butt. Akhtar deposed that she was not separated from the deceased at that time of his demise. According to Akhtar, the family had their share of problems, which arose from the deceased unfair application of the assets and monies which they had jointly worked for and his use of the same in dating and marrying young girls. She deposed that this was a serious issue for her for the reasons that; she got married to the deceased in 1983 in accordance to the Mohammedan law and they bore Haroon, that during the subsistence of their marriage and they lived modestly and later pooled their joint resources to form and jointly operate Modern Coast Builders & Contractors.

53. According to her, the company was initially registered as a partnership between herself and the deceased but was later incorporated into a limited liability company in 1994 and retained equal shareholding of 50:50 each based on their respective financial contributions. She deposed that with the improved business earnings in 1994, she and the deceased acquired the Mkomani house as their matrimonial home and that they lived harmoniously until 2002 when the deceased married a second wife and took her to the Mkomani house. However, that marriage ended in divorce soon thereafter. The deponent further averred that in 2005 the deceased married a 3rd wife, Rokaya, but they divorced in 2008. Akhtar deposed that the deceased fully provided for her needs till his demise, and that the deceased and her maintained a close relationship, and before his demise, they had agreed that she (Akhtar) would move back into the Mkomani house. She deposed that Haroon always lived together with his father.

54. According to Akhtar, the Mkomani house was renovated in 2007 by the deceased and Haroon because the latter needed a house of his own within the main compound as he had a steady girlfriend. She deposed that Regine came into the picture when the renovations and adjustments were completed.

55. Akhtar deposed that the plot known as LR No. 209/6209, Kitui Road, Industrial Area, was not a property of the deceased but the same was leased from its owners by Modern Coast Express Limited for its business operations.

56. She also deposed that the LR 209/12938 and LR 209/6438 were wholly purchased by Haroon and registered in his name during the lifetime of the deceased, and that the deceased and Regine did not get engaged in May 2008 as alleged but did so in February 2009 after the deceased divorced Rokaya.

57. It was averred that the idea for starting and operating a bus company was made by Haroon in 2005, who then carried out a market survey on the same, but Modern Coast Builders Company Limited did not have sufficient funds to finance the proposed bus business until 2007 when it made sufficient profits and Modern Coast Express Ltd was incorporated on 2nd October, 2007. The first order for the first four buses was made under the said company in December 2007, and the buses operated from the Modern Coast Builders Company Limited offices and were managed by Modern Coast Builders Company Limited staff. The deceased did not contribute any of his personal earnings or assets towards the formation and acquisition of the buses. According to Akhtar, Modern Coast Express Ltd and Modern Coast Courier Ltd, legitimately operated as companies and their business and operations are separate, distinct, and independent to the private affairs of the deceased and his estate.

58. Akhtar deposed that the courier company was part of the transport business to allow charges for the parcels to be made as parcels that could be delivered through the bus. She stated that other than the name and the registration, the courier company depended fully on the assets of Modern Coast Builders Company Limited and the bus company in that it did not have any separate operation or assets other than those of the two companies.

59. According to Akhtar, all the businesses were operated from bank loans which are still being serviced to date. At the time of the deceased death, the bank loan of the business was over Kshs. 350,000,000/= but the companies have continued to service the said loans with the result that the same now stand at just about Kshs 150,000,000.00. She deposed that the deceased received reasonable remuneration for his hard work just like all the other employees of the companies.

60. According to the deponent, Regine was not aware of the formation, acquisition, and operations of the companies as she was only married in July 2009 when all the companies were fully operational. During the subsistence of their marriage, Akhtar and the deceased worked hard in building their company and purchasing the Mkomani home, improved business earnings in the operations of Modern Coast Builders Company Limited and they were able to access bank loans and purchased Pirbhai Jivanjee Limited whose property they used as a yard for the trucks and location for their office. That she said happened between the year 1983 and 2004 and that none of them committed any personal funds towards the formation and acquisition of the subsequent companies.

61. According to the deponent, the deceased did not register any of his personal properties in the name of any of their companies, and that the properties owned and registered by the companies were wholly acquired by the companies for the said companies' business operations and advancement. Neither she nor Haroon are aware of the alleged names of the close relatives through whom the deceased allegedly maintained or operated bank accounts maintaining that the bank accounts of the said companies were operated regularly, and the deceased did not have an unhindered control as alleged. In any event, she asserted, at all times the companies operated current accounts with huge overdraft facilities, and that the suggestion that the companies were operated irregularly with the deceased having unfettered control over the companies' finances and bank account is false. She reiterated that the interest of the deceased in the said companies was limited to his shares and the monthly salary he received from the subject companies. According to Akhtar, the deceased did not acquire Blue Bell Properties Limited, but the said company was acquired using the proceeds from Modern Coast Builders Company Limited.

62. Akhtar dismissed the contents of the Affidavits exhibited in the Supporting Affidavit to the Summons for Confirmation of Grant as not having probative value. She further deposed that the alleged annual returns of 17th December, 2009, 14th August, 2013, 30th November, 2012 and all other returns relied on by Regine are falsified and do not represent the true shareholding of the company and that the lawful and legitimate position of the respective shares as held in the respective companies is that the deceased had 50% and Akhtar 50% shareholding. She deposed that the deceased and her had never agreed and /or passed a resolution to change the shareholding of the companies, reiterating that Regine was not present at the time of the acquisition and/or incorporation of the subject companies, she has never been a shareholder and/or a director of any of the companies and is a stranger to the operations of these companies. She deposed that the Registrar of Companies' records sought to be relied on by Regine do not represent the actual shareholding in the companies because the said records had been irregularly interfered with during her dispute with the deceased in 2006 and maintained that the companies' shareholding have never been lawfully and regularly changed from the date of their acquisition and/or incorporation.

63. Akhtar further deposed that the deceased did not acquire Pirbhai Jivanjee & Company Ltd, Vantage Point Clearing and Forwarding Limited, Modern Coast Road Transporters Limited as alleged. According to her, Pirbhai Jivanjee & Company Ltd was acquired using the proceeds from Modern Coast Builders Company Limited, for purposes of providing a yard for the operation of Modern Coast Builders Company Limited. The company was owned equally between herself and the deceased.

64. It was further deposed that plot No. MN/VI/49 Port Reitz; Mombasa was acquired using funds from Modern Coast Builders Company Limited for purposes of improving Modern Coast Builders Company Limited's operations at the port. It was meant to be used for the construction of a warehouse close to the port to store cargo due for transportation by Modern Coast Builders Company Limited and to ease loading on the Modern Coast Builders Company Limited trucks. She deposed that once the property was acquired by Modern Coast Builders Company Limited in the name of Vantage Road Transporters Limited on 8th June, 2011, the deceased and Haroon decided to acquire the property from Vantage Road Transporters in December 2011 by reimbursing Modern Coast Builders Company Limited the funds applied towards the acquisition of the said property. Upon full payment of the funds, the property was on 18th January, 2012, transferred and registered in the name of the deceased and Haroon as joint owners having been acquired in November 2011. She further stated that on 13th March, 2012, the Government advertised under Kenya Gazette Notice No. 3229, its intention to acquire the said property which was identified and determined to be jointly owned by the deceased and Haroon. Although the intention to acquire was gazetted in March 2012, the actual acquisition process commenced in 2013 but the same was not followed through as the deceased and Haroon challenged the amount offered by the Government. Akhtar deposed that at the time of the deceased's death, the acquisition had not taken place as the parties had not reached an agreement, and that after the demise of the deceased, the ownership of the said property lawfully passed to Haroon as the sole proprietor. She added that sometime in July 2014, Kenya Ports Authority, The National Land Commission and Haroon met and agreed on the acquisition and compensation and in August 2014 the compulsory acquisition took place.

65. Akhtar deposed that she is not aware of the company known as Premac Properties Ltd and that the same is not part of the companies incorporated or acquired from the property and profits of Modern Coast Builders Company Limited, and that she is also a stranger to the allegation that the deceased made people execute blank transfers in his favour as neither she nor Haroon ever executed blank transfers as alleged or at all.

66. According to Akhtar, the companies' income was never delivered to the deceased as he was not the accountant of the companies, which had bank accounts and professional accountants who oversaw their incomes, and the income from the companies was used to settle the Bank loans and to pay running expenses including salaries and allowances for the deceased and Haroon.

67. The deponent avers that she is not aware of the property known as Kilifi/Kawala "A" Kadzonzo/32 but affirms that LR 209/12938 and 209/6438 belong to Haroon as he purchased them during the lifetime of the deceased. She deposed that Apt.3, Behrendstr/Glinkastr.10117 Berline-Mitte purchased in the name of Haroon from Ari Property UG (haftungsbechrant, Berlin) purchased on 15th August, 2011 and

Frakonia Euroban VersAM Stadtpalais behrenstrape gmbh purchased in the name of Haroon Butt from Ari Property UG, Berlin and transaction completed on 27th July, 2014 do not belong to the deceased but to Haroon who acquired them during the lifetime of the deceased. She further deposed that Investment Policy No. xxxxxxxx; Account No. xxxxxxxxxxxxxx(USD) with Royal London 360, Royal London House, Isles of Man Business Park, Cooil Road, Douglas, Isle of Man, IM2 2SP, British Isles and Monies/Investments in Account No. xx-xxxx-xxxx held in Sun Life Financial Investments (Bermuda) Ltd, Victoria Hall, 2nd Floor, 11 Victoria Street, Hamilton HM 11, Bermuda were liquidated by the deceased before his death.

68. Akhtar states that Haroon started working in the companies at the age of 12 years and became a director in 2004. He went for studies in the UK to improve his management skills and general administration of the companies and continued to work even while in school. He worked during all the school holidays and became full time manager of the companies in the year 2008 when he finalized his studies. He has earned his own resources and is in a position to invest and acquire properties jointly owned between himself, Taseem Shahid Butt and the deceased. She further deposed that the purported bank account of the various companies stated therein do not form part of the deceased's estate.

69. Akhtar further deposed that the deceased did not operate the bank accounts, investments, and investment policies outlined below: -

- i. Monies in Account No. xxxxxxxx, Standard Chartered Limited, Jersey Branch, P.O Box 841,15 Castle Street, St. Helier, Jersey, Chanel Islands in the name of Shahid Butt and Haroon Butt.
- ii. Savings in Standard Chartered Bank Account No. xxxxxxxxxxxx, Treasury Square Mombasa in the Name of Shahid Pervez Butt &/ OR Haroon Shahid Butt.
- iii. HSBC Bank, Account No. xxxxxx-xxxxxxx: Haroon Shahid Butt, 27, Gloucester, London, WIU 8HU.
- iv. Savings and investments in xxxxxxxxxxxx in the Name of Haroon Butt.
- v. Monies in Account No. xxxxxxxx, COMMERZBANK in the name of Haroon Shahid Butt.
- vi. Investments under contract No. xxxxxxxx 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.
- vii. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Total Petrol Station (KES)
- viii. Account No. xxxxxxxxxxxx, Cooperative Bank of Kenya, Nkrumah Road Branch: Modern Coast Express Ltd (KES).
- ix. Dollar Account No. xxxxxxxxxxxx: Standard Chartered Bank: Modern Coast Builders & Contractors Ltd, Treasury Square Branch, Mombasa.
- x. Account No. xxxxxxxxxxxx, National Bank of Kenya, Nkrumah Branch: Modern Coast Builders and Contractors Ltd (KES).

70. She deposed that the investigation of the deceased arose from business rivalry, the management of the Muslim Association and his support for the Masjid Sadiki Mosque. The same had nothing to do with monies transferred abroad as alleged and/or at all, and that the Mombasa Chief Magistrate's Court Criminal Miscellaneous No. 282 of 2013, was instigated and the deceased was mysteriously bonded to keep peace without being charged for any offence, his firearms were then confiscated thus leading to his sudden and untimely demise.

71. She further deposed that there was no forced closure of the Standard Chartered Bank account, Treasury Square Branch as alleged by Regine because the deceased continued to receive his salary and allowances and carried out his financial transactions through the said account. At the time of his death, the said account had a sum of Kshs. 1,856,388.49, and added that the deceased did not hold any other account in the name of Haroon or Ameera (Haroon's wife) as alleged or at all.

72. She pointed out that everyone had their own credit cards, that the motor vehicle Registration No. Kxx xxxx was owned by Modern Coast Builders Company Limited and used by the deceased as the Director which Motor Vehicle was badly damaged during the attack leading to the deceased's demise. The said vehicle never at any given time belonged to the deceased as alleged and/or at all. The said vehicle was bought and imported in the name of Haroon but pursuant to a request by the deceased, Haroon allowed Regine to use the vehicle until it developed a series of mechanical problems and became uneconomical to operate. The deceased then gave Regine his private Motor Vehicle Registration No Kxx xxxx and gave to Haroon his Motor Vehicle Reg No. Kxx xxxx. She further stated that Haroon purchased Motor Vehicle Registration No. Kxx xxxx, in the year 2006 before Regine was married and that Motor Vehicle Registration No. Kxx xxxx was purchased by Haroon to celebrate his 26th Birthday. According to Akhtar, the deceased did not purchase any motor vehicle in the name of Haroon or any other person and that Motor vehicle registration no. Kxx xxxx was purchased for her by Haroon and not the deceased. All motor vehicles owned by Haroon, she said, were acquired during the lifetime of the deceased.

73. On the alleged acquisition of 30 buses and trucks, Akhtar in denial, deposed that the deceased never carried out such negotiations nor did he make any payment as alleged. To the contrary, she averred that the companies acquired buses and trucks through bank loans, and following the unfortunate demise of the deceased, the operations of the companies were continuously disrupted by bad publicity as a result of which that the companies could not procure financial facilities as the Banks grew cold feet in any fresh dealings with any company associated with the deceased.

74. Owing to the alleged bad publicity attributed to Regine, it became imperative that new companies be incorporated and were regularly

incorporated as a means and ways of obtaining financial facilities of up to Kshs. 900,000,000.00 which Haroon has used to carry out his business and support the operations of the companies associated with the deceased.

