

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CIVIL CASE NO. 28 OF 2022

BETWEEN

CONRAD ALFRED LEO.....1ST PLAINTIFF

ALLAN ALFRED LEO.....2ND PLAINTIFF

VERSUS

KAREN KINDONDECHI LEO.....DEFENDANT

RULING

15/08/2023 & 19/09/2023

MWASEBA, J.

I am compelled to compose this ruling following a notice of the preliminary objection which was raised by the respondent's counsel in their written statement of defence on the following points:

- a) That the Court lack the pre-requisite jurisdiction to entertain and determine the matter.*
- b) That the plaintiff has no cause of action against the defendant*



Before the above points of the preliminary points of objections were determined, on 25th May, 2023 the respondent's counsel again filed another point of the preliminary objection that:

1. The suit is unmaintainable and amounts to an abuse of Court process as the Plaintiffs is pursuing two matters which has nexus to wit:

- i) That there is pending appeal to the court of appeal to revoke the administrator who is the defendant herein emanating from Misc. Civil Application No. 34 of 2018.*
- ii) That at the same time the plaintiff wants the Court to compel the Defendant (Administrator) who might be revoked any time, to collect and distribute the estate of the late Alfred Tumaini Leo which is primary duty of administration, an act aimed at pre-empting the pending court of appeal in a matter involving same parties, that will render judgment of this Court nugatory and of no essence.*
- iii) That should the pending appeal be in plaintiff's favour, this Court will eventually make an empty decree, not capable of execution.*



As a matter of practice, where there are points of preliminary objection raised by a party to the suit, the court must determine first the preliminary objection before hearing of the main suit as I hereby do.

It is appropriate to recognise the representation of the parties whereby throughout the hearing of this P.O the plaintiffs enjoyed legal services from Mr. Alute S. Mughwai and Mr. Jeremiah Mutobesya both learned counsels. On the other hand, the defendant also was under the legal representation of Mr. Salim Juma Mushi and Mr. Ngereka Miraji learned advocates, with leave of the court the P.O was disposed of by way of written submissions.

Submitting in support of the raised points of preliminary objection, the counsel commenced with the 1st point in the additional point of preliminary objection. In this point, Mr. Salim submitted that the suit is unmaintainable and amounts to an abuse of court process as the plaintiff is pursuing two matters. He submitted further that before the institution of this case there was another case filed by the plaintiff via Civil Application No. 34 of 2018 seeking to revoke the defendant as administrator. The decision of Civil Application No. 34 of 2018 was dismissed on 8/12/2021 for want of merit, thereafter the 2nd plaintiff filed notice of appeal to the Court of Appeal of Tanzania to challenge the



decision of this court for not revoking the defendant as the administrator. It was his further submission that, if the defendant will be revoked by the Court of appeal, this court will be making an empty decree capable of execution. Therefore, this suit is an abuse of the court process. He supported his arguments with various cases such as **The Registered Trustee of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe & 4 Others**, Civil Appeal No. 210 of 2020 and **Saidi Mkuki v. Fatuma Ally**, Civil Appeal No. 147 of 2017.

On the second point of preliminary objection, Mr. Salim submitted that this court lack-pre-requisite jurisdiction to entertain and determine the matter. He argued that for the reason that once the defendant filed inventory and accounts of the estate on 3/12/2021 this court lacks jurisdiction to entertain the matter as the administrator already discharged his duties. It was his further submission that unless the administrator misappropriates or misuse the property of the deceased as per **Section 138 and 139 of the Probate and Administration Act**, Cap. 352 R.E 2002, this court lacks jurisdiction. His arguments were supported with the case of **Ahmed Mohamed Al Lamaar v. Fatuma Bakari and Asha Bakari**, Civil Appeal No. 71 of 2012.



On the last point of preliminary objection, Mr. Salim submitted that the plaintiffs have no cause of action against the defendant. He stated that the plaintiffs had no cause of action against the defendant in her personal capacity but as an Administratrix of the late Alfred Tumaini Leo. However, as the defendant is no longer an administratrix of the estate of the late Alfred Tumaini Leo, the prayers sought by the plaintiff cannot be performed by the defendant. He cited the case of **Burhan Said Mlavi v. Mohamed Saad Hajirin, Rukia Said Mlavi (the Legal Personal Representative of the estate of the late Said Mlavi and Another,** Land Case No. 48 of 2022. He prayed for the points of preliminary objection to be sustained and the suit being dismissed for want of jurisdiction.

Opposing the points of objection raised by the counsel for the defendant, Mr. Mughwai responded on the 1st point that, there is no substantive appeal at the court of appeal apart from a notice of appeal filed on 8/12/2021. He submitted further that the parties in Misc. Civil Application No. 34 of 2018 are not the same as in this suit as one of the applicants in previous case (Nemes Leo) is not part of this suit. More to that in Misc. Civil Application No. 34 of 2018 the applicants applied for revocation but in the current suit the plaintiffs are claiming to be

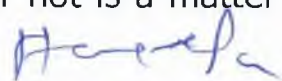


declared the rightful heirs of the late Alfred Tumaini Leo who are entitled to get share on part of the estate of the late Alfred Tumaini Leo.

