

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE 48 OF 2022

BURHAN SAID MLAVI.....PLAINTIFF

Vs

MOHAMMED SAAD HAJIRIN.....1ST DEFENDANT

**RUKIA SAID MLAVI (the legal personal representative
of the estate of the late Said Mlavi).....2nd DEFENDANT**

**REHEMA ISSA NASSORO (Legal personal Representative
of the estate of the late Neema Said Mlavi).....3rd DEFENDANT**

RULING

Date of last Order:30-5-2023

Date of Ruling: 16-6-2023

B.K.PHILLIP,J

This Ruling is respect of the points of preliminary objections raised by the advocate for the defendants, the learned Advocate Rodgers Godfrey Mlacha, to wit;

- i) This suit is *res judicata* vis-vis application no.24 of 2019 between the same parties conclusively determined by the District Land and Housing Tribunal Arusha.
- ii) The plaintiff has no *locus standi* to prosecute this suit.
- iii) This suit is bad in law and untenable for administration of the proceedings in respect of the estate of the late Said Mlavi have been closed.

- iv) This honorable Court has no original jurisdiction to entertain and determine this suit.
- v) That the plaintiff has no cause of action against the 3rd defendant.

The plaintiff is represented by the learned Advocate Ombeni Kimaro. The points of preliminary objections were disposed of by way of written submissions.

A background to this matter albeit briefly, is worth it for a better understanding of the coming discussion. It is the plaintiff's case that he is the one of the heirs of the late Said Mlavi who was his father. The 1st defendant is his sister. He has sued her in her capacity as the administrator of the estate of the late Said Mlavi. The 3rd defendant is the administrator of the estate of the plaintiff's sister the late Neema Said Mlavi who was also the administrator of the estate of the late Said Mlavi. The 1st defendant is the person who bought the suit property located at Plot No. 13 Block "G", Area "F" Arusha City with CT No. 56960 which formed part of the estate of the late Said Mlavi. The plaintiff alleges in the plaint that the sale of the suit property to the 1st defendant was illegal and was done clandestinely by his sisters aforesaid in their capacity as administrators of the estate of the late Said Mlavi without involving him. Initially the plaintiff herein was appointed as the administrator of the estate of the late Said Mlavi. His appointment was revoked and his aforesaid sisters that is, the 1st defendant and the late Neema Said Mlavi were appointed as administrators of the estate of the late Said Mlavi. The plaintiff alleges in the plaint that within three days from the date of their appointment as administrators of the estate of the late Said Mlavi, the 2nd defendant and

the late Neema Said Mlavi disposed of the suit property to the 1st defendant illegally. Thereafter the 1st defendant evicted the plaintiff from the disputed property together with his tenants as the suit property was rented to tenants.

In this case the plaintiff prays for the following orders;

- i) That the disposition (bequeath) done by the defendants is illegal *ab initio*.
- ii) An order that the administratrix of the estate of the late Said Burhan Mlavi has no mandate to bequeath the disputed property to the 1st defendant without consulting the heirs to the estate.
- iii) An order that the suit property should be taken back to the estate of the said Burhan Mlavi.
- iv) An order that the suit property being part of the estate of Said Mlavi if disposition it take place must be agreed by all heirs of the estate of the late Said Mlavi.
- v) An order that the suit property belongs to the heirs of the estate including the plaintiff.
- vi) Declaration that eviction done by the 1st defendant be declared unlawful.
- vii) An order of evicting the 1st defendant and or his agents from the suit property.
- viii) Costs of this suit.
- ix) Any other reliefs this Hon Court may deem fit to grant.

Back to the points of preliminary objections; I will start dealing with the 3rd point of preliminary objection since it attacks the competency of this suit. It is a common knowledge that for a suit to be entertained by the court it has to be competent and tenable under the law.

