

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND CASE NO. 8 OF 2022

HADIJA GERVAS SWAI 1ST PLAINTIFF
MATEI GERVAS SWAI 2ND PLAINTIFF
ANDREW GERVAS SWAI 3RD PLAINTIFF
FRANCIS GERVAS SWAI 4TH PLAINTIFF
EVALINE GERVAS SWAI 5TH PLAINTIFF
RITHA GERVAS SWAI 6TH PLAINTIFF
JOYCE GERVAS SWAI 7TH PLAINTIFF
ANNA GERVAS SWAI 8TH PLAINTIFF
MERCY GERVAS SWAI 9TH PLAINTIFF
ISACK GERVAS SWAI 10TH PLAINTIFF
GEORGE GERVAS SWAI 11TH PLAINTIFF

VERSUS

MAGDALENA GERVAS SWAI 1ST DEFENDANT
ANNA GERVAS SWAI..... 2ND DEFENDANT
HILDA GASPER SWAI 3RD DEFENDANT
RAYMOND GASPER SWAI 4TH DEFENDANT
VITALIS GERVAS SWAI 5TH DEFENDANT
ALBERT GERVAS SWAI 6TH DEFENDANT
JOYCE GERVAS SWAI 7TH DEFENDANT
ROSE MUSHI 8TH DEFENDANT
GRACE GERVAS MUSHI 9TH DEFENDANT

RULING

23/08/2023 & 26/09/2023

SIMFUKWE, J.

The plaintiffs and the defendants are blood relative as they are children and grandchildren of the late Gervas Msaiye Swai. Following his demise, the 1st and 2nd defendants were appointed as administrators of his estates. They distributed the properties of the deceased including eight houses, four farms and one plot. The probate was marked closed by the Primary Court of Moshi. The plaintiffs in several occasions attempted to challenge the distribution of the estate of the deceased in vain. They decided to file this suit praying for the following reliefs:

1. That this court be pleased to declare that the probate of the late Gervas Msaiye Swai has already been closed thus it is right for the plaintiffs to file a suit before this court.
2. The court to issue an order requiring those who were distributed with the estates of the late Gervas Msaiye Swai to return them so that they can be distributed to the rightful heirs.
3. The court to declare that the estates of the late Gervas Msaiye Swai be distributed according to the law.

When the defendants were served, they filed their Written Statement of Defence. The 1st, 2nd 3rd and 4th defendants filed their preliminary objection on the following grounds:

- 1. That, the suit is hopelessly time barred.*
- 2. That, the intended suit is res judicata.*
- 3. That, the plaintiffs have no cause of action against the defendants.*

During the hearing, the plaintiffs were represented by Mr. Emanuel Antony, learned counsel while the 1st, 2nd, 3rd and 4th defendants enjoyed the service of Mr. Phillip Njau, learned counsel.

Supporting the first ground of objection that the matter is hopelessly time barred, Mr. Njau submitted that in their plaint, the plaintiffs are claiming the properties of the deceased Gervas Msaiye Swai who died on 27/03/2004. That, counting from the date of death to the time of instituting this suit makes 18 years which is out of time. He made reference to **Item 22 of Part 1 to the Schedule of the Law of Limitation Act, Cap 89 R.E 2022** which provides for limitation of suits to recover land to be twelve years. He also cited **section 9(1)** of the same Act which provides accrual of right of action on a person interested in land of a deceased to be counted from the date of death. Further reference was made to **Order VII rule 6 of the Civil procedure Code, Cap 33 R.E 2022** which provides that where a suit has been filed out of time, the plaintiff must show ground of exemption from limitation of time. That, the plaint in this case has no such paragraph that has been advanced to address the delay.

The learned advocate buttressed his argument by citing the case of **Aloysius Benedicto Rutaitwa vs Stanslaus Mutahyabarwa and 7 Others** (Land Appeal 22 of 2020 [2021] TZHC 6161 which discussed the

provision of **section 9(1) of the Law of Limitation** and referred to the Court of Appeal decision in **Haji Shomari vs Zainabu Rajabu, Civil Appeal No. 91 of 2001**, which is to the effect that time to recover land begins to run after the death of the deceased. He argued that the fate of the suit filed out of time is to dismiss the same as provided for under **section 3(1) of the Law of Limitation Act** (supra).

Mr. Njau averred that the plaintiffs have stated at paragraph 3(i) of the plaint that the parties in this suit are blood relatives from the late Gervas Msaiye Swai who died in 2004. That, they have stated further under paragraph 3(x) of the plaint that they are claiming their share from the deceased estate in their capacity as rightful heirs of the estate of the said Gervas Msaiye Swai. The learned counsel urged this court to dismiss the suit as provided under **section 3 of the Law of Limitation Act** (supra) for being filed out of time.