75. According to Akhtar, at the time of the deceased death, the companies associated with the deceased had financial facilities and liabilities in bank loans in excess of Kshs. 400,000,000/= and so the companies decided to concentrate on settling these loans which are now at Kshs. 150,000,000.00. She deposed that Regine had done all within her means to undermine and scuttle the operations of the companies associated with the deceased by engaging in a deliberate negative media campaign which has greatly affected the operations of the companies. She deposed that the introduction of the Standard Gauge Railway Services on the Mombasa – Nairobi route and their highly subsidized price has fundamentally affected the operations of the companies which are mainly in the transport business. Akhtar deposed that the monies used for acquiring assets in the companies belonging to Haroon are financial facilities from the Bank and not monies from the companies associated with the deceased as alleged or at all. She further deposed that all the motor vehicles listed in Regine's Supporting Affidavit aforesaid were regularly acquired and owned by the various companies. Akhtar deposed that the vehicles acquired after the death of the deceased by companies not related to the deceased are not part of the estate and therefore not subject to distribution. She contended that Regine's intention is to disinherit all the beneficiaries of the deceased from his estate, as can be seen from Regine's proposed mode of distribution. She deposed that Regine has declined to co-operate with other family members and has continued to malign and tarnish their names without any evidence and/or plausible reasons.

76. Akhtar deposed that the deceased passed on when the petitioner was on holiday abroad following her return to the Mkomani house. This led to a serious disagreement between Regine and the deceased. The deceased then forced Regine to go for holiday abroad with her children to allow Akhtar settle without unnecessary interference. As a matter of fact, Regine was only given two options, either to accept that the Mkomani house belonged to Akhtar as her matrimonial house and stay with her, or be divorced by the deceased. She deposed that Regine had never participated in the management of any of the companies associated with the deceased and has never held any shares in those companies even during the life of the deceased. Therefore, Regine is a stranger to the affairs of the companies which in any event do not form part of the estate of the deceased.

77. According to Akhtar, Regine had chosen to use her two young children as pawns in seeking attention and sympathy from the Court through peddling falsehood and misrepresenting facts aimed at disinheriting the interested parties. She added that Regine was never evicted from the subject house but voluntarily moved out to stay in her house which is within the said Nyali Estate. Upon her voluntary departure, she quickly rushed to Court to procure orders to evict the Interested Parties from the Mkomani house and under the pretext that she (Regine) had been forcefully evicted from the said house. The Order was denied by the Court in two decisions.

78. Akhtar deposed that the Mkomani house was then demolished in every unclear circumstances in the presence of Regine and in absence of the interested parties who were at the material time out of the country for treatment. She deposed that she was personally admitted in hospital at the material time and was shocked to learn that the house had been demolished. She further stated that after the demolition of the subject house, Regine through her agents, procured an order requiring them to be jailed for three months for allegedly demolishing the Mkomani house, which they were equally ordered to rebuild and also pay to Regine a monthly rent of Kshs. 250,000/=. She contended that the ruling by the Court was patently irregular for which reason they have applied to have the same reviewed or set aside.

79. It was further deposed that Haroon had no interest whatsoever in interfering with his father's grave and that being a practicing Muslim, the graveyard has an attendant who ensures that the same is kept and maintained in accordance to Muslim laws, culture and practices.

80. To the deponent, Haroon ensures that Regine and her children enjoy life and receives huge monthly sums for free which she applies towards a lavish lifestyle and visiting popular entertainment joints in Mombasa and that she (Regine) has made maximum use of the estate and solely enjoyed the same at the expense of all the dependents. It was averred that Regine receives the following payments from the Estate of the Deceased: -

- i. School Fees (per year) - Kshs, 1,059,000.00
- ii. Monthly upkeep - Kshs, 150,000.00
- iii. Monthly school allowance- Kshs, 130,000.00
- iv. Monthly fictitious rent - Kshs, 250,000.000
- v. Alleged Motor Vehicle Repair - Kshs, 1,500,000.000
- vi. Monies from the Deceased A/c - Kshs, 1,856,388.49

81. Akhtar states that Regine receives Kshs. 530,000.00 every month, and that she has equally utilized over Kshs. 4.5 Million which forms part of the estate and that she has unhindered use of Motor Vehicle Registration No. Kxx xxxx. Further Akhtar deposed that Regine took away watches and jewellery belonging to the deceased person which are valued at over Kshs. 45,000,000.00

82. Akhtar denies the allegation that the value of the destroyed house and the items as claimed could reach Kshs. 65,530,678.62. and that in any event, Regine had moved out with all her belongings.

83. Akhtar deposed that Regine should tender evidence confirming that the Motor Vehicle Registration No. Kxx xxxx was part of the estate and that loans have been taken using the assets of the estate as collateral. She asserted that no financial institution can give anyone a loan on the property of a deceased person without confirmed letter of grant.

84. According to Akhtar, Roselinde Gudrun Osterg has no interest in the estate of the deceased, and that based on the conduct and the untruthfulness of Regine, it is fair, just and proper that this Court applies Islamic law which acquires that Regine and Haroon jointly hold in trust whatever bequest made to the minors to be released to them when they attain the age of majority. She added that the mode of distribution proposed therein is completely strange to any law or fact and urged the Court to first determine the estate and the applicable law for purposes of distribution before inviting submissions on the mode of distribution.

85. According to Akhtar, the estate of the deceased as known to her comprises the following: -

- 1) Kshs. 1,856,388.49 held in the deceased's account No. xxxxxxxxxxxx Imperial Bank Ltd
- 2) Motor Vehicle Registration No. Kxx xxxx (Toyota Mark X)
- 3) Motor Vehicle Registration No. Kxx xxxx (Toyota Land Cruiser)
- 4) Watches and jewellery in the custody of the 1st Petitioner
- 5) Masionette on Plot 6562/1/Mainland North, Nyali Estate Mombasa (Purchased for his sister Mrs. Nasrin Malik.
- 6) 2% Interest in Title Number Malindi C.R. 31679.
- 7) 2% Interest in the Title Number Malindi C.R. 55825
- 8) 2% Interest in the Title Number Malindi C.R. 31682.
- 9) 2% Interest in the Title Number Malindi C.R. 31680
- 10) 2% Interest in the Title Number Malindi C.R. 31678
- 11) 2% Interest in the Title Number Malindi C.R. 31681
- 12) 2% Interest in the Title Number Malindi Portion No. 7117
- 13) 2% Interest in the Title Number Malindi Portion No. 7114
- 14) Shares in Vantage Point Clearing and Forwarding C. Ltd, (to be established)
- 15) Shares in Modern Coast Express Ltd, (to be established)
- 16) Shares in Modern Coast Builders & Contractors Ltd, (to be established.
- 17) Shares in Pribhai Jivanjee & Co. Ltd, (to be established).
- 18) Shares in Blue Bell Properties Ltd (to be established)
- 19) Shares in Vantage Road Transporters Limited (to be established)
- 20) Shares in Modern Coast Courier Limited (to be established)
- 21) Shares in Vantage Point Clearing & Forwarding Limited (to be established)

86. Lastly, Akhtar deposed that administration and distribution of the estate is limited to the private and personal assets and properties of her late husband and the same do not extend to the management of properties belonging to independent companies where he held shares as sought by Regine herein. Accordingly, the interested parties urged the Court to dismiss the Summons for the Confirmation of Grant.

Submissions

87. Pursuant to Courts directions of 18th May, 2020, the law firm of Miyare & Company Advocates acting for the petitioners filed three sets of submissions dated 4th October, 2018, 2nd June, 2020 and 28th February, 2020, while the law firm of Prof. Albert Mumma & Co. Advocates acting for the Interested Parties filed two sets of submissions dated 31st August, 2020 and 21st November, 2019. During the highlighting of submissions Mr. Kaluma, learned counsel for the petitioners relied on the submission filed on 4th June, 2020, while Prof. Mumma, learned counsel for the Interested Parties relied on his submissions dated 31st August, 2020.

88. On 21st March, 2017, the parties agreed in High Court Succession Cause No. 301 of 2014 where it was proposed that a bench herein, (now this bench) be constituted to determine the following issues and in so doing to help settle this matter at once: -

1. *The law applicable in a matter of succession in respect of assets/properties of a deceased person registered and/or held in the name of companies in general and in the related matters in particular;*
2. *Whether or not assets that vest in a spouse under and by operation of the Matrimonial Properties Act, 2013 are subject to succession upon death of a spouse;*
3. *The law applicable to succession proceedings at the High Court concerning the estate of deceased person and parties professing the Islamic faith in light of article 170(5) of the Constitution;*
4. *Directions and orders as the court deems appropriate to secure orderly and prompt conduct of the business of the court herein.*
5. *That the orders to apply to three pending actions between the parties herein*

Petitioners' submissions.

The law applicable in a matter of succession in respect of assets/properties of a deceased person registered and/or held in the name of companies in general and in the related matters in particular

89. Learned counsel for the petitioners, Messers. Kaluma and Miyare submitted that the position in law is that a company is a legal entity distinct from its directors, shareholders, or incorporators; with rights and liabilities of its own which are distinct from those of its shareholders. However, over time in order to secure justice and equity in situations where upholding the corporate personality of a company would lead to injustice, courts have disregarded the corporate personality and lifted the corporate veil *inter alia*, where the company is confirmed by facts and evidence to be a mere agent holding assets in trust for the shareholders, directors and/or incorporators. The application of the principle of trust has been adopted where the property though registered in the name of the company is in fact the property of the individual behind the company and the company is a mere trustee. Counsel cited the decision of the United Kingdom Supreme Court Case of **PREST Vs. Petrodel Resources Ltd and Others [2013] UKSC 34**, where the court reaffirmed the principle of trust as a basis of disregarding the corporate veil in particular circumstances.

90. Counsel submitted that the corporate veil would be disregarded where it is established on the facts and evidence that the company is the *alter ego* of an individual. Counsel argued that for the principle of *alter ego* to apply, there must be unity of interest and ownership between a company and "its owner" and that an inequitable result would follow if the courts were to uphold the corporate entity of the company. Consequently, the Alter-ego doctrine is an equitable remedy to prevent injustice. Further counsel submitted that alter ego is a question of fact and not law. To buttress their submissions, counsel cited the United States Court of Appeal finding in **Dewitt Truck Brokers, Inc., Appellee, v. W. Ray Flemming Fruit Company and W. Ray Flemming, Appellants, 540 F.2d 681 (4th Cir. 1976)** where the Fourth Circuit stated:

"But when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness, courts have experienced "little difficulty" and have shown no hesitancy in applying what is described as the "alter ego" or "instrumentality" theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder. Iron City S. & G. Div. of McDonough Co. v. West Fork Tow. Corp., supra, 298 F. Supp. at 1098.¹² But, in applying the "instrumentality" or "alter ego" doctrine, the courts are concerned with reality and not form, with how the corporation operated and the individual defendant's relationship to that operation...the Court found that the defendant had "substantial, if not exclusive, control over appellee; " that the other directors "were nothing more than figureheads" who "attended no directors meetings, and were paid no salaries," and that there were no "minutes of stockholders' meetings."

91. Counsel then submitted that there was adequate evidence to demonstrate that the subject companies were in fact owned by the deceased and that all the properties registered in the names of the companies were in fact so held for the benefit of the deceased and are properties of the deceased merely registered and held in the names of the companies as trustees/ agents /alter ego of the deceased who was the sole /absolute controlling mind and hand behind the companies. Reference was placed in the case of **Jane Wanjiku Kanyotu vs. Mary Wanjiku Kanyotu 79 others [2013] eKLR**, where the High Court stated that

"Where a deceased owned majority shares in a company, those shares can only be transferred after the succession process has been concluded. In the present application, it was evident that the deceased owned a substantial part of his properties through limited liabilities companies. From the structure of the shareholding, it was apparent that the deceased, for all intent and purposes, was the only shareholder of the said companies. The shareholding of the said companies were such that one limited liability company where the deceased was a majority shareholder, owned a single share in another company where the deceased was also a majority shareholder. A case in point is Kawakanja Ltd where the deceased owned 999 shares while a company known as Tropical Registrars Limited owned 1 share. The total share capital of the company was 1,000 shares. This court would not be off the mark if it holds that the companies that the deceased incorporated were in fact alter-egos of the deceased. The companies qualified to be referred to in the Kenyan speak as "Kampuni yangu" i.e the companies could not be separated or be considered as distinct entities from the incorporators. In this regard, Kawakanja Ltd and Kangaita Coffee Estate Ltd were "Kampuni yangu" of the deceased. This does not mean that this court is unaware of the separate legal personalities of the companies and their incorporators. Far from it.

The law as applied to the deceased companies

92. Counsel submitted that it is a fact that the deceased died a tycoon but had no property registered or bank account in his personal name. Instead, the properties were acquired in the name of his earlier listed companies, and he used the said companies as personal property without any restrictions since he caused to be deposited and withdrawn monies at will as his own and without restriction.

93. It was submitted that **Blue Bell Properties Limited –C57833** which is the subject matter in Mombasa HCC Civil Case no. 8 of 2014 (O.S) was acquired by the deceased on 18th February, 1994 through purchase of all the shares for the sole purpose of the deceased acquiring his matrimonial home situated on Plot No. 1271/1/MN. The deceased later allotted himself and Akhtar one share each. However, the said company never traded and had no money of its own. It was also submitted that in his affidavit sworn on 6th October 2006 in opposition to Winding Up Petition No. 2 of 2006, in the Matter of Blue Bell Properties Ltd brought by Akhtar, the deceased deposed that he solely purchased the shares in Blue Bell Properties Limited without the contribution of Akhtar and that she did not contest the deceased's deposition.

94. It was further submitted that the deceased determined the shareholding of Blue Bell Properties Limited at will and it was for that sole reason that he enhanced his shareholding in the company to 51% while diminishing Akhtar's share and according to her equal shareholding to that of his other wife Ahmed Rukaya S. Butt and that the deceased lived with all the wives he married in the same property, including Regine. When they separated, the Court upheld the deceased's overriding beneficial right over the said plot No. 1371/1/MN and by way of consent the deceased acquired a separate residence for the 2nd Interested Party.

95. It was counsel's submission that the Interested Parties with the assistance of their advocate have made fraudulent and unlawful attempts to alter and diminish the deceased's shareholding, stake and control of the company after his death and before succession, this includes an interim return lodged with the Registrar contrary to Section 45 of the Law of Succession Act and are therefore null and void.

96. On **Modern Coast Builder & Contractors Ltd**, counsel submitted that the same was incorporated on 24th February, 1995 to engage in long-haul transportation business with Mombasa/Block XII/2, Lumumba Road registered in the name of Pirbhai Jivanjee and Company Limited being its registered office. It was further submitted that at the time of incorporation of the Company, the deceased and Akhtar party were assigned 500,000 shares each, and that the annual returns in respect of the company filed on 14th August, 2013, before the deceased died, showed that the deceased had last assigned himself 350,000 shares in the company, Akhtar had been assigned 100,000 share while Haroon was assigned 150,000 shares in the same company.