Submitting for the 3rd point of preliminary objection, Mr. Mlacha argued that the probate / administration proceedings in respect of the estate of the late Said Mlavi have been concluded and closed after the filing of inventory by the administrators of the deceased estate. He contended that upon filing inventory the administrators of the deceased estate became *functus officio*. Referring this court to paragraph 4(d) and (e) of the 2nd defendant's written statement of defence and annexure M-1 thereof, and paragraph 3(d) of the 2nd defendant's Written statement of defence, he insisted that the inventory in respect of the estate of the late Said Mlavi was filed in court on 18th May 2017 and the administration of the deceased estate was closed. He was of the view that if the plaintiff believes that the 2nd defendant and the late Neema Said Mlavi who was also the administrator of the estate of the late Said Mlavi wasted the estate of the late Said Mlavi, then he has to sue them in their personal capacity. To cement his arguments he referred this court to the case of **Ahmed Mohamed AL Laamar Vs Fatuma Bakari and another, Civil Appeal No. 17 of 2012**(unreported).He prayed this point of preliminary objection to be upheld.

In rebuttal, Mr.Kimaro argued that the holding in the case of **Ahmed Mohamed AL Laamar** (supra) is to the effect that if the beneficiary genuinely believes that the administrator acted in excess of his mandate or

wasted the estate and /or damaged or occasioned any loss to it they are free to sue the administrator. To cement his argument he cited the provision of section 138 and 139 of the Probate and Administration of Estate Act (Cap 352 R.E.2019). He contended that the plaintiff in this case is suing the former administrators of the estate of his late father who had already completed their duties something which the law allows. Moreover, he contended that the administrator or parties to a case cannot become *functus officio* only a court can become *functus officio*.

Furthermore, Mr. Kimaro submitted that Mr. Mlacha's argument that since the Probate/ administration cause in respect of the estate of the late Said Mlavi have been closed the administrator can be sued in their personal capacity might be true. However, he was quick to point out that position of the law is that a suit cannot be defeated by reason of mis-joinder of parties. He cited the provision of Order 1 Rule 9 of the Civil Procedure Code (" the CPC"). Also, he cited the provisions of Order 1 Rule 10(1) (2) and (4) of the CPC and went on arguing that this court has powers to issue an order that the names of parties improperly joined be struck and order the proper parties to be joined in order to adjudicate the really matter in dispute. In conclusion of his submission he contended that the case of **Ahmed Mohamed AL Laamar** (supra) is distinguishable from the facts of this case because the Court Appeal allowed the appeal in that case on the ground the High Court Judge erred to revoke the administrator of the deceased estate who was not into existence. He prayed this preliminary objection to be dismissed and this court be pleased

to order the names of the wrongly joined party be struck out and names of right parties be joined in the case.

In rejoinder, Mr. Mlacha submitted that Mr. Kimaro has admitted that the administration of the estate of the late Said Mlavi were closed long time ago and that the administrators of the deceased estate cannot be sued in that capacity that is, as administrators of the deceased estate. He contended that the prayer for an order to struck out the names of parties wrongly sued made by Mr. kimaro is not tenable and cannot rescue the plaintiff's case on the reason that not every non-joinder of parties can be cured under Order 1 Rule 9 of the CPC. He referred this court to the case of **Godfrey Nzowa Vs Selemani Kova & Tanzania Building Agency , Civil Appeal No. 183 of 2019** (unreported). He added that be as it may, the amendment sought cannot serve any useful purpose because the way the plaint is framed, the plaintiff's claim therein can only be pursued against active administrators of the deceased estate. He contended that in the absence of the administrator of the estate of the late Said Mlavi the plaintiff cannot sue the 1st defendant. Mr. Mlacha further argued that this suit is for recovery of a landed property which was owned by the late Said Mlavi, to make matters worse , it has been preferred not only against the administrators who have already discharged their duties but also against the 1st defendant who has never been the administrator of the estate of the late Said Mlavi.

Having dispassionately analyzed the competing arguments made by the parties, let me proceed with the determination of the merit of the point of preliminary objection in question. According to the submissions made by

the learned advocates it is a common ground that the administration of the estate of the late Said Mlavi was closed quite a long time ago. That position has been clearly conceded by Mr. Kimaro in his submission. Going by the holding of the Court of Appeal in the case of **Ahmed Mohamed AL Laamar** (supra), I am inclined to agree with Mr. Mlacha that this suit is untenable as will elaborate soon hereunder.