On the second ground of objection that the suit is res judicata; Mr. Njau narrated the historical background of the case. That, following the demise of the deceased, one Albert Gervas Swai applied and was granted letters of administration of the estate in Probate Cause No. 14/2005. Hadija Gervas Swai, the first plaintiff herein was dissatisfied with the administrator's conduct in managing the estate and successfully filed Application No. 228/2006, for revocation of the grant and she was appointed administratrix. However, she spent nine years without performing her duty and in the year 2015, the 1st and 2nd Defendants herein through Application No. 2 of 2015 applied for revocation of the letters of administration and they were appointed administratrix of the estate on 25/03/2015. After being appointed, they collected the

properties of the deceased, paid outstanding debts, distributed the remaining assets and two months later on 21/05/2015 they filed form number V and VI showing details of the collected properties, payments and the distribution of the estates to the heirs. The court then made an order for the filed accounts to be open for inspection by anyone interested for a period of one month before closing the probate.

Mr. Njau continued to state that before closing the probate, the 1st plaintiff filed Application No. 7 of 2015 before Moshi Urban Primary Court and Probate Appeal No. 11 of 2015 before the District Court of Moshi. Application No. 34/2016 before Moshi District court was filed by the 8th and 9th defendants. After determination of the said applications, the probate was officially closed by Moshi Urban Primary Court on 24/06/2016, that being thirteen months after the accounts were filed in court. That, even after the closing of the probate, more challenges were witnessed through Revision No. 1/2017 at the District Court of Moshi and Civil Appeal No. 11 of 2017 at the High Court of Moshi. Both the District court and the High Court blessed the distribution and the primary court decisions.

Mr. Njau contended that according to the plaint, this suit has been filed by Plaintiffs who are claiming a share from the deceased's estate following distribution of the estate of the late Gervas Msaiye Swai to the heirs in 2015. That, through paragraphs 3(iv)(viii) and (ix) of the plaint, the plaintiffs are admitting that distribution of the deceased's estate has already been effected and the accounts was filed in court since 21/05/2015. That, the plaintiffs prayed the court to make an order for

the return of the distributed properties so that the same may be re-distributed to them.

Mr. Njau referred to the judgment of this court in Civil Appeal No. 11 of 2017 at page 10 where it was stated that:

"I have gone through the record of the Primary Court and find the decision of the District magistrate in Revision no. 1/2017 rightly given. I concede that the legal and right decision of Moshi Urban Primary Court is that in Application No. 2 of 2017 and thus if any of parties was aggrieved with ought to have appealed against it."

Mr. Njau subscribed to the above findings that the primary court decision in Application No. 2/2017 marked the end of all inquiries and claims in respect of the estate of the deceased Gervas Msaiye Swai. That, as long as there has not been any appeal against that primary court decision, this suit is res judicata. He cited and quoted **section 9 of the Civil Procedure Code** which prohibits matters that has already been decided by a competent court to its finality to be reinstituted at a later stage.

The learned advocate emphasised that the intended suit by the plaintiffs is res judicata for the reason that what is being prayed was discussed and determined in Probate Cause No. 2 of 2015; and its subsequent applications were lawfully closed on 24/06/2016 after the court was satisfied that form No. V and VI were properly filed in court showing the list of the deceased's assets and its distribution to the heirs. That, as correctly stated by the District Court in Revision No. 1 of 2017 which was

annexed to the defendants' written statement of defense, Application No. 2/2015 which appointed the administratrix of the estate was never revoked. Mr. Njau observed that, following the closing of the accounts on 24/06/2016 marked the end of all litigations in respect of the estate of the deceased Gervas Msaiye Swai. That, to institute this suit with the intention of recalling and redistributing the same assets makes the suit *res judicata*.

The learned counsel referred to the case of **Munga Leketo Munga Kivuyo vs Loserian Loisulie Sepere Lukumai and Others (Land Case No. 36 of 2021) [2022] TZHC 3212** where the court discussed **section 9 of the Civil Procedure Code** and quoted with approval the decision in **Breenhalg Mallard [1947] 2 All ER at page 255** which stated that:

"Res judicata for this purpose is not confined to issues which the Court is actually asked to decide but that it covers issues of facts which are so clearly part of the subject matter of litigation and clearly could be raised that it could be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."

Mr. Njau went on to state that the court further quoted the case of **BADUGU GINNING CO. LTD vs CRDB BANK PLC AND TWO OTHERS, Civil Appeal No. 265 of 2019 CAT** (unreported) which held that:

"It is our finding that parties were the same even if those two did not appear in the former suit still the doctrine of res Judicata would apply, in the circumstances."