97. Counsel submitted that in the Further Affidavit sworn on 8th June, 2005 in opposition to Winding Up Petition No. 3 Of 2006: In The Matter of Modern Coast Builders & Contractors Ltd brought by Akhtar, the deceased deposed that he solely registered the company, allocated Akhtar, who was a housewife shares merely to meet the requirement of the repealed Companies Act. In the said Winding Up Cause, the deceased also averred that he singlehandedly ran/managed the company for the benefit of his family, a fact confirmed by Haroon confirmed in his affidavit sworn on 29th September, 2005 in the winding up petition that all the fees and other expenses he incurred during studies at the time had been paid by the deceased from this company's funds.

98. It was also submitted that the deceased determined the shareholders and shareholding in the company at will and he was always the majority shareholder in order to remain in control. The deceased even granted Rokaya Butt 25% of the Shares in the Company upon marriage just as Akhtar, and took the shares back when he divorced her. Therefore, the claims by the 2nd Interested Party on ownership of the company is not consistent with the deceased's ownership and exclusive control of the company.

99. Counsel submitted that the company never traded, had no money of its own and the deceased used Plot No. *Mombasa/Block XII/2, Lumumba Road, Mombasa* as its registered office and parking yard for vehicles owned and operated by the deceased through his other companies herein, and all assets registered in the name of this Company were so registered in trust and for the benefit of the deceased. Consequently, there is no doubt that the company was merely used by the deceased to acquire and legally own this prime property for the deceased's personal benefit.

100. On the issue of violation of Section 45 of the Law of Succession Act, counsel submitted that the Interested Parties with the assistance of their Counsel herein have made fraudulent attempts to change and diminish the deceased's shareholding, interests and control of the Company after death but before succession. However, the Registrar of Companies in refusing the fraudulent changes noted that the "*signature on the share transfer form signed by Shahid Butt differ with other company records*", confirming the Interested Parties had forged the signature of the deceased on the documents.

101. Concerning **Pirbhai Jivanjee and Company Limited - C1531**, Counsel submitted that the company was acquired on 1st June, 1995, by purchasing all shares from its incorporators. However, the Company did not trade or do business at all, and was only used by the deceased to acquire and hold the said *Mombasa/Block XII/2, Lumumba Road*, in trust and for him and that any assets registered in the name of the company are actually the property of the deceased and form part of the deceased's estate.

102. It was further submitted that the deceased assigned himself 295 shares of the company, while he assigned Akhtar Party 5 shares only and that all subsequent shareholders in the company were personal relations of the deceased who were appointed and removed at the deceased's will, since he had the majority shareholding and control of the company. Consequently, the circumstances surrounding the purchase and use of the property by the deceased and his companies is inconsistent with the idea of corporate ownership of the property by this company, but fraudulent attempts had been made by the Interested Parties with the assistance of their counsel herein to change and diminish the deceased's shareholding after his death and before succession contrary to Section 45 of the Law of Succession Act. However, the changes were rejected by the Registrar of Companies for being fraudulent.

103. Counsel submitted that **Vantage Point Clearing and Forwarding Ltd - C84258** was incorporated on 29th January, 1999, by the deceased to engage in clearing and forwarding business with its registered office being *Mombasa/Block XII/2, Lumumba Road* registered in the name of Pirbhai Jivanjee & Company Limited, which was the deceased personal address and all assets registered in the name of this Company were so registered in trust and for the benefit of the deceased. At the time of incorporation of this Company, the deceased allocated himself 95 shares and one Javed Iqbal had only 5 share shares. Subsequently, all the shareholders appointed by the deceased at will were personal relations or employee(s) of the deceased as evidenced in the annual returns. However, the deceased maintained control of the shareholding in the company, and at the time of his death he had 748 shares out of the 1000 shares issued.

104. It is counsel's submission that after the death of the deceased, the Interested Parties assisted by their Counsel herein purported to lodge returns for *Vantage Point Clearing and Forwarding Ltd* seeking to alter the shareholding in the Company before succession, without authority to do so and contrary to Section 45 of the Law of Succession Act. However, the purported change to the shareholding of the Company after the deceased's demise being a nullity the same was cancelled by The Registrar of Companies on 11th April, 2014.

105. It was submitted that **Modern Coast Road Transporters Limited - xxxxx** was incorporated on 25th October, 2004, to engage in long-haul transportation business, and all vehicles/assets registered in the name of this Company were so registered in trust and for the benefit of the deceased, since the deceased used *Mombasa/Block XII/2, Lumumba Road* as the registered office for the Company and assigned his personal address at *P.O. Box 97079, Mombasa* as the official address of this company. At incorporation, the deceased assigned himself 585 shares; Harun Butt - 10 Shares and Dhaniram Dogra- 5 shares (employee). They all used the deceased personal postal address. Consequently, the deceased was not just the majority shareholder but the owner and/or controlling mind and hand of this company.

106. Counsel submitted that unlawful and fraudulent attempts have been made by the Interested Parties with the assistance of their Counsel herein to change and diminish the deceased's shareholding, interests, and control of the Company; contrary to Section 45 of the Law of Succession Act. However, The Registrar of Companies rejected the fraudulent transfers.

107. On **Vantage Road Transporters Ltd - xxxxx** incorporated on 10th November, 2004, to engage in the transportation business. Counsel submitted that the company was assigned the deceased personal postal address as the official company address and the company was operated by the deceased from his office at *Mombasa/Block XII/2, Lumumba Road, Mombasa* registered in the name of *Pirbhai Jivanji & Co Ltd*. Further, the deceased used the company to acquire and hold *Mombasa/Block XII/4, Lumumba Road* and to purchase several trucks and used the acquired property as parking yard for his vehicles registered and operated in the names of all his companies herein and no rent was paid to Vantage Road Transporters Ltd by other companies belonging to the deceased for the use of *Mombasa/Block XII/4, Lumumba Road*. On 8th June, 2011, the deceased acquired *Plot MN/VI/49, Portreiz, Mombasa* measuring 4.28 acres in the name of *Vantage Road Transporters Limited* and in 2012, the deceased acquired *Plot No. 18/Mariakani/Kawala "B". MNAGONI as well as Plot No. Kadzonzo Kawala Adjudication Section "B" Plot No. 18 or Parcel No. 18 Kawala "B"* measuring 9.15 acres purchased at Kshs. 45,750,000.00 all in the name of Vantage Road Transporters Ltd.

108. Counsel submitted that at the time of incorporation of this Company, the deceased allocated himself 585 shares; Harun Butt-10 shares and one Dhaniram Dogra(employee) had only 5 shares in the company. Nevertheless, it is noteworthy that the deceased signed the Memorandum and Articles of Association for Harun Butt who was then a student and out of the country at the time of incorporation. Subsequently, the deceased changed the shareholding of the company at will, while maintaining the majority shareholding and control and allocating shares to personal relations and/or employees.

109. Counsel submitted that immediately following the brutal killing of the deceased, the records in respect of the title to the said *Plot MN/VI/49, Portreiz, Mombasa* were patently/clearly and fraudulently altered to show that it was now owned by the deceased and Haroon as joint proprietors. The original records have been replaced with provisional certificate of title in respect of this property. Counsel further submitted that Haroon hastily proceeded to claim and receive the payment from the National Land Commission before succession. It is further averred that Haroon has retained this payment and is seeking to disinherit, deprive, and divest the beneficiaries of the estate of the same, yet at the time of the purchase of the subject property, Haroon was just settling into the country after his studies abroad, and that he had not worked and was wholly dependent on the deceased and had no money of his own to purchase or contribute towards purchase of this property. Consequently, the compensation funds of Ksh. 245,000,000.00 and the remainder of the property (2.4633 acres) belong to the deceased and form part of the estate, and any interest, if any, recorded in the name of Haroon in respect of *Plot MN/VI/49, Portreiz, Mombasa*, was/is so held in trust for the deceased's estate.

110. Counsel argued and submitted that the fact that **Vantage Road Transporters Ltd** "purchased" *Mombasa/Block XII/4, Lumumba Road, Mombasa* hardly 20 days after incorporation, leaves no doubt that the company was merely used by the deceased as a vehicle to acquire and legally own this prime property. Therefore, the purchase and use of *Mombasa/Block XII/4, Lumumba Road, Mombasa* by the deceased and his companies is inconsistent with the idea of corporate ownership of the property by the Company. Clearly, the deceased was not just the majority shareholder but the controlling mind/hand of this company and the company herein is the deceased's alter ego.

111. It was then submitted that like other companies, fraudulent attempts have been made by the Interested Parties with the assistance of their Counsel to change and diminish the deceased's shareholding, interests and control of the Company, contrary to Section 45 of the Law of Succession Act. However, even in their fraudulent attempts, the Interested Parties recognized the companies as the deceased's companies and acknowledged his power to unilaterally determine the shareholding structures thereof, at will and without reference to corporate formalities.

112. Counsel submitted that **Modern Coast Express Ltd-C145511** was incorporated on 2nd October, 2007, to engage in luxury passenger transport business across East Africa. On 26th May, 2008, the deceased began his transportation business. He started this passenger transport business with 2 buses which increased to 4 and later to 8 within one year of trade. The deceased purchased and registered buses in the name of this Company with funds from his other businesses when it began operation. The company used *Mombasa/Block XII/2, Lumumba Road* registered in the name of *Pirbhai Jivanjee and Company Limited* as its registered office and assigned his personal postal address as the official address of the company besides using the company to engage in the said passenger transport business for his personal benefit.

113. Counsel submitted that the deceased later diversified to courier business along the passenger transport routes established for *Modern Coast Express Ltd*. The passenger transport and courier businesses flourished and became the deceased's core occupation enabling him to fully settle business loans. By the time of his death, the deceased had expanded his passenger transport and courier businesses through *Modern Coast Express Ltd* and *Modern Coast Courier Limited* to cover Kenya, Uganda, Tanzania and Rwanda.

114. It was submitted that from the time of incorporation of the Company to the demise of the deceased, he allocated shares in *Modern Coast Express Ltd* as follows: Shahid Pervez Butt- 85 shares; Haroon Shahid Butt- 13 shares; Mohamed Arif Ahmed- 1 share (employee) and Osman Abdulaziz Esmail- 1 share (employee). Therefore, it was submitted that the deceased was not just the majority shareholder but the owner and controlling mind and hand of this company.

115. It was also submitted that fraudulent attempts have been made by the Interested Parties with the assistance of their Counsel herein to change and diminish the deceased's shareholding, interest, and control of the Company; contrary to Section 45 of the Law of Succession Act. However, the Registrar of Companies in refusing the fraudulent changes confirmed that the Interested Parties had forged the signatures. Nevertheless, it was submitted that even in their fraudulent documents, the Interested Parties recognized this as the deceased's company and acknowledged his power to unilaterally determine the shareholding structure of the company at will and without corporate formalities.
116. Concerning **Modern Coast Courier Limited - xxxxx**, the same incorporated on 2nd May, 2008, to engage in courier business across East Africa, and Counsel submitted that the deceased used *Mombasa/Block XII/2, Lumumba Road* registered in the name of *Pirbhai Jivanjee & Company Limited* as the registered office for the Company. The deceased assigned his personal address as the official address of this company then used his vehicles registered in the names of his companies herein, and mainly Modern Coast Express Limited, to do his business through this company; and only registered a few vehicles/motorcycles in the name of this Company for local deliveries. At the time of incorporation of the Company, the deceased allocated shares in *Modern Coast Courier Ltd* as follows: Himself- 90 shares; Haroon Shahid Butt-7 shares; Mohamedarif Ahmed (employee)- 1 share; Osman Abdulaziz Esmail (employee)- 1 share and Mohamed Ahmad Malik (employee)- 1 share. The shareholding never changed till the demise of the deceased.
117. Counsel submitted that the deceased signed the Memorandum and Articles of Association on behalf of Haroon who was then a student and lived out of the country at the time of incorporation. The other purported shareholders were nephews and employees of the deceased and they all used as their addresses the personal postal address of the deceased being P. O. Box 97079, Mombasa. Consequently, it was submitted, the deceased was not just the majority shareholder but the owner and controlling mind/hand of this company.
118. Counsel once again repeated that unlawful and fraudulent attempts have been made by the Interested Parties with the assistance of their Counsel herein to change and diminish the deceased's shareholding, interest, and control of the Company; contrary to section 45 of the Law of Succession Act. However, the Registrar of Companies in refusing the fraudulent changes the Interested Parties had sought to make to the company's shareholding, noted *inter alia*, that the shareholding of the deceased as they were on 14th May, 2008 had been misrepresented and that the purported transferees were not present "at the meeting where changes were effected".
119. Concerning **Ari Property UG**, founded on 24th March, 2011 in Germany and formally registered in Kenya on 4th June, 2011 by the deceased, it was submitted that the company was used to acquire and hold various properties including 10117, Berline – Mitte, Apt 3, purchased in the name of the company on 15th August, 2011 barely 5 months after incorporation.
120. Concerning **Premac Properties Limited** acquired by the deceased to engage in real estate business, Counsel submitted that the deceased did not do any business through the company and information regarding the company and the company's assets is scant and still under investigations.
121. It was submitted that all the Companies were served by the same employees; who were in actual employment and service of the deceased, and were operated by the deceased from his office on *Mombasa/Block XII/2, Lumumba Road*, used as their registered and official address the address of the deceased who made himself and served as the Managing Director of all the Companies and had unrestricted access to the companies funds and assets, without adherence to any corporate formalities as to meetings and resolutions, and at no time did the companies herein declare/issue dividends. This was the case for all the companies herein including those companies, which actively traded, made profits, and paid employees huge salaries. Consequently, Haroon and Taseen were/are mere trustees thereof for the benefit of the deceased's estate. However, it was submitted that Haroon unlawfully arrogated himself the position of Managing Director of all the deceased's Companies herein immediately following the deceased's death, without any corporate formalities or consent from Regine.
122. Counsel submitted that the deceased retained the firm of *Lumumba Mumma & Kaluma Advocates* to represent him in all his personal matters; and, in all matters concerning his companies herein, even where the representation was against Akhtar.
123. It was submitted that through *Mombasa Chief Magistrates Court Criminal Miscellaneous No. 282 of 2013* the police sought bond against the deceased as they carried out investigations on the huge foreign financial transactions in bank accounts operated by the deceased in Kenya, after which banks were reluctant to maintain accounts for the deceased in his name or in the names of his companies, and on 31st May, 2014, *Standard Chartered Bank (Kenya)*, in particular, forced closure of all accounts the deceased maintained and operated with them.
124. In order to operate his businesses unhindered after scrutiny, Counsel submitted that the deceased operated other bank accounts in the names of his companies and close relatives, into which he caused to be deposited and withdrawn income from his businesses without restrictions, including: *inter alia*, *Account No.xxxxxxxx, Imperial Bank Ltd* in the name of Shahid Pervez Butt and Regine Butt; *Account No.xxxxxxxx; Account No.xxxxxxxx, HSBC Bank: Haroon Shahid Butt, 27, Gloucester, London, WIU 8HU*. The deceased also took out several credit cards in his name and in the name of Haroon, and also purchased motor vehicles registration number *Kxx xxxx (Nissan Patrol)* and *Kxx xxxx, Range Rover* imported in the name of Regine for her use, motor vehicle registration number *Kxx xxxx (Mercedes 350 CLS)* registered in the name of Haroon in 2006 for Regine's use; motor vehicles registration number *Kxx xxxx (Toureg V6 Escape)* and *Kxx xxxx* in the name of Haroon.
125. Counsel submitted that since the deceased's death, the Interested Parties have used the incomes of the estate to acquire many more motor vehicles for themselves using the deceased's money against the interests of the estate. Having failed in their fraudulent bid to alter the shareholding structure of the deceased's Companies hereinabove, it was submitted that the Interested Parties proceeded to incorporate *Modern Coast Coaches Ltd, Modern Truckers Ltd, Modern Mail Ltd, Hadar Express Limited and Boteq Ltd* using income from the deceased's companies which have been under their unlawful control since the deceased died. Further, counsel submitted that the Interested Parties have used the new companies to do the businesses of the deceased's companies herein soon after the deceased's death and during the pendency of these proceedings and some of the vehicles have been registered in Uganda, Tanzania and Rwanda away from the jurisdiction of this Court. Consequently, to them, it is only fair and just that this Court issues orders compelling the Interested Parties to disclose all assets registered and bank accounts maintained in the names of *Modern Coast Coaches Ltd, Modern Truckers Ltd, Modern Mail Ltd, Hadar Express Limited and Boteq Ltd*, in Kenya and out of jurisdiction and they should render just and true accounts of the estate so that the estate can be wholly collected and fairly distributed among those beneficially entitled.