First and foremost, in my considered view , the case of **Ahmed Mohamed AL Laamar** (supra) is relevant in this matter since it has similar facts to the case at hand, to wit; that both cases that is, the case of **Ahmed Mohamed AL Laamar** (supra) and the case at hand involve administrators of deceased estate who have completed their duties and the administration of the deceased estate has been closed. That is the crucial similarity between the these two cases. In the case of **Ahmed Mohamed AL Laamar** (supra), the Court of Appeal held as follows;

*"Given the fact the appellant had already discharged his duties of executing the will, whether honestly or otherwise , and had already exhibited the inventory and accounts in the High Court , there was no granted probate which could have been revoked or annulled in terms of section 49 (1) of the Act. **As the appellant was already functus officio**, as correctly argued by Mr. Akaro, the revocation or annulment order , in our respectful opinion , was superfluous....."*

*Finally, although we have no legal obligation to do so, we wish to make these brief observations. One, if the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and /or subjected it to damage or occasioned any loss to it through negligence , **they are free to sue him. Sections 138 and 139 are relevant.** Two, if they are also convinced that he either fraudulently converted some properties forming part of the estate , and /or that he deliberately*

exhibited a false inventory or account , they are equally free to institute criminal proceedings against him in accordance with the provisions of the law..”

The above excerpt from the judgment of the Court of Appeal brings home two important things which are relevant in this matter. **One**, having discharged her responsibility as the administrator of the estate of the late Said Mlavi, the 2nd defendant is done and she is *functus officio* for whatever she did in her capacity as administrator of the deceased estate. Thus, she has nothing she can do now as far as the administration of the estate of the late Said Mlavi is concerned. **Two**, the 2nd defendant can be sued in her personal capacity for the flaws she committed in administration of the deceased's estate if any pursuant to the provisions of section 138 and 139 of the Probate and Administration of Estate Act (Cap 352 R.E.2019).The same applies to the 2nd defendant.

With regard to 3rd defendant, since the late Neema Said Mlavi who was the administrator of the estate of the late Said Mlavi completed her task and before her death she was already *functus officio* as far as the administration of the estate of the late Said Mlavi is concerned thus, the administrator of her estate cannot be held liable for matter concerning the administration of the estate of the late Said Mlavi which were closed quite a long time ago. In short the estate of the late Neema Said Mlavi has nothing to do with the estate of the late Said Mlavi which can legally cause the administrator of her estate to be sued by the heir of the late Said Mlavi (the plaintiff). In the light of what I have endeavored to elaborate herein above, the reliefs sought by the plaintiff in this case in particular prayers numbers (i) to (V) inclusive, shows clearly that this case is

untenable since the 1st and 2nd defendants have no powers over the estate of the late Said Mlavi at all. The administration cause in respect of the administration of the estate of the late Said Mlavi have already been closed by the court. In fact, the effect of the prayers made by plaintiff in this court is to re-open the administration cause in respect of the estate of the late Said Mlavi something which cannot be done by this court. Under the circumstances and for the reasons I have explained herein above, I am convinced that this suit is not tenable.

In addition to the above, I wish to point out that the prayer made by Mr. Kimaro that this court be pleased to issue an order to the effect that parties wrongly sued be struck out and proper parties be joined in the case is a polite way of conceding to the arguments raised by Mr. Mlacha that this suit is not tenable. Not only that, as correctly submitted by Mr. Mlacha not all non-joinder of parties can be cured under Order 1 Rule 9 of the CPC. [See the case of **Godfrey Nzowa** (supra)]. I agree with Mr. Mlacha that the plaintiff's suit has been framed in way that it has to be pursued against administrators of the deceased estate and not otherwise. Thus, Mr. Kimaro's prayer aforesaid is not practical leaving alone the fact that Mr. Kimaro was not able to mention the proper parties he wants to join in the case.

With the findings I have made herein above, it goes without saying that in the absence of the 2nd and 3rd defendants, even the claims made against the 1st defendant and the reliefs sought against him are not tenable since they are dependent on the claims made against the 1st and 2nd defendants and reliefs sought against them.

From the foregoing it is the finding of this court that the 3rd point of preliminary objection has merit. Under the circumstances, I do not see any plausible reasons to proceed with the determination of the remaining points of preliminary objection. Thus, this case is hereby struck out with costs.

Date this 16th day of June 2023.




B.K.PHILLIP

JUDGE