The court went on to say that:

"From the above provision of the law and the cited authority, this court is of the view that the essence of having this doctrine is to ensure that there must be an end to litigation and to bar multiplicity of suits from the same party or parties who may have common interest."

Further reference was made to the case of **Peniel Lotta v. Gabriel Tanaki and Others**, Civil Appeal No. 61 of 1999 [2003] 312 CA.

Mr. Njau continued to submit that although in the present matter there are several Plaintiffs and Defendants, still by invoking the case of **Munga Leketo** (supra), all the matters related to the collection and distribution of the estate of the deceased Gervas Msaiye Swai, came to an end with the closing of probate on 24/06/2015. The learned advocate averred that what the Plaintiffs are trying to do is to get in through the back door which is an abuse of court process as the suits must come to an end.

The defendants' advocate supported his argument with the provision of **Item 10 of Part II of the Fifth Schedule to the Magistrates Courts Act**, Cap 11 R.E 2022 which provides that:

"An administrator who distributes the assets in discharge of such lawful claims as he knows of and, after not less than three months after the death of the deceased, distributes the remaining assets among the persons or for purposes entitled thereto, and who gives effects or complies with the directions of the court (if any) shall not be liable for those assets to any person of whose claim had no notice at the time of such distribution."

Basing on the above cited provision, the learned advocate contended that the Administratrix of the estate of the deceased Gervas Msaiye Swai distributed the properties to the rightful heirs and filed the accounts of the estate through form No. V and VI. That, the accounts remained open for thirteen months before finally being declared closed by the court.

Mr. Njau reiterated that to institute a new suit demanding for re-distribution of the deceased's assets amount to abuse of court process since the plaintiffs were given the opportunity to challenge the distribution but decided to bury their rights. Thus, their claims have been overtaken by events. That, those who are bequeathed with the properties as their share of inheritance from the estate of the deceased have all the rights against any claim since the assets were legally allocated to them by the lawful appointed administratrix of the estate and there is no appeal filed to that effect.

Lastly, under the third ground of objection that there is no cause of action against the defendants; Mr. Njau submitted that according to the plaint and the reliefs sought, it shows that this suit is a claim over the deceased's immovable properties. That, the said properties were distributed to the rightful heirs and the probate was closed in 2015. That in their plaint, the plaintiffs have not shown which property in particular are they claiming against the defendants. He quoted paragraph (b) of the reliefs sought which reads:

"This Honorable Court to be pleased to issue an order requiring those who were distributed with the estate of the

late, Gervas Msaiye Swai to return them so that they can be distributed to us the rightful heirs.”

The learned counsel cited **Order VII rule 5 and 7 of the Civil Procedure Code**, which requires the plaintiff to show the claims a defendant has interests in the subject matter and the reliefs the plaintiff claims against the defendant. He argued that the said provision was not complied with by the plaintiffs since they have not shown any cause of action against the defendants. Also, they have not indicated the property which each of the defendant is occupying. He insisted that, since the plaintiffs have admitted that the probate was closed in 2015 it is obvious that they have no cause of action against the defendants.

The learned advocate concluded that the filed suit is devoid of merit and should be dismissed with costs.

In reply, the learned advocate for the plaintiffs on the outset condemned Mr. Njau for misconceiving the facts as to the cause of action as presented in the plaint.

Responding to the objection that the suit is time barred, he argued that the cause of action arose on 21/05/2015 as reflected on paragraphs 3. (Viii), (ix) and (x) of the plaint.

He elaborated that counting from when the cause of action of this suit arose to 07/09/2022 when the case was filed it is about 7 (seven) years. He also referred to **Item 22 of Part 1 to the schedule of the Law of Limitation Act** and argued that the present suit was instituted within time. He noted that this is a land case whose origin is featured from the

proceeds of probate issues. That, the Defendants' counsel was supposed to gather well the facts which establish the cause of action and the facts giving the foundation as to the cause of action. That, failure to gather the chronological facts establishing the cause of action, amounts to the delay of justice to the parties and unnecessary costs.

He observed that, if the defendant's counsel was of the view that the case is *res judicata*, he could have gone with one ground of preliminary objection which could end the case at hand.

Mr. Emanuel continued to fault Mr. Njau for misapplying the provision of **section 9 (1) of the Law of Limitation Act**, (*supra*). He said that he is not disputing the fact that the deceased Gervas Msaiye Swai died on 27/03/2004. However, he argued that after the death of the deceased there were some procedures done. That, the estate of the said deceased Gervas were distributed to some lawful heirs only and the plaintiffs were not distributed any estate of the deceased as lawful heirs, or distributed not according to the law.