126. Counsel submitted that the Interested Parties unlawfully evicted Regine and her children from her matrimonial house/home in *Plot No. 1371/1/MN, Mkomani*, carted away the deceased's and Regine's matrimonial property, household goods before demolishing Regine's matrimonial house/home, despite court orders issued in *HCCC No.8 of 2014 (O.S): Regine Butt vs. Haroon Butt & Akhtar Butt*, which the Interested Parties have refused to comply with by reconstructing the matrimonial home. Counsel also submitted that in furtherance of their flagrant intermeddling with the estate, the Interested Parties have caused to be filed a case in the name of *Bluebell Properties Limited*, without the authority of Regine as Administratrix in order to obfuscate their contemptuous act of demolishing Regine's home.

127. Counsel Further submitted that Interested parties are doing everything to conceal, divert and convert the estate to their sole benefit through acts including depositing in personal bank accounts funds from the estate, and registering in their own names and in the names of companies they have subsequently registered properties acquired with profits/proceeds from the deceased's businesses undertaken through the deceased's companies.

128. Counsel cited Jane *Gathoni Muraya- Kanyotu vs. Mary Wanjiku Kanyotu & Others(supra)*, where the High Court stressed the point that where a Deceased owned majority shares in a company like is the case herein, those shares can only be transferred, affected, or shareholding, control or stake in the company affected, altered or diminished after succession. Therefore, the shareholding, control, or stake the deceased had over the companies herein must remain undisturbed until succession is complete.

129. On the totality of the above circumstances, counsel submitted that the Court ought to disregard, sidestep and/or overcome the corporate veil of the subject companies; and, to apply the *trust*, *Agency* and/or *alter ego* doctrines to prevent abuse of the corporate legal personality of the companies by the Interested Parties and their conspirators, and therefore secure equity and justice to the Petitioners and other lawful beneficiaries of the estate so as to prevent the Interested Parties from frustrating enforcement of the law of succession over the properties and assets which though registered in the name of the companies truly form part of the estate of the deceased.

Whether or not assets that vest in a spouse under and by operation of the Matrimonial Properties Act, 2013 are subject to succession upon death of a spouse.

130. It was submitted that the deceased married Regine on 13th June, 2009, the marriage was transacted at the deceased's residence in *Plot No. 1371/1/MN, Mkomani, Mombasa* where they established their matrimonial home and lived throughout their marriage until the deceased's death. Counsel further submitted that the position under the *Matrimonial Property Act, No. 49 of 2013* ("the Act") is that matrimonial property vests by dint of matrimony and that Section 17 of the Act provides that a "person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person; and, proceeds to prescribe the procedure for doing so." In essence, matrimonial property disputes are disputes between spouses or former spouses and the law does not provide that such disputes may be made in a succession cause(s).

131. It was also submitted that matrimonial properties are only subject to succession to enable transfer in the name of the surviving spouse. Therefore, the fact that the deceased established his home in the property without paying rent or any monies to *Blue Bell Properties Limited* is inconsistent with any claim that can be made over the property for the company as a corporate entity and a juristic person. It was further submitted that there was no doubt that the deceased merely used this company as a vehicle to acquire and hold legal title over the property for himself and for the benefit of his estate.

132. Counsel cited *Prest vs. Petrodel Resources Ltd [2013] UKSC 34*, where the Supreme Court when dealing with a similar case held:

"All of these properties were acquired by PRL before it began commercial operations and began to generate funds of its own. This was the main basis on which the judge found that the matrimonial home was held on trust for the husband from its acquisition in 2001. Since, as the judge found, no rent was paid to PRL for the family's occupation of the matrimonial home, this is a particularly clear case of the husband using PRL as a vehicle to hold legal title on trust for himself ..."

133. Counsel submitted that at the time the deceased married Regine, the deceased had long separated from Akhtar in 2005 and the deceased paid her subsistence in compliance with the orders of the Court of Appeal until his demise. Nevertheless, in the course of the marriage, the deceased and Regine rebuilt, renovated and furnished their matrimonial home into an ultra-modern property using materials she mainly imported from her home country Germany. Consequently, counsel submitted that Akhtar's claim on Regine's matrimonial home on *Plot No. 1371/1/MN, Mkomani, Mombasa* had been extinguished by the time Regine got married to the deceased.

134. Counsel submitted that before his untimely death, the deceased had acquired, took possession and developed *LR. No. 209/6209, Kitui Road, Industrial Area, Nairobi* to use as his workshop, offices and yard in Nairobi. However, the deceased died before transfer, but this prime plot continues to serve as the workshop and yard for all the deceased's vehicles in and going through Nairobi and Haroon was to relocate to Nairobi so that he could help the deceased manage the businesses from the said property.

135. It was submitted that the Court of Appeal In Civil Application No. 31 Of 2015, directed the Akhtar to vacate Regine's matrimonial home and to move to her earlier residence and the said orders reaffirmed the orders made by the High Court requiring the immediate reinstatement of Regine and her children into the matrimonial home. It was submitted that in blatant contempt of the orders of both the High Court and the Court of Appeal the Interested Parties refused to grant Regine and her children access into, possession and occupation of the matrimonial home.

136. Counsel further submitted that on 18th February, 2016, the High Court gave orders committing the Interested Parties to civil jail for contempt of court and ordered the Interested Parties to reconstruct Regine's matrimonial home and to return all goods and effects they had removed therefrom. As an ancillary order, the court directed the Interested Parties to pay rent for the accommodation of Regine and her children before reconstruction. The Interested Parties unsuccessfully applied for stay execution in the Court of Appeal in *Civil Application No. 4 Of 2016* and to date the interested parties have not purged the contempt.

Submissions on Interested Parties Application for review dated 1st November, 2017

137. Counsel submitted that the two (2) applications referred to hereinabove dated 28th April, 2016 seeking *inter alia*, beneficial ownership in the property of the deceased and, that dated 1st November, 2017 seeking review of the contempt orders by the Interested Parties, are an abuse of the process of this court, since all matters raised in the review application, including the claim by the Interested Parties that the matrimonial home of Regine herein was demolished by the County Government of Mombasa, were duly placed before the High Court and adequately considered before final orders which were upheld by the Court of Appeal were made.

138. Counsel also submitted that if the Interested Parties faced challenges in compliance with the orders for reconstruction, which is denied, the same should be addressed to the Court of Appeal as this Court cannot intervene in a matter the Court of Appeal is properly seized of and in which it has ordered for further proceedings to be undertaken upon confirmation of full compliance with its directions. Further, Counsel submitted that the application for review of the committal orders is also a nonstarter, a spit in the face of court and an abuse of court process for the reason that: the application is being made before a court other than the court which made the orders sought to be reviewed, contrary to law; this bench was established to determine specific issues identified by the parties; this bench did not hear and decide the matter sought to be reviewed.

139. Counsel urged the Court to deny the Interested Parties audience in their application for review herein, until they purge the contempt.

The law applicable to succession proceedings at the High Court concerning the estate of deceased person and parties professing the Islamic faith in light of Article 170(5) of the Constitution;

140. Counsel for the petitioner submitted that by a ruling delivered on 16th December, 2014, the issue of the applicable law was determined, and the same is thus *res judicata* and added that Article 170(5) of the Constitution provides for the jurisdiction of Kadhi's courts and states: -

“(5) The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

141. Counsel then submitted that the law applicable to succession proceedings at the High Court concerning the estate of a deceased person and parties professing the Islamic faith in light of Article 170(5) of the Constitution is dictated by the *choice of forum* by the parties. Regarding the sources of law, Counsel put reliance on the provisions of *section 3 of the Judicature Act, chapter 8 of the Laws of Kenya* and that the applicability of the Islamic law on succession founded on cited provisions of the Quran would yield unconstitutional and inequitable results against Aleena Shahid Butt (born on 18th April, 2012), the girl child herein based on sex, against the provisions of Article 27 of the Constitution. This would be repugnant to justice and morality and unconstitutional. Counsel further submitted that the application of the Quran would obligate that Taseen Butt (born on 26.5.2010), who is going to school and needs more to be maintained, and seen through life receives equal portion of the estate as Haroon (34) who has enjoyed the estate all the time, simply because both are sons of the deceased. This would be repugnant to justice and morality and unconstitutional. Further, the application of the Quran would also obligate that Regine (45 years old) receives equal share of the estate as Akhtar (70 years) and who was for all intents and purpose divorced from the deceased. This would be repugnant to justice and morality and unconstitutional.

142. To buttress his submission, Counsel cited the finding in *Mary Rono vs. Jane Rono and William Rono, Civil Appeal No. 66 of 2002*, where the Court of Appeal while dealing with the matter of distribution of the estate of the deceased stated thus: -

“...That would clearly work injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice ... the Act does not provide for that kind of equality.”

Submissions on Interested Parties Originating Summons Dated 28th April, 2016 (The 1st Application herein).

143. In reference to the 1st Application herein, Counsel submitted that no evidence was placed before the court to show contribution or participation by Akhtar in the deceased's businesses, or in the acquisition or development of the properties of the deceased or the assets of the companies of the deceased before they separated in 2005. Instead, evidence before court including the Memorandum and Articles of Association of the deceased's companies, affidavits sworn by the deceased when he lived, correspondence exchanged between Akhtar and the deceased, as well as the affidavits sworn by Haroon and annexed at pages 455 – 509 confirm the deceased single-handedly run his businesses and only had peace and prospered after parting ways with Akhtar.

144. Counsel further submitted that Akhtar had previously filed *Mombasa Civil Suit No. 93 of 2006 (OS) against the deceased seeking declaration that Plot No. 1371/1/MN and all motor vehicles and other properties of the deceased were matrimonial property and jointly owned*. This suit which was opposed and subsequently withdrawn by consent orders in *Civil Application No. 285 of 2006* in which the deceased was ordered to provide Akhtar alternative housing and specified agreed maintenance. Consequently, the matrimonial property action is not only an afterthought and abuse of court process, but also uncertain as it is not clear what property Akhtar seeks to be declared matrimonial property. Furthermore, the Originating Summons herein also seeks retrospective application of the Matrimonial Property Act, 2013 in the properties of the deceased settled way before the enactment of this law.

145. In the end, the Petitioners pray that the Interested Parties' Summons under the Matrimonial Property Act dated 28th April, 2016 be dismissed with costs.

The Interested Parties' Submissions.

What is the net Effect of the Consolidation of the Three Cases Being the Subject Succession Cause No. 395 Of 2014, Civil Case No. 8 Of 2014 and Succession Cause No. 301 Of 2014 all Between the same Parties Herein and in Respect to the Same Estate of the Deceased?

146. Prof Mumma appearing with Mr. Agwara learned Counsel for the Interested parties submitted that it is not in dispute that this Court on 3rd November, 2017 consolidated the above three cases and directed that the same be heard and determined as Succession Cause No. 395 of 2014. Therefore, once the cases were consolidated, this Court would then consider the same jointly and give an appropriate decision covering all the subsisting issues within the three cases and upon consolidation, the Petitioners did not reserve a residual right to have the consolidated cases considered separately. The cases were subsumed into one and all the outstanding issues must be determined in the same course taking into account all the pleadings and affidavits filed therein.

147. Counsel cited the finding in *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR*, which cited with approval the decision of the Supreme Court of India in *BRIJ KISHORE VS SIR SINGH & OTHERS at the High Court of Punjab and Harana (L. R5922 of 2013)* where Justice Paramjeat Singh quotes the following from the Supreme Court Case of *PREM LALA NAHATA & ANOTHER VS CHANDI PRASAD SIKARIA, (2007) 2, SUPREME COURT CASES 551 at paragraph 18: -*

"It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits"

148. Counsel submitted that since the petitioners did not challenge the order consolidating the three cases, they cannot be allowed to undermine the same through the back door.

What is the jurisdiction and powers of this Court in hearing and determining the summons for confirmation of grant?

149. Counsel submitted that Sections 55, 71, 72 and 73 of the Law of Succession Act give the court the jurisdiction to hear and determine an application for confirmation of grant. However, where the property forming the estate is not determined as is the case herein, then this Court lacks the requisite jurisdiction to proceed with confirmation of grant as sought.

150. Counsel further submitted that it is clear that the subject summons for confirmation of grant in respect to the intestate estate herein is premature as the applicants have neither set out the shares of each of the beneficiaries of the estate nor determined what constitutes the estate. The purported summons for confirmation of grant intestate as filed herein, seems to proceed on an erroneous presumption that this Court can simultaneously determine the estate and distribute the respective shares of the estate to each of the identified beneficiaries contrary to the express provisions of Section 71 of the Act.

151. Counsel cited the holding in **The Matter of the Estate of Kahuri Kimani (Deceased) Nairobi Succession Cause 358 Of 1996**, Lady Justice Rawal (as she then was), when faced with a similar situation converted the hearing of the confirmation of grant application into a hearing on the determination of the estate and proceeded to determine what constituted the estate and directed parties to make fresh application for confirmation having regard to the determined estate.

152. Counsel urged this Court to find and hold that the Court lacks the requisite jurisdiction to proceed with the summons for confirmation of grant as sought herein and instead progress this matter by determining the estate of the deceased together with all the other matters certified for determination by the bench after which the court will thereafter allow parties to make representations and deal with the summons for confirmation of grant taking into account the court's determination on the estate and the related matter.

Whether or not properties belonging to private limited liability companies and 3rd parties constitute the estate of the deceased person? if not, can the Court lawfully deal with the said properties in the summons for confirmation of grant as sought herein?

153. Counsel submitted that it was the Interested Parties who were actively involved in the running of the various companies and participated in the actual independent acquisition of all the properties listed by the Petitioners through bank loans, and out of the operations and earnings of those respective companies, and not the deceased's personal funds. However, the petitioners have made baseless assertions and not provided any evidence confirming that the same belong to the deceased or were acquired by the deceased during his lifetime and for some reasons registered in the names of 3rd parties or the companies.

154. Counsel submitted that the trite position of the law is that the properties of a limited liability company or that of a third party (who is alive) do not comprise the estate of a deceased person and cannot lawfully form part of the confirmed grant as sought herein. It was further submitted that in dealing with a similar matter, Musyoka J in **Succession Cause No. 2786 of 1997; In the matter of the Estate of Yakub Umardin Karimbux (Deceased)**, held as follows:-

"...The Application is about Nakuru Municipality Block 6/107, 108, 109 and 110, yet this property does not form part of the estate of the deceased...The said property belongs to a company known as Kenya Oatmeal Limited. The deceased held shares in Kenya Oatmeal Limited, and it was these shares that were before the court for distribution. He did not own the property held in

the name of the Company, and such property cannot be dealt with as if it forms part of his estate. That being the case, this court cannot make any orders touching on Nakuru Municipality Block 6/107, 108, 109 and 110...

155. Counsel further submitted that the argument by the Petitioners that the said registered limited liability companies were either agents and/or trustees of the deceased person for purposes of holding his properties is, in light of the evidence before this court, unfortunate, absurd and untenable both in law and fact. Moreover, it was submitted that Petitioners have willfully failed to provide any factual basis or evidence to support such allegation and controvert the documentary evidence before the Court, which clearly and loudly confirm that the said properties were lawfully acquired by the said companies for their operations and mostly through bank loans.

156. Counsel cited the Court of Appeal in **Muthembwa vs. Muthembwa [2002]1 EA**, wherein the court held as follows: -

“The trial Judge erred in taking into account as matrimonial property the two vehicles registered in the name of Kyaleka Properties Limited as the Company was not a party to the suit. Likewise, the order directing the division and distribution of properties owned by the limited liability companies was erroneously made and the trial court decree would be varied by excluding it.”

157. On the compulsory acquisition of the property known as Plot No. MN/VI/49, Port Reitz, Counsel submitted that the property was jointly purchased and registered in the names of Haroon and the deceased as joint owners. Following the unfortunate demise of the deceased, the property automatically devolved to Haroon by virtue of the right of survivorship and the same has never formed part of the estate of the deceased. Counsel cited the Court of Appeal in **P N N v Z W N [2017], eKLR** where a similar situation arose in that the property in issue was transferred to a limited liability company during the pendency of a matrimonial dispute before the court but still held that such transfer could not be addressed and/or impeached in the matrimonial dispute where the joint owner of the property was not a party. The Court held as follows: -

“48. There is evidence that the two properties have since the 23rd June, 2004 been held in the joint names of P and one M G. The finding by the High Court was that the transfer to the joint names was of no consequence since it was vitiated by the circumstances listed in paragraph 18 of this judgment. While I respect those findings, especially the protection of the authority and dignity of the court which was seized of the matter of those properties but P had no qualms in transferring them, the pendency of the suit notwithstanding, there is still an equal if not overriding consideration; that of condemning a party without a hearing. It is a principle of natural justice which all courts must jealously protect. The co-proprietor of the two plots was neither joined in the suit nor called to testify or make any presentation. It would not be right therefore to divest her of her interest in those properties without giving her a hearing.

49. *For the reasons given above, I would dismiss the appeal save for the claim relating to Kabatini [particulars withheld] and Kabatin [particulars withheld] which is allowed and the orders relating thereto set aside. The issues relating to the said properties may be unraveled in a separate litigation, if the parties so choose.”*

158. Further, counsel submitted that the “alter ego” principle which the Petitioners equally seem to be relying on do not apply in succession proceedings and none of the persuasive English authorities cited therein suggest that the same would apply in a succession cause as the one now before us. The said principle mainly applies in the process of lifting the veil of a company especially when directors and incorporators of the company have engaged in fraudulent and illegal activities and sought to hide behind the veil of the company. In such occasions, both the incorporators, the directors and the company are normally parties to such proceedings and not their estate.

What documents can this Court lawfully consider and rely on in determining the matter herein and whether the same extend to contested affidavits filed in previous proceedings between the deceased & Akhtar and uncertified documents purporting to be public documents

159. Counsel submitted that the Petitioners have attempted to rely on various documents including contested unproven affidavits filed in various previous court cases which were settled by consent of parties. However, Section 35(3) of the Evidence Act, provides that such affidavit evidence is precluded from being applied by this Court since the same were made during the pendency of court proceedings involving a dispute the deceased sought to prove by making such affidavits. The above provision of the law therefore expressly bars both the Petitioners and the Interested Parties from using and/or relying on untested affidavits made on other proceedings for purposes of proving facts in dispute in those proceedings. Counsel further submitted that both the affidavits of the deceased and the Interested Parties sought to be selectively relied on herein were made during the pendency and active prosecution of disputes between the said parties and are therefore not admissible and this Court must either expunge them from the record or just ignore them as the same are not applicable to these proceedings.

160. Counsel also relied in **Ruth Njeri Kuniara v Industrial & Commercial Development Corporation & 2 others [2018] eKLR**, wherein the court held as follows:

“12. Section 35 is in respect, generally, to statements in Documents made either before proceedings and are filed or there is anticipation of a dispute or proceedings. The policy objective would be that Statements made when proceedings are pending or when disputes are anticipated may be motivated by an incentive to conceal or misrepresent facts and so there is an inherent danger and difficulty in admitting them without testing them through cross-examination...”

What is the law to be applied by this Court in the distribution of the estate of a deceased person who professes the Islamic faith and whose beneficiaries equally profess the Islamic faith?

161. Counsel submitted that it is not disputed that the deceased herein together with all the parties in this matter profess the Muslim faith and

as such **Section 2(3) and (4)** of the Law of Succession Act is applicable to this matter. Counsel cited the Court of Appeal in ***Re the Estate Ismail Osman Adam (Deceased) Noorbanu Abdul Razak -v- Abdulkader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009*** and held as follows:-

“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the LSA [Law of Succession Act]. However, by Section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi's Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of Section 2(3) of the Law of Succession Act, law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example, disputes relating to the validity of a will made by a Muslim and ascertainment of heirs and shares of each will be determined in accordance with Muslim Law.

162. Counsel submitted that based on the law and the facts of this case, once the estate of the deceased is determined by this Court, the only law applicable to the distribution and/or dissolution of the subject estate is the Muslim Law and the High Court has no latitude in the choice of law for purposes of distributing and/or dissolving the estate of a deceased Muslim.

Whether or not Akhtar is entitled to 50% of the estate of the deceased acquired before July 2009, ss her matrimonial property.

163. Counsel submitted that the matrimonial properties which were held in trust for Akhtar by the deceased prior to his untimely demise do not constitute the estate of the deceased and as such the same should be identified and set apart for her before the confirmation of grant and distribution of the estate as sought herein. Therefore, her unopposed OS application dated 28th April, 2016 and filed herein on 17th May, 2016 merely seeks to determine what is lawfully due to Akhtar prior to the distribution of the estate of the deceased.

164. It was further submitted that from the evidence before Court, Akhtar is lawfully and legitimately entitled to 50% of all the shares issued in (1) Modern Coast Builders and Contractors Ltd; (2) Blue Bells Properties Ltd and (3) Pirbhai Jivanjee & Company Ltd, because they jointly held 50% of shares in the said companies and she contributed to the formation and management of the companies and always remained a director and a shareholder. She denies ever transferring any of her shares to either the deceased or any third party. Consequently, it is asserted, the Court ought to maintain this factual and lawful position by removing some of Akhtar's shares transferred by the deceased to himself under unclear circumstances, and currently appearing to be in his name and return the same to the lawful owner to enable Akhtar retain her 50% shareholding in the Companies. The above position is fully supported by the documentary evidence before the Court.

165. In respect of Vantage Road Transporters Limited; Vantage Point Clearing and Forwarding Co. Ltd; Modern Coast Express Ltd and Modern Coast Courier Limited, Counsel submitted that Akhtar is entitled to 50% of all shares held by the deceased in those companies for reasons that the companies were started by capital drawn from Modern Coast Builders and Contractors Ltd which was the only trading company and fully financed the operations and capitalization of the four companies which are all operated from the premises of MCBC at the Makupa Yard where Akhtar held 50% shareholding and was an active director.

166. Counsel further submitted that the above listed 7 companies were incorporated and/or acquired between the year 1984 and 2008 prior to the marriage of Regine who was married in July 2009, when everything was already in place and did not participate in the operations of any of the companies.

167. Counsel relied on the decision recently affirmed by the Court of Appeal in ***Esther Wanjiru Githatu v Mary Wanjiru Githatu [2019] eKLR*** wherein the Court of Appeal clearly stated that the matrimonial property belonging to the 1st wife does not constitute the estate for purposes of distribution and must be identified and set aside.

168. It was further submitted that even if this Court were to disagree with interested parties on the actual contribution done by Akhtar towards the formation, acquisition and operation of the listed companies, then the Court would still be right in holding that the subject shares and assets were held in trust by the deceased for her and remove the same from the estate prior to the distribution thereof.

Who is the owner of the Mkomani house? Can the same be said to be the matrimonial home? if so, whose matrimonial home is it as between Akhtar and Regine?

169. Counsel submitted that from the evidence on record, it is not in dispute that the Mkomani house is owned by a limited liability Company known as Bluebell Properties Ltd. The said property has never been owned by the deceased or any of the parties herein, and that the deceased has shares in the Company, Blue Bells Properties Limited some of which he transferred to Haroon. However, it is pointed out that Akhtar has never transferred any of her shares in the Company and that her rightful shareholding remains 50%. Therefore, the only matrimonial property capable of being shared are the shares held by the deceased in Bluebells Properties Limited. However, the said shares are not available to Regine by virtue of Section 8(1) (a) of the Matrimonial Property Act since the same was acquired in the year 1995 before her marriage to the deceased.

170. It was further submitted that Bluebells Properties Limited is not a party to these proceedings and its property cannot be dealt with without affording it any hearing and there is no evidence whatsoever to suggest that the property belonged to the deceased single-handedly or that it is matrimonial property capable of being shared.

Have the interested parties demonstrated sufficient grounds to warrant the review and setting aside of the contempt orders issued vide the ruling of 18th February 2016

171. Counsel submitted that the Court has the inherent jurisdiction to review the ruling and order made on 18th February, 2016, which has an

error on the face of the record, and therefore is ripe for review, for reasons, *inter alia* that in arriving at the said decision, the Court for some strange reason failed to take into account, the fact that the County Government of Mombasa had confirmed that it had demolished the subject house and as such the Interested Parties did not carry out the demolition.

172. Counsel further submitted that since the demolished house did not belong to the Interested Parties, the County Government of Mombasa would have declined any application by them for construction approval. Further, Counsel submitted that in ordering the Interested Parties to pay to Regine a monthly rent of Kshs. 250,000/= the court failed to take into account the fact that she is living in her own house within Nyali, and that the Interested Parties are paying Kshs. 150,000/= per month for her upkeep; Kshs. 130,000/= per month for children related activities, and school fees of Kshs. 1,608,360/= per year for the children.

173. Counsel cited the Court of Appeal decision in **Nairobi City Council V Thabiti Enterprises Limited [1995] 2 EA 231**, where the court considered a similar matter and held that there was an error apparent on the face of the record where the court issued orders which were neither pleaded nor sought by the parties. Consequently, Counsel submitted that the Interested Parties have demonstrated sufficient reasons to warrant the review of the Ruling of 18th February, 2016.

174. As we conclude, we must express the dissatisfaction in the manner in which the pleadings have been presented before this court by both parties. We point out, in particular, the manner in which the documents were annexed to the various affidavits and failure to cross-reference. It was a herculean task tracing and laying hands on the documents referred to in the very voluminous affidavits and supporting documents. A point in issue is the documents supplied by the interested parties in their Replying Affidavit Sworn by Akhtar on 2nd May, 2018 in which every annexure thereto all totaling 1608 pages, were marked 'AB' without distinction. It was a nightmare looking for any particular document and relating it to a particular paragraph of the affidavit. Regine on the other hand annexed 517 documents to support the Summons for confirmation of grant, all of which were marked RB. None of the parties eased the duty of the court tracing the documents referred to.

Determination

175. We have carefully considered the pleadings, submissions of the parties and the authorities relied thereon. We are of the opinion that the issues agreed on between the parties and adopted by the Court generally agree with the pleadings filed thus we are able to resolve the disputes between the parties finally. Even though parties agreed by consent on three substantive issues for determination by the court, the interested parties in their submissions have raised three additional issues. These are:-

- i. Disputed jurisdiction of the court in determining Summons for Confirmation of Grant;
- ii. Admissibility of affidavits filed in previous proceedings; and
- iii. Who should be the legal guardian of the two minors for purposes of the continuing trust.

176. We shall dispose of these three issues prior to addressing the agreed issues.

177. The Court's jurisdiction to consider and determine confirmation of grant is conferred by the provisions of Sections 55, 71, 72 and 73 of the Law of Succession Act. These Sections read as follows:-

"55. No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—

(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case,

immediately issue a confirmed grant of representation.