He continued to state that the closure of the probate of the late Gervas Msaiye Swai was done on 21/05/2015 by filing the accounts and inventory of the probate administration and estate of the late Gervas. He said that, that is the point where the plaintiffs got their cause of action.

Replying on the next ground of objection that the matter is *res judicata*, Mr. Emmanuel submitted to the effect that there was no judgment or suit between the same parties and cause of action decided before any competent court of law in Tanzania. Thus, the arguments by Mr. Njau are

baseless because if required to give proof he can't succeed to help this court.

Mr. Emmanuel informed this court that he is aware with the provision of **section 9 of the Civil Procedure Code**, which prohibits the court to entertain the matter which has been previously decided by the competent court of law. He said, the present suit is not of that nature as interpreted by the Defendants' counsel. That, when tracing the facts from counsel's submission, all the applications lodged involved different parties and different cause of actions. Even the nature of cases was different to the circumstance at hand.

He asserted that the Plaintiffs' case is moved under **section 138 and 139 of the Probate and Administration of Estate Act, [Cap 352 R.E 2002]** which provides that:

"When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount."

Mr. Emanuel stated that the cited provisions give the Plaintiffs room to take the action against the Defendants by instituting the case against them. He supported his point with the case of **Ahmed Mohamed Al Laamar Vs Fatuma Bakari and Asha Bakari**, Civil Appeal No. 2012, **(CAT)** which held that:

"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. Section 138 and 139 are relevant".

Mr. Emmanuel continued to say that the option of instituting this suit is the lawful remedy persuaded by the Plaintiffs and they have never been persuaded before by them against the Defendants with this cause of action. He referred to the case of **KARSHE v UGANDA TRANSPORT CO LTD [1967] 1 EA 774, at page 777.**

On the strength of the above authority, Mr. Emmanuel explained that all applications and decided cases as argued by the defendants' counsel do not meet the criteria provided under the cited law and case above. He opined that this point of objection needs a proof from the other side which can't be done now rather during the hearing of the case.

Responding to the third ground of objection that the Plaintiffs have no cause of action against the Defendants; Mr. Emmanuel responded that this objection cannot stand due to the fact that, the Plaintiffs' plaint established everything clearly chronologically as traced at paragraph 3 (i) to (x) of the Plaint which provides the facts constituting the cause of action. He blamed the defendants' counsel for failure to gather the cause of action. He cited **order I rule 3 of the Civil Procedure Code**, which provides for persons who may be joined as defendants and argued that the same was taken into account while instituting this suit against the defendants.

In his rejoinder, the learned counsel for the Defendants submitted that there is no shadow of doubt that the Plaintiffs have instituted this suit claiming their share of inheritance from the assets of the late Gervas

Msaiye Swai. He reiterated the reliefs sought by the Plaintiffs and stressed that the suit is time barred.

Concerning the allegation that time started to run against the Plaintiffs in 2015 when the Probate Cause was closed, Mr. Njau submitted that the same was misleading as it was not pleaded in the pleadings. He cited the case of **Salim Said Ntomekela v. Mohamed Abdallah Mohamed**, Civil Appeal No. 149/2019, Court of Appeal at Dsm [2023]. He suggested that the plaintiffs should have claimed their purported share of inheritance from the administratrix and not those who were bequeathed with the properties.

Contesting the cited provisions of **sections 138 and 139 of Cap 352** (supra), Mr. Njau stated that in the plaint there is no allegation of misapplication of the estate by the appointed administrators. That, the plaintiffs have stated that they were not satisfied with the distribution. He added that the cited case of **Ahmed Mohamed** is distinguishable and not applicable in the instant situation.

Regarding the issue of res judicata, it was reiterated further that the subject matter in the previous suits is the same and some of the plaintiffs and defendants herein were also involved in the previous suits. Mr. Njau was of the view that instead of instituting a fresh suit, the plaintiffs should have appealed against the Probate case that dealt with the estates of the deceased.

Having considered submissions of both parties, the issue to be resolved is ***whether the raised preliminary points of objection have merit.***

On the first point of preliminary objection that the matter is hopelessly time barred; on the outset, when did time start to run against the plaintiffs?