[Act No. 19 of 1984, Sch., Act No. 18 of 1986, Sch.]

Grants not to be confirmed in certain circumstances

72. No grant of representation shall be confirmed until the court—

(a) is satisfied that no application under Part III of this Act is pending; and

(b) has received a certificate from the Estate Duty Commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or

(c) is itself satisfied that no estate duty is payable in respect of the estate concerned.

Duty of court to give notice to holder of grant to apply for confirmation

73. The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.

178. We are satisfied that the causes before us has satisfied the provisions of the law cited above.

179. However, before we proceed further we wish to address certain preliminary issues which were raised by the parties in this matter including the jurisdiction of this court to entertain these Causes. The issue of jurisdiction was raised on three prongs. The first one being that this bench as constituted has no jurisdiction to hear and determine the summons for confirmation of grant herein. This was based on the allegations that this bench as constituted was not conferred with the jurisdiction to confirm the grant but rather to ascertain the assets and liabilities of the estate and upon doing that this court would then have to down its tools and let the parties file proposals on the distribution of the estate. In our view, even though constituted as a three-judge bench, this Court remains the High Court and retains jurisdiction under Article 165(3)(a) of the Constitution, Section 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules, 1980.

180. On the second prong, it was argued that this Court could not proceed to distribute the estate until the assets and liabilities of the estate have been identified and ascertained. In the Summons for confirmation of grant and response to it, parties have stated the assets and liabilities which they consider to belong to the estate. Although those assets and liabilities have not been agreed on, they form the basis upon which this Court can exercise its jurisdiction to distribute the estate upon being satisfied that the application is procedurally before the Court, and parties do not have to agree on the list of assets and liabilities because that is where the court Comes in.

181. Therefore, the mere fact that parties have disagreed on what constitutes the assets and liabilities is not a bar to the Court's mandate and obligation to resolve the dispute. We, therefore, do not agree that we lack jurisdiction to embark on ascertaining the assets and liabilities of the estate and the beneficiaries thereof and at the same time decide and distribute the estate to each beneficiary.

182. In any event, the grant herein was issued on 3rd November, 2017 to Regine and Haroon. It has taken more than the statutory 6 months before the application for confirmation was made. We take the view that the Court's duty is to oversee the administration of the estate and facilitate the expeditious completion of such administration. In our view, therefore, the objection to jurisdiction is without merit and we so hold.

183. The second issue touches on the admissibility of affidavits filed in previous proceedings between the deceased and Akhtar. We need not say much except that we have looked at those affidavits and we take the view that they have no bearing in the matter before us. In any event, we take guidance from the decision of the Court of Appeal in **Ruth Njeri Kuniara v Industrial & Commercial Development Corporation & 2 others** (*supra*) where the Court held: -

“12. Section 35 is in respect, generally, to statements in Documents made either before proceedings and are filed or there is anticipation of a dispute or proceedings. The policy objective would be that Statements made when proceedings are pending or when disputes are anticipated may be motivated by an incentive to conceal or misrepresent facts and so there is an inherent danger and difficulty in admitting them without testing them through cross-examination...”

184. Being guided and bound by that decision we have been careful to avoid relying on the affidavits filed in previous proceedings which were in any event settled by parties amicably and without being tested by way of cross-examination.

185. The third issue on the guardianship of the minors is hinged on Section 75A of the Law of Succession Act on continuing trust and the applicable law in this matter. The question of guardianship of beneficiary minors is one that follows the determination of the question of confirmation of grant and distribution of the estate. This issue is one that is subject to Muslim Law which dictates that guardianship of a minor irrespective of gender be vested in the mother. Here, other than the mother, the grandmother of the minors, the 2nd petitioner (Roselinde Gudrun Ostertag) also seeks to be appointed a trustee over any bequest made to the two minors. We strive to uphold kinship and harmony in the family and using this Court's inherent powers to do justice in the best interest of the minors, we decline the request by Roselinde Gudrun Ostertag and instead appoint Regine and Haroon as the trustees in guardianship of the two minors and their shares in the estate.

186. We now embark on addressing the three substantive issues agreed on by the parties and adopted by the Court. The issues for determination are as follows: -

i) Whether or not assets that vest in a spouse under and by operation of the Matrimonial Properties Act, 2013 are subject to succession upon death of a spouse;

ii) The law applicable in a matter of succession in respect of assets/properties of a deceased person registered and/or held in the name of companies in general and in the related matters in particular; and

iii) The law applicable to succession proceedings at the High Court concerning the estate of deceased person and parties professing the Islamic faith in light of article 170(5) of the Constitution.

187. A succession Court has the primary duty and mandate to identify the assets and liabilities of the estate then determine what part of it constitutes free property before embarking on distribution, we shall therefore seek to determine whether some of the assets claimed by the petitioners belong to the estate in whole or at all. That question will also demand an answer if any of the property is matrimonial, and what share if any, is due to Akhtar.

Whether or not assets that vest in a spouse under and by operation of the Matrimonial Properties Act, 2013 are subject to succession upon death of a spouse;

188. We understand and appreciate this issue to pose the question of whether the claim by Akhtar in the application dated 28th April, 2016 is due for determination in this cause being a succession cause and if the same can be dealt with at the same time as the court confirms the grant and distributes the estate. The position taken by the Interested Parties is that it would be premature and hurried to consider the application for confirmation prior to determining the matrimonial property claim and that the Court can only determine Akhtar's share in the property listed then call upon the parties to give proposals on how to have the net estate property distributed. On the other hand, the petitioners contend that a matrimonial property claim is a dispute between spouses or former spouses and does not fit in a succession cause.

189. We take the view that there is a constitutional obligation upon the Court and any other person engaged in litigation before the Court to facilitate and help in the expeditious determination of disputes in a proportionate and cost-effective manner. That must be seen to have been the rationale behind the consolidation of the three causes now before us. Once that step of consolidation was taken, the matter is one and a judgment on it, to be conclusive, must be one. It matters not that there is a matrimonial dispute that has been invited into a succession cause. It matters the least because in consolidating the matters by consent, parties bound themselves into a contract whose terms remain unchallenged. We find and hold that the Court has the duty and mandate to determine the entire dispute before it, at the earliest possible opportunity and that it would be an affront to the obligation of the court to stagger its determination as proposed by the Interested Parties. Here we determine that the parties have placed the matrimonial claim before us by consent and it behoves us to pronounce ourselves on the dispute by a decision.

190. What is the claim by Akhtar here? The second interested party asserts that she married the deceased while both were of very modest means, borrowed from her brother to start a business on 50:50% basis, which business thrived culminating in incorporation of Modern Coast Builders Company Ltd, which then laid the basis of subsequent acquisitions and incorporation of the other seven companies. She thus asserts that the seed capital for all the companies having grown from the 50:50% operation of the initial business name, her contribution in all the companies subsequently progressed in that ratio. She contends that she contributed to the subject companies in those shares and should be adjudged to be entitled to 50% thereof.

191. We find that indeed the question whether the property acquired by the deceased during the subsistence of the marriage with Akhtar constitutes matrimonial property, must be determined here as part of the court's mandate in isolating the free property of the estate for purposes of distribution.

192. What one spouse gets entitled to, as beneficially owned, in a property registered in the name of the other spouse is ordained by law to be the proven contribution of that spouse in the acquisition of the property. The ordination is enshrined in Article 45 (3) of the Constitution as well as Sections 2, 6 and 7 of the Matrimonial Property Act, 2013. The synergy between the said sections and the Constitution has been interpreted by the Court of Appeal in a number of decisions and we are bound by the latest of such decisions being **EGM v BMM [2020] eKLR** where the Court said: -

“We think it was erroneous for the learned judge to assume and hold that the Constitution gives spouses an automatic 50% share of the matrimonial property simply by being married. The stated equality means no more than that the Courts to ensure that both parties at the dissolution of a marriage get their fair share of the property. This has to be in accordance with their respective contribution. It does not involve denying a party their due share or unfairly (sic) a party by giving such party more than he or she contributed.”

193. We reiterate that there is no law that in a matrimonial property claim, the property is to be shared equally irrespective of parties' contribution and that the claimant retains the onus to prove her claim to the satisfaction of the Court.

194. In this matter, while it is not in doubt that the foundation of all the subject companies is traceable to the business name initially operated between the deceased and Akhtar, it is also common ground from the documents filed by both sides, that Akhtar had shares in those companies as of right. We take the view and agree with the Interested Parties' contention that the subject companies were properly and legally run as legal entities and not just bodies disguising the person of the deceased. If properly and procedurally run, then the processes by which the shares were allocated and subsequently altered was also properly and procedurally done.

195. On the same score, we read from the documents that both Akhtar and the deceased worked tirelessly but harmoniously in acquiring and incorporating the companies. No evidence was placed before the Court to prove any impropriety on the part of the deceased in the way the companies and their finances were managed. We find that if the two worked harmoniously then the allocation of shares to Akhtar was done in harmony and amicably and that what was allocated to her was the reward for her industry in the family enterprise. We therefore, find no justification to assign to Akhtar any interest in the shares of the deceased in the subject companies. We determine finally therefore that there has not been established any contribution by Akhtar in the acquisition of the shares held by the deceased in the companies and that all shares shown to have been held by the deceased on the date of his death were the free property of the estate and are all due for distribution to the persons entitled by inheritance in accordance with the law we shall determine to apply for such distribution.

196. In conclusion, therefore, the application by Akhtar to be vested with interests in the property of the deceased, as matrimonial property, as relates to shares in the subject companies lacks merit and the same is dismissed.

The Law Applicable in a respect of properties of a deceased person registered in the name of companies.

197. It is the petitioners' case that the companies listed in the affidavit in support of the Summons for confirmation of grant were an alter ego of the deceased because he used the assets and monies of the companies for his personal use and also because the deceased died a tycoon with no asset in his name.

198. Section 323 of the Companies Act, 2015 provides that the shares or other interests of a member in a company are personal property and are not in the nature of real estate. To give texture to these consolidated causes, the said provisions must be read alongside the provisions of Section 3 of the Law of Succession Act which defines "estate" to mean the free property of a deceased person and "Free property" in relation to the estate of a deceased person means property of which that person was legally competent freely to dispose of during his lifetime, and in respect of which his interest has not been terminated by death. A reading of the said definition reveals that this Court can only deal with the assets which were personally held by the deceased as at the date of his death and not properties held in the names of companies in which the deceased held shares.

199. The case of **Salomon vs. A. Salomon & Co Limited, (1897) AC 32**, explained the legal personality of a company in the following words-

“a limited liability company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued. And it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders.”

200. The legal personality of a company was also explained **In the Estate of Gitere Kahura (Deceased) (2018) eKLR** where it was held as follows-

“The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company, were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquidate it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.” (emphasis added)

201. Further, in regard to the legal personality of companies, the Court of Appeal in **Victor Mabachi & another v Nurtum Bates Limited**

[2013] eKLR, held as follows-

“A company is a body corporate, is a personal juridical, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting the lifting of the veil”.

202. In **Pacific Frontier Seas Ltd v Kyengo & another** [2022] KECA 396 (KLR), the Court of Appeal recently dealt with the issue of whether the beneficiaries to the estate of a deceased who was a shareholder in a company was entitled to the company's property. The Court held as follows-

*“It is trite law that what the estate of a deceased shareholder is entitled to are only the shares of the deceased in the company, and not to the property of the company. We have already adverted to the decision in *Re Estates of Gitere Kahura and Mary Nyokabi* (supra). In the course of determining an application for confirmation of grant, the High Court realised that the properties that the parties wanted to distribute did not belong to the deceased persons, but to a company in which they held shares. In refusing the application, the court stated that the jurisdiction of the probate court lies with the distribution of the shares, but not the liquidation of the company or distribution of its assets, which belong to the company. The court added that such properties ought not to be listed at all among the assets of the deceased and further that it is only the shares held by the deceased in the company that ought to be listed as his assets. The Court concluded:*

*“I have carefully perused through the voluminous papers filed herein by the parties. What emerges from the pleadings, the various affidavits and other documents on record is disturbing. I get the sense that the parties herein, virtually all of them, are inviting me to distribute assets that do not belong to the estates of the deceased persons. The averments and documents on record suggest that the assets that are alleged to belong to both estates actually is property registered in the name of the company known as *Gitere Kahura Investments Limited*, in which each of the deceased persons held one share... It is abundantly clear that a substantial part of the assets listed in the two confirmation applications do not belong to the estates of the deceased persons or are not registered in the names of the deceased persons or the said deceased persons were not the registered owners thereof, but were registered in the name of the company in which the two deceased held equal shares. It would appear that most of these assets were initially registered (sic) the name of one or both of the deceased persons before the two formed the company and transferred the assets to the name of the company. From the material before me, it is clear beyond peradventure that the bulk of what is claimed by the administrators to be assets in the estates of the two deceased persons do not in fact belong to them but to the company in which they held shares. The said assets are therefore not available for distribution in these two causes.”*

By parity of reasoning, the High Court and this Court have consistently held, even in disputes on division of matrimonial property, that while the Court can divide between spouse's shares held by them or one of them in a company, it has no jurisdiction to share out to a spouse properties registered in the name of a company. (See *SNK v. MSK & 5 Others* [2015] eKLR, *Mbugua v. Mbugua* [2001] 2 EA, *Muthembwa v. Muthembwa* [2002] 1 EA 186 and *Mereka v. Mereka* [2008] 1 KLR (G&F) 263).” (emphasis added).

203. Having considered the above authorities, we are in concurrence that the correct position of the law is the one advanced by Prof. Mumma that a company is a separate and distinct legal entity from its shareholders as espoused in the decision he relied on, **In the Matter of the Estate of Yakub Umardin Karimbux (deceased) Succession Cause No. 2786 of 1997**. Given the said circumstances the only free property of the deceased in this cause are shares, if any, held in the subject companies and properties registered either wholly in his name or in common with other persons.

204. The petitioners submitted that they do not seek for this Court to lift the corporate veil but for the Court to declare that the deceased held the assets of the companies in trust for the estate. To buttress the said contention, Mr. Miyare relied on a decision of the United Kingdom Supreme Court in **Prest vs. Petrodel Resources Ltd and others** (supra). The background of the said case is that it concerned ancillary relief proceedings before the English courts following a divorce. The deceased's wife sought an order for the transfer of ownership of eight residential properties including the matrimonial home, legal title to which was vested in two companies which her deceased husband wholly owned and controlled. In the said case, the deceased had used the companies' assets as his own without restriction. In reaching judgment, the Supreme Court held that it would not be appropriate to pierce the corporate veil because there was no evidence to demonstrate that the deceased had been concealing or evading any legal obligation. Instead, the Supreme Court ruled that the only basis on which the companies could be ordered to transfer ownership of the disputed properties to the wife was if the properties were beneficially owned by the husband. The Court unanimously held that the facts supported the conclusion of the deceased's beneficial ownership. The Court took into account that the deceased had provided the funds to purchase the properties which were then subsequently transferred to the companies for minimal consideration.

205. The case of **Prest vs. Petrodel Resources Ltd and others** (supra) is very distinct from the cause before us. From the affidavit evidence before this Court, we are left in no doubt that the deceased and Akhtar started their businesses from the scratch by a business partnership which was later incorporated into Modern Coast Builders Company Limited. The two had equal shareholding at the time of incorporation. They put in long hours to make the said company a success. Other companies mushroomed from the funds obtained from Modern Coast Builders Company Limited, and other companies were acquired using resources from the said company. None of the companies outlined in the pleadings in this cause was wholly owned by the deceased.

206. It is clear to us that the petitioners are surreptitiously urging us to lift the corporate veil by their proposition that the companies in issue are an alter ego of the deceased. In **Ukwala Supermarket v Jaideep Shah & another** [2022] eKLR the Court held as follows:

*“[18.] The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.’ (See *Jones vs. Lipman & Another* [1962] 1 All ER 442) and *H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd* [1956] 3 ALL ER where it was held;*

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”

[19.] In general, therefore, Courts in Kenya will only allow for the piercing of the corporate veil when two requirements are met:

- a) First, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and**
- b) Second, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.**

[20.] Some of the factors the Court would likely look at to determine if the two requirements have been met include the following:

- i. Whether the company is adequately capitalized;**
- ii. Whether there is a failure to maintain adequate corporate records or to comply with corporate formalities;**
- iii. Whether there has been demonstrated commingling of funds or assets between the company and the asserted alter ego;**
- iv. Whether the alter ego has treated the assets or finances of the corporation as his own.”**

207. The onus of proof under the provisions of Sections 107, 108 and 110 of the Evidence Act was on the petitioners to demonstrate that the subject companies were alter egos of the deceased. However, having noted that shares had been issued to two shareholders in some companies and to several shareholders in others, it is our finding that the subject companies cannot be said to have been alter egos of the deceased.

208. Therefore, the answer to issue number two raised hereinabove is that the estate property must be limited to the shares the deceased held in the companies established in the documentation availed before us in this cause.

The law applicable to succession proceedings at the High Court concerning the estate of deceased person and parties professing Islamic faith in light of Article 170(5) of the Constitution.

209. The jurisdiction of the Kadhi’s Court is provided for in Article 170(5) of the Constitution, which provides as follows:

“170. (5) The jurisdiction of a Kadhis’ court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi’s courts.”

210. Before we proceed further into this issue, it is to be noted that the petitioners had in their submissions raised the issue of *res judicata*, averring that the issue as to which law was applicable was already decided by Muriithi J. in Succession Cause No. 301 of 2014 before the consolidation herein, by a decision made on 16th December, 2014. We have looked at that decision, the orders issued and noted that they do not touch on the issue of the applicable law. On the contrary, the judge stated in paragraph 24 of the ruling as follows:

“24. Accordingly, I find that the High Court has jurisdiction to entertain the application by the Petitioners in this case. The issue of the applicable law will fall for consideration, as observed above when the court determines the prayers for administration and distribution of the Estate.”

211. Clearly, therefore, the issue of *res-judicata* as raised by the petitioners in their submissions does not hold any water. In any event, and for the avoidance of doubt, a party cannot raise an issue in submissions if that issue was never raised in pleadings. The Court of Appeal stated this clearly in **John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR** as follows:-

“Turning to the law on presentation of issues before the court, we state that there is now a wealth of case law on this. The path is well beaten. Generally, the law as we know it is that courts would only determine a case on the issues that flow from the pleadings and that judgment would be pronounced on the issues arising from the pleadings or from issues framed for court’s determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of the case. See the case of *Chalicha FCA Limited versus Odhiambo & 9 others [1987] KLR182* for the proposition that a case must be decided on the issues on the record and the court has no power to make an order, unless by consent, which is outside the pleadings; the decision in the case of *Galaxy Paints Co. Ltd versus Falcon Guards Ltd EALR [2000]2EA 385* for the proposition that the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination...

The only exception to the above obtaining position is where, as in the decision in the case of *Odd Jobs versus Mubea [1970] EA 476* wherein, it was held *inter alia* that a court may base its decision on an unpleaded issue if it appears from the course followed

at the trial the issue has been left to the court for decision...

212. Applying the above principles to the rival arguments, we find and hold that the issue of *res-judicata* was never pleaded by the parties herein. It would amount to an ambush if this Court proceeds and determines the issue of *res-judicata* without giving the Interested Parties their right to be heard on that plea. Consequently, the plea of *res-judicata* as raised by the petitioners fails.

213. Turning to the determination of the applicable law, it is not disputed that the deceased lived and died a Muslim and that all the heirs to the deceased estate profess the Muslim faith.

214. Section 2(3) of the Law of Succession Act provides:

“(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.

215. Subsection 4 provides:

(4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.”

216. Clearly, Section 2(3) of the Act precludes the application of the Law of Succession Act (save for Part VII thereof) to Muslims. Even where matters relating to the estate of a Muslim are filed in the High Court, the applicable law remains Muslim law. Therefore, the devolution of the estate herein being of a Muslim, shall not be subject to the Law of Succession Act but shall instead “be governed by Muslim law”. This was articulated by the Court of Appeal in **Re the Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v. AbdulKader Ismail Osman, Mombasa Civil Appeal No. 285 of 2009** delivered on 5th December, 2013 which upheld the choice of Muslim parties to submit to the Kadhi’s Court or to file succession proceedings in the High Court. In his decision Githinji, JA. Sitting with Koome JA. (as she then was), and Okwengu, JA. concurred in holding that:-

“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes. Section 47 makes it clear that the High Court has jurisdiction to entertain any application and determine any dispute under the LSA [Law of Succession Act]. However, by section 48(2) the jurisdiction of the High Court is not exclusive as Kadhi’s Courts have also jurisdiction to entertain disputes relating to the estate of deceased Muslims. However, if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) [of the Law of Succession Act], the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the LSA. As an example, disputes relating to the validity of a will made by a Muslim and the ascertainment of heirs and shares of each will be determined in accordance with Muslim law. In Saifudean Mohamedali Noorbhai v. Shehnaz Abdehussein Adamji, Mombasa Civil Appeal No. 142 of 2005 (unreported) this Court said in part:

‘Kenya Courts have held in past judgments that every litigant of whatever religious persuasion, has the option of going directly to the High Court, and a Muslim is not necessarily restricted to the jurisdiction of the Kadhi’s Court’

However, by virtue of section 2(4) LSA, the law relating to the administration of the Estate of the deceased Muslim is the one stipulated in Part VII of the Act, that is, sections 44-95 in so far as those provisions are not inconsistent with Muslim law.”

217. We have carefully considered the cited authorities. We find and hold that by virtue of the doctrine of Stare decisis, we are bound by the decisions by the Court of Appeal unless the said decisions are issued *per incuriam*, which is not the case presently. Consequently, this Court assumes jurisdiction on the dispute before it. However, by virtue of Section 2(3) of the Law of Succession Act, the applicable law in this cause as to the devolution of the deceased’s estate herein, is the Muslim Law, with liberty to apply the provisions of Sections 44-95 of the Law of Succession Act in so far as those provisions are not inconsistent with the Muslim law.

218. The Petitioners oppose the distribution of the estate of the deceased on the ground that it is discriminatory on the basis of gender and therefore an infringement of the provisions of Article 27 of the Constitution. Article 27 of the Constitution of Kenya, 2010 embodies the principle of equality and non-discrimination as follows:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

219. It is evident that the right to equality and non-discrimination is not absolute and certain limitations have been imposed by Article 24 in relation to persons who profess the Muslim religion. Article 24 (4) provides:

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

220. The foregoing provision requires that Islamic Sharia shall be applied to Muslims in matters relating to personal status, marriage, divorce and inheritance notwithstanding the equality provisions in the Bill of Rights in the Constitution. **See In re Estate of Mohamed Kinango Kitonyo (Deceased) [2019] eKLR.**

221. On Islamic law, the Court of Appeal in **CKC & another (Suing through their mother and next friend JWN) v ANC [2019] eKLR**, stated thus:

“In a wide-ranging review, this Court noted, a few basic principles pertaining to Islamic law. The first is that Islamic law is a moral doctrine at whose heart lie the values of justice and kindness translating into an ethic of care and compassion for the weak and vulnerable, especially among one’s close relations. Secondly, in interpreting the Quran-inspired law, regard must be had to the Quran’s moral teachings as a whole. Thirdly, Islamic law is dynamic and adapts to evolving social, political, cultural and economic conditions and realities and that “not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence has been and continues to be a search for the good law to be applied in differing times and situations.” Lastly, the Court stated that Islamic law does not constitute a single uniform code of law. On the contrary, its hallmark is legal pluralism and diversity, comprising a multiplicity of Muslim schools of law within the two major branches of Sunni and Shia.”

222. Accordingly, therefore it is not correct to infer any discrimination in the applicability of the Muslim Law in this cause, and there is no abrogation of Article 27 of the Constitution as alleged by the Petitioners. The proposed distribution of the estate of the deceased in accordance with Islamic Law cannot, therefore, be said to be unconstitutional. We are accordingly bound by the Constitution and Statute Law to apply Islamic Law in the matter of distribution of the estate herein, for which reason the contention by the Petitioners in this regard fails.

Principles of distribution of an estate of a deceased Muslim.

223. Principles of intestate succession come into play when a Muslim dies without leaving a will. In 1990 an amendment to the Law of Successions Act, through Statute (Miscellaneous Amendment) Act, (Act No. 2 of 1990) exempted Muslims from the substantive provisions of the Law of Successions Act. These included provisions relating to testamentary or intestate succession, thereby subjecting the estate of a deceased Muslim exclusively to Islamic Law of succession as provided by Sec. 2(3) and 4 of the Law of Succession Act, which we have quoted hereinabove.

224. According to the treatise, **“Mulla Principles of Mahomedan Law” revised by Professor Iqbal Ali Khan**, Dean and Chairman Department of Law Aligarh Muslim University 20th Edition, the heirs to the estate of a deceased Muslim are divided into three classes. The first class is called the *Dhawil-il-Furudh* or the Sharers, the second class is called the *Asabah* or Residuaries or Agnates and the third class is called the *Dhaw-il-Arham* or the Distant Kindred (uterine relations). Assigning these classes of heirs their respective shares, if any, is done in the following manner: The first rule of intestate succession is that the Quranic “Sharers” must come first before all others and be assigned their Quranic shares. The Sharers are the most important class of heirs who take primacy in that they are entitled before all others. The shares are allotted to them either by the Holy Quran or by the traditions. In the **Holy Quran, Surat Nisaa, 4:11** it is ordained as follows:-

“God (thus) directs you as regards your Children’s (inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth...These are settled portions ordained, by God, and God is all-knowing, All-wise.”

225. The second rule of intestate succession is that if any balance is left after assigning the shares of the Sharers, the residue should go to the heirs of the second class, namely the *Asabah* or Agnates, also known as the Residuaries, because they take the residue of the estate of the deceased person.

226. Third rule of intestate succession is that, if there are no Sharers and no Residuaries, the Distant Kindred are entitled to the deceased’s estate.

227. Based on the verses above, we can conclude that:

- 1) The principle of inheritance distribution in Islam is that the portion for a brother is equivalent to two parts of the sister. It also specifies that a widow, where there are children, is entitled to one-eighth of the estate.
- 2) The beneficiaries from Qur’anic “Sharers” and others have been clearly defined along with their individual inheritance portions. Among the Qur’anic “Sharers” beneficiaries mentioned in that verse include a daughter, mother, father, husband, wife, male siblings of the same mother, female siblings of the same mother, female siblings of the same parents and female siblings of the same father.
- 3) The distribution of inheritance among the beneficiaries must be made after all debts being paid and after the deceased’s will is settled (if any) on a 1/3 rate from the total inheritance amount.

228. Although the Islamic Inheritance Law has determined the inheritance of beneficiaries with their respective portions, the law has provided ample space to the beneficiaries to either accept the inheritance or otherwise. A beneficiary’s compromise of the inheritance can be done through the *takharuj* doctrine (Conciliatory Sharing or Conditional Share Wavering). See **Al mausu’a Al fiqh Al Kuwaitiyyah Vol. 11 pg 6.**

229. The *takharuj* doctrine is practised in inheritance distribution in various forms and with various means of payment solely to provide

comfort and freedom to the beneficiaries involved. It should be done with the approval and willingness from the beneficiaries who have rights in the distribution of the inheritance, whether through individual or group beneficiaries and whether with a specific payment or without any payment.

230. In our view, the *takharuj* doctrine stated above is laudable as it affords the parties in this cause an opportunity to live their faith through reconciliation and conciliation, and we urge Haroon and Regine as administrators of the deceased's estate to bear at heart the best interests of the two minor beneficiaries.

231. In the Matter of the Estate of Ishmael Juma Chelanga – Deceased [2002] eKLR, Etyang J quoted with approval the scholarly works of Dr. Mohammed Abdi Hai Ariti in the book **Death and Inheritance (The Islamic Way) Edition 1968 at page 194**, as follows:

“...that after the death of their husbands, they shall take possession of all immovable property left by them, under the false impression that they are the owners of everything. The fact is that: anything their late husbands gifted them during their lifetime and handed over to them as being theirs, is no doubt theirs. But the rest of it is combined inheritance and, according to the rules of Shariah, this will be distributed among all heirs as a matter of obligation. A widow does not, therefore, own the whole of a deceased husband's property. She owns only that share which she is entitled under the law.”

232. In this regard we have observed that Regine has made a claim for 32% for Taseen, 33% for Aleena and 20% of the estate for herself, leaving only 15% for Akhtar and Haroon. That to us flies on the face of Islamic law and the decision cited above.

233. Clearly, Islamic law does not differentiate the kind of properties to be inherited. As **Muhammad M. Khan, in Islamic law of inheritance**, 13 observes:

“Muslim law makes no distinction between various kinds of properties for purpose of succession. Under Islamic law whether the property is real or personal, ancestral or self-acquired, corpus or usufruct, movable or immovable is immaterial, the rules of succession are the one and the same.”