Section 4 of the Law of Limitation Act provides that:

*"The period of limitation by this Act in relation to **any proceeding shall, subject to the provisions of this Act hereinafter contained, commence from the date on which the right of action for such proceeding accrues.**"*Emphasis added

Section 5 of the Law of Limitation Act provides that:

*"Subject to the provisions of this Act the **right of action in respect of any proceeding, shall accrue on the date on which the cause of action arises.**"*Emphasis supplied

In the case at hand, since the plaintiffs are aggrieved with the distribution of the estates of the deceased, I am of considered opinion that the cause of action accrued on the date of filing the inventory and accounts before the court. Thus, on 21/05/2015. Paragraph 3 (viii), (ix) and (x) of the plaint quoted at page 2 of reply submission by the learned counsel for the plaintiffs, is relevant. Therefore, counting from 21/05/2015 when the probate of the late Gervas Msaiye Swai was closed to 14/7/2022 when this matter was filed, it is seven years. Thus, the matter was filed within the prescribed time of twelve years.

On the second point of preliminary objection, that the matter is res judicata; as rightly submitted by Mr. Njau, looking at the reliefs sought in the plaint, the plaintiffs are aggrieved with the filed accounts of the estate

of the deceased Gervas Swai. The learned counsel for the plaintiffs was of view that this matter is not res judicata. Paragraph 6 (iv) of the Written Statement of Defence of the 1st and 2nd Defendants states that:

"iv. That despite officially closing the probate, it was further contested in Civil Revision No. 1/2017 at the District Court of Moshi and Civil Appeal No. 11/2017 at the High Court Moshi District Registry where the distribution and closing of the Probate was confirmed. (Copy of the District Court revision no. 1/2017 and the High Court decision in Civil appeal no 11/2017 is annexed herein to form part of this WSD and marked MA-2)."

At page 2 last paragraph of the cited decision in Civil Appeal No. 11/2017 the learned counsel for the appellant therein (the first Plaintiff in this matter) was quoted to have submitted inter alia that the closing of Probate Cause No. 2/2015 was done in secrecy and without knowledge of the majority of the heirs. At page 9 last paragraph and page 10 of the same High Court decision, my learned sister **Hon. Sumari J** held that:

*"As for the third and fourth ground of appeal, **the appellant is complaining that the closure of Probate Cause in Application No. 2/2015 was done in high secrecy and without majority of heirs.....**It is my considered view that the appellant is confusing herself on this matter. If at all the appellant had been aggrieved in Misc. Application No. 2/2015, she was supposed to appeal against such decision in the District Court. Such decision was never appealed against that means the appellant was satisfied with it. I have gone through the record of the Primary Court*

and find the decision of the District Magistrate in Revision No. 1/2017 rightly given. I concede that the legal and right decision of Moshi Urban Primary Court is that in Application No. 2/2017 and thus if any of parties was aggrieved with, ought to have appealed against it."Emphasis supplied

Up to this juncture, it is crystal clear that this matter is res judicata. In the case of **Zuberi Paul Msangi vs. Mary Machui, Civil Appeal No. 316 of 2019**, CAT [2022] at page 10 it was held that:

*"The combined effect of the respondent's proof of existence of the said five conditions is that, being the administrator of the estate of his deceased father, the appellant could not be heard **to re-open the same suit which had already been heard and conclusively determined by the Resident Magistrate's Court.**"*Emphasis mine

Likewise, in the instant matter, under the doctrine of res judicata the Plaintiffs are precluded by law to re-open the same complaints which were heard and conclusively determined in Civil Revision No. 1/2017 and Civil Appeal No. 11/2017 (supra). Otherwise, the instant suit is purely an abuse of court process. The claims of the Plaintiffs amount to forum shopping having in mind the previous multiple applications which were determined to finality. I subscribe to the Court of Appeal decision in **Sosthenes Bruno and Another v. Flora Shauri, Civil Appeal No. 249 of 2020**; at page 16, second paragraph, where forum shopping was discouraged as follows:

"That was an abuse of the court process because the appellants, particularly the first, was seeking to ride two horses at the same time, an ill practice also called forum shopping which is illegal in this jurisdiction. This practice, in courts, is most discouraged and very unwanted. See East African Development Bank v. Blue Line Enterprises Ltd, Civil Appeal No. 101 of 2009, The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe and Four Others, Civil Appeal No. 210 of 2020, Hamis Said Mkuki v. Fatuma Ally, Civil Appeal No. 147 of 2017 and Harrison Mandali and Others v. The Registered Trustees of 16 the Archdiocese of Dar es Salaam, Civil Application No. 482/17 of 2017 (all unreported)."Emphasis added

Having found that the matter is res judicata, I do not see any cogent reason to discuss the issue whether the Plaintiffs have a cause of action against the Defendants or not.

In the upshot since the second point of preliminary objection is merited, I hereby dismiss this suit with costs.

Dated and delivered at Moshi this 26th day of September 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

26/09/2023