234. In this regard, there was evidence that Haroon received Kshs. 245,000,000.00 upon compulsory acquisition of the Port Reitz property (Plot No. MN/VI/49) which was jointly registered in his name and the deceased's. Haroon alleges that by the time the acquisition was concluded, he had acquired the property by operation of the law of survivorship and that he became the sole beneficiary thereof. This allegation was objected to by Regine who contended that the transfer of the said property from Vantage Road Transporters Limited to Haroon and the deceased was fraudulent. We find no evidence to prove fraud. Nonetheless, we find that as at the date of death of the deceased, the said property was registered in the joint names of the deceased and Haroon and upon the death of the deceased, the said property devolved in favour of Haroon absolutely. This is our understanding of the principle of survivorship. Section 91 of the Land Registration Act provides for the right of survivorship in joint tenancy. It states as follows:-

“Meaning and incidents of co-tenancies.

(1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

(2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

(3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—

(a) whether those persons are joint tenants or tenants in common; and

(b) the share of each tenant, if they are tenants in common.

(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and

(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.”

235. From the above section, it is clear that Haroon became the sole owner of the Port Reitz property pursuant to the principle of survivorship. This position is further buttressed by Section 60 of the Land Registration Act and Section 49 of the Land Act which are as follows:-

“Section 60 of the Land Registration Act

Transmission on death of joint proprietor.

If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.”

Section 49 of the Land Act

“Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.”

236. Although we have adopted the Muslim Law as the law applicable in this cause and although under the Muslim Law there is no right of survivorship which would mean that the deceased’s share of the property would be available for distribution, we appreciate that the applicability of Muslim Law is in relation to and limited to administration of the estate of a Muslim under the Law of Succession Act. Where a statute expressly provides for proprietorship like the Land Registration Act and Land Act do, in the cited stipulations, the hierarchy of laws dictate that the statute takes precedence to Muslim Law.

237. This leaves us with one outstanding issue whether or not we should review the orders of the Court dated 18th February, 2016 for adjudging the interested parties to have been in contempt of Court. We will not go into the depth of this matter because both parties agree that the issue was escalated to the Court of Appeal which is now seized of the matter. The law on review is that one cannot pursue a review and an appeal at the same time. This was held in the Court of Appeal case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** where it was stated as follows:

“If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karani & 47 Others v Kijana & 2 Others [1987] KLR 557 the court held that:

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

(See also: African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK).”

238. There was a claim by one, Naslin Malik, that in the deceased’s lifetime, he bought and bequeathed to her that property known as **Plot Number 6562/1/Mainland North, Nyali estate**. That claim was never opposed but conceded by all sides. On the 5th October, 2018, when parties appeared before the court they agreed as much. What is not contested by parties raises no dispute for determination by the court and we allow that claim as made.

DISPOSITION

239. In conclusion, the summary of the consolidated Causes before us is as follows: Arising from the unfortunate demise of the deceased herein on 11th July, 2014 various actions were brought on behalf of his estate. The consolidated causes prayed for various orders with the 1st application by the interested parties seeking to set aside Lady Justice Thande’s orders issued on 18th February, 2016 which condemned them to contempt of this Court. As we have found that the application has no merit since those proceedings have been escalated to the Court of Appeal and have therefore left the jurisdiction of this Court.

240. The 2nd Application also by the interested parties sought to vest the deceased’s shares in the subject companies on Akhtar was also herein found to be of no merit and was dismissed. We note that there was equally an Original Originating Summons instituting HCCC No. 8 of 2014 (OS), by which Regine sought to question if that property known as House No. 1 situate on Mombasa MN 1371, Mkomani Road, Mombasa, (Plot No.1371/1/MN) aka Mkomani house, and the household goods and effect therein were the matrimonial property between the deceased and her. We have found and held that that property having been registered all along in the name of a limited liability company was never the property of the deceased from which any spouse could claim beneficial ownership in the name of matrimonial property. We now find and hold that, the property known as Plot No.1371/1/MN was never a matrimonial property and that none of the widows can maintain a claim over it. The consequence is that the Originating Summons dated 8th September, 2014 is also devoid of merit and is thus dismissed

241. The 3rd Application herein sought to confirm the grant issued herein to Regine and Haroon on 3rd November, 2017. Pursuant to the foregoing provisions of this judgment herein this court finds and holds that the Summons for confirmation of grant dated 16th January, 2018 has merit and should and is hereby allowed and **ORDERS** granted as follows:

i. The grant of letters of administration intestate made to Regine Butt and Haroon Butt on 3rd November, 2017 is hereby confirmed.

ii. The deceased’s estate is hereby distributed among his dependants in accordance with the Muslim Law as follows:

List of Companies and Shareholding

| | Companies | Shares | Shares due to the estate | Distributed per formula to: |
|---|------------------------------|------------------------|--------------------------|-----------------------------|
| 1 | Blue Bell Properties Limited | Shahid Pervez Butt- 51 | 51 | Akhtar- 6.25% |

| | | | | |
|---|--|---|---------|---|
| | | Akhtar Butt-12 Haroon Butt- 25 Rokaya Butt- 12 | | Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 2 | Modern Coast Builders & Contractors Ltd | Shahid Pervez Butt- 350,000 Akhtar Butt- 100,000 Haroon Butt- 150,000 | 350,000 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 3 | Pirbhai Jivanjee and Company Limited | Shahid Pervez Butt- 280 Haroon Butt- 10 Akhtar Butt- 5 Rokaya Butt- 5 | 280 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 4 | Vantage Point Clearing and Forwarding Ltd | Shahid Pervez Butt- 748 Akhtar Butt- 5 Haroon Butt- 200 Rokaya Ismail -45 Mohamed Arif Ahmed-1 Osman. Abdulaziz Esmail-1 | 748 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 5 | Modern Coast Road Transporters Limited | Shahid Pervez Butt- 585 Haroon Shahid Butt- 10 Dhaniram Dogra- 5 (As per 29 Nov 2013 Annual Returns-filed.) | 585 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 6 | Vantage Road Transporters Ltd | Shahid Pervez Butt- 585 Haroon Butt- 10 Dhaniram Dogra- 5 Rokaya Butt- 5 | 585 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% |

| | | | | |
|---|---------------------------------|--|-----|---|
| | | Mohamed Ahmed Malik- 5 | | Aleena- 17.5% |
| 7 | Modern Coast Express Ltd | Shahid Pervez Butt- 85 Haroon Butt 13 Mohamedarif Ahmed- 1 Osman Abdulaziz Esmail- 1 | 85 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 8 | Modern Coast Courier Ltd | Shahid Pervez Butt 90 Haroon Butt- 7 Arif Ahmad- 1 Osman Abdul Aziz- 1 Mohd Ahmad Malik- 1 | 90 | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 9 | Premac Properties Ltd | Neither Certificate of Incorporation nor annual returns on record | Nil | |

List of Parcels of Land

| | Properties | Registered owner(s) | Due to the estate | Distributed per formula to: |
|---|--|---|--------------------------|---|
| 1 | Mombasa Plot No. 1371/1/MN. Mkomani Mombasa | Bluebell Properties Limited | Nil | |
| 2 | Mombasa Plot MN/VI/49, Port-Reiz, Mombasa | Shahid Pervez Butt and Haroon Shahid Butt | Nil | |
| 3 | Mombasa/Block XII/4 Lumumba Road, Mombasa | Vantage Road Transporters Limited | Nil | |
| 4 | Mombasa/Block XII/Parcel 2, Lumumba Road, Mombasa | Pirbhai Jivanjee & Company Limited | Nil | |
| 5 | Malindi Plot No. 7114 (Original Number 538/35) and Plot No. 7117 (Original Number 538/38), Malindi Municipality, Kilifi District | Agreement for sale-showing ownership by: - Shahid Pervez Butt (2%), Haroon Shahid Butt (49%) and Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 6 | Malindi Plot No. 7118 (Original Number 538/39) Malindi Municipality, Kilifi District; | Shahid Pervez Butt (2%), Haroon Shahid Butt (49%) and Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 7 | Malindi Plot No. 7119(Original Number 538/40) Malindi | Shahid Pervez Butt (2%), Haroon | 2% | Akhtar- 6.25% |

| | | | | |
|-----------|---|---|-----|---|
| | Municipality, Kilifi District | Shahid Butt (49%) and Taseen S Butt (49%) | | Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 8 | Malindi Plot No. 7120 (Original Number 538/41) Malindi Municipality, Kilifi District | Shahid Pervez Butt (2%), Haroon Shahid Butt (49%) and Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 9 | Malindi Plot No. 7121(Original Number 538/42) Malindi Municipality, Kilifi District | Shahid Pervez Butt (2%), Haroon Butt (49%) and, Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 10 | Malindi Plot No. 7122(Original Number 538/43) Malindi Municipality, Malindi District | Shahid Pervez Butt (2%), Haroon Butt (49%)and Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 11 | Malindi Plot No. 7124 (Original Number 538/45), Malindi Municipality, Kilifi District | Shahid Pervez Butt (2%). Haroon Butt (49%) and Taseen S Butt (49%) | 2% | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 12 | Ngumo Patsa/Mazeras/156 | Modern Coast Builders and Contractors Limited | Nil | |
| 13 | Apartment in Taarifa Suites on LR. Numbers 209/12938 Parklands, Nairobi | Lease Transfer to Haroon Butt | Nil | |

14. Nairobi LR No. 2009/6209, Kitui Road, Nairobi alleged by Petitioner to have been acquired by the deceased but not transferred without any document. On the other side the interested parties alleged the same to have been leased by an unidentified company and without any document. A copy of the title shows the registered owner to be Verb Limited. With no evidence that the property was ever acquired by the deceased, we have no jurisdiction over the property in this cause.

15. Kilifi/Kawala "A" Kadzonzo/32 is registered in the Names of Jamal Abeid Khamisi, Abdulhakim Abeid Khamis, Mohamed Abeid Khamis. With no evidence that the property was ever acquired by the deceased, we have no jurisdiction over the said property in this cause.

16. Ngumo Partsa/Mazeras/152, measuring 1.5 hectares is shown to be registered in the name of Regional Container Freight Station. With no evidence that the property was ever acquired by the deceased, we have no jurisdiction over the said property in this cause.

17. The following Properties were mentioned by the petitioners but without documents of title on record.

- a) Plot. No. Mnagoni/Mariakani/330;
- b) LR. 209/12060, Nairobi;
- c) L.R 209/21361, Nairobi;
- d) Interest in LR No. 209/2267, Cross Road Nairobi;
- e) Interest in Plot No. 5, Dewiton Street, Kampala;
- f) Mombasa Plot No. 3202, Nyali, Mombasa;
- g) Interest in L.R No. 516, Jomo Kenyatta Avenue Mombasa;
- h) Apartment in Taarifa Suites on LR. Numbers 209/6438, Parklands, Nairobi;
- i) Apt.3, Behrendstr/Glinkastr.10117 Berline-Mitte purchased in the name of Haroon Butt from Ari Property UG(haftungsbechrant, Berlin) purchased on 15th August, 2011 at 291,281.00 Euros;
- j) Frakonia Euroban VersAM Stadtpalais behrenstrape gmbh purchased in the name of Haroon Butt from Ari Property UG, Berlin and transaction completed on 27th July, 2014 at 122,500.00 Euros;
- k) Apartments with Living 106; Berline Capital Investments; and
- l) Jewellery and watches.

18. There were allegations and counter-allegations on the above properties (a-l above) with each side claiming and blaming the other side to be in possession thereof. However, no evidence was led to the satisfaction of this Court about the existence of such property. Without evidence on the existence and ownership, we are unable to make any decision on the same.

List of Bank Accounts

| | Bank Account | Owner | Due to the estate | Distributed per formula |
|----|---|--|--------------------------|---|
| 1. | Investments under contract No. xxxxxxxx with Friends Life Services Limited, P.O. Box 1810, Bristol, Bxxxx 5SN; Pixham End, Dorking, Surrey, RH4-1QA, UK in the name of Shahid Pervez Butt. | Shahid Pervez Butt | whole | Akhtar- 6.25% Regine- 6.25% Haroon- 35% Taseen- 35% Aleena- 17.5% |
| 2 | Account No. xxxxxxxxxxxx, Imperial Bank Ltd | Shahid Pervez Butt and Regine Butt | Nil | |
| 3 | Monies/Investments in Account No. xx-xxxx-xxxxxx held in Sun Life Financial Investments (Bermuda) Ltd, Victoria Hall, 2nd Floor, 11 Victoria Street, Hamilton HM 11, Bermuda | Shahid Pervez Butt and Haroon Shahid Butt | Nil | |
| 4 | Investment Policy No. xxxxxxxxxxxx; Account No. xxxxxxxxxxxx(USD) with Royal London 360, Royal London House, Isles of Man Business Park, Cooil Road, Douglas, Isle of Man, IM2 2SP, British Isles | Shahid Pervez Butt and Haroon Shahid Butt. | Nil | |

Motor vehicles

19. A number of motor vehicles were alleged to have belonged to the deceased but according to the document availed to court only Kxx xxx and Kxx xxxx fbelonged to him. These two motor vehicles are available as property of the estate for distribution and the same formula for distribution shall apply.

iii. In accordance with Muslim Law, Regine Butt and Haroon Butt be and are hereby appointed trustees of such bequests as have been made herein in favour of the deceased's children herein Aleena Shahid Butt and Taseen Shahid Butt (both minors).

iv. Plot Number 6562/1/Mainland North, Nyali estate vests in Naslin Malik pursuant to paragraph 238 of this judgment.

v. Any assets of the deceased's estate, which may have been inadvertently left out of the confirmed list of assets of the estate, which may be discovered after this judgment, and are subject to the distribution to the Sharers, shall be distributed in accordance with Muslim Law and subject to the formula used hereinabove.

vi. Parties are directed to bear their own costs, this being a family dispute.

vii. For ease of case management and bringing this litigation to an end, and in line with the Court's duty to oversee the administration of the estate, the administrators are directed to ensure the transmission of all the shares of the Sharers within 90 days from today.

242. It is so ordered.

DATED, SIGNED, AND DELIVERED ONLINE VIA MS TEAMS THIS 25TH DAY OF MARCH, 2022

.....

E. OGOLA P.J.O. OTIENO M. NJOKI MWANGI

PRESIDING JUDGE JUDGE JUDGE

In the Presence of:-

Ms. Mutuku for Mr. Miyare for the Petitioners.

Ms. Samba for Mr. Kaluma for the Petitioners.

Mr. Agwara for Prof. Mumma for the Interested Parties.