Mr. Mughwai argued further that even the appeal filed by the 2nd plaintiff has already expired as per **Rule 90 (1) of the Court of Appeal Rules**, 2009 for failure to file an appeal within sixty (60) days after the date of lodging a notice of appeal. Therefore, the 2nd plaintiff had already been penalized by operation of the law and cannot be vexed twice. He supported his arguments with the case of **Javda Karsan v. Harnam Sigh Bhogal** (1953) EACA Vol. 2, 74 at page 76.

Replying to the 2nd point of preliminary objection, Mr. Mughai argued that no provision of the law was cited by the counsel for the defendant to support that this court lacks jurisdiction to entertain the matter. He stated further that as the plaintiff believe they are the rightful heirs of Alfred Tumaini Leo and they were denied their rights, therefore they are correct to file this suit in order to recover their shares. The case of **Ahmed Mohamed Al Lazaar v. Fatuma Bakari and Another** (Supra) was cited to support the arguments.

On the last point of preliminary objection, Mr. Mughwai submitted that it is not for the defendant to decide under what capacity she need to be sued. Further, whether cause of action is disclosed or not is a matter of



facts need to be ascertained by evidence hence, not a pure point of law to be entertained as a preliminary objection. He prayed for the preliminary objection to be dismissed with costs.

In his brief rejoinder, Mr. Salim reiterated what has already been submitted in his submission in chief and maintained that the suit is incompetent for want of jurisdiction and prayed for the same to be dismissed with costs.

Having considered the parties' submissions, it is now time for determination of the above mentioned points of the preliminary objection. Going through the parties' pleadings together with the rival submissions of the parties, basically this court is called upon to determine the issue as to whether it has jurisdiction to determine the suit at hand.

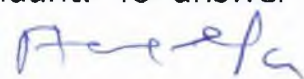
In the present matter the plaintiffs have filed a suit against the defendant who essentially is the administratrix of the late Alfred Tumaini Leo. The reliefs sought by the plaintiffs in this suit are such that this Court be pleased to declare that the plaintiffs are part of the heirs of the estate of the late Alfred Tumaini Leo, second, that this court be pleased to order the defendant to distribute half of estate of the late Alfred Tumaini Leo to the plaintiffs as rightful heirs, third that this court be



pleased to order the defendant to collect other properties forming part of the estate of the late Alfred Tumaini Leo to wit; Plot No. 46 Engera Road, Corridor Area Arusha Municipality and Plot No. 33 Them Hill, Arusha Municipality and after collection to distribute the same as resolved in the family meeting held on 25th and 29th January, 2016.

One among the preliminary objection raised by the defendant's counsel is that this suit is unmaintainable and an abuse of court process. Expounding to this P.O the counsel stated that, the 2nd plaintiff herein together with one Nemes Leo who is not part to this suit had once filed an application for revocation through Civil Application No. 34 of 2018 seeking for revocation of the defendant herein as an administratrix of the estate of their late father Alfred Tumaini Leo. Unfortunately, the application was dismissed for want of merit. Dissatisfied by the said decision of this court the 2nd plaintiff alone, filed a notice to the Court of Appeal of Tanzania against the defendant herein the fact which is not disputed by the plaintiffs.

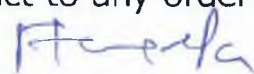
From the facts above, the question that follows is whether this court has jurisdiction to deal with the matter at hand taking into account there is a pending notice of appeal to the Court of Appeal of Tanzania intending to challenge the appointment of the present defendant. To answer this



question this court has no other good words than those stated by the Court of Appeal of Tanzania in the case of **Tanzania Electricity Supply Company Limited v. Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 (Unreported) where the Court stated that:

"It is settled law in our jurisprudence, which is not disputed by the counsel that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court, commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter."

In the matter at scrutiny, it is the defendant who is the key party, as it has already been stated that the defendant's appointment is subject to challenge at the Court of Appeal of Tanzania through the notice filed by the 2nd plaintiff. Yet it is the same party who is now the defendant herein whom the plaintiffs want her to recognise them as rightful heirs of the late Alfred Tumaini Leo. With due respect, it is my first stand that this court lacks jurisdiction first, since there is a notice of appeal challenging the appointment of the current defendant and second, as correctly submitted by the defendant's counsel any decision that will be delivered by the Court of Appeal of Tanzania will have an impact to any order that



will be issued by this court, mostly importantly where her appointment will be annulled.

I have observed that the counsel for the plaintiffs has argued that the said notice has expired by virtue of **Rule 90 (1) of the Court of Appeal Rules**, with due respect this is misconception by the senior counsel and so to say, Notice of appeal to the Court of Appeal never dies a natural death as what the counsel is trying to say, its expiry is subjected to an application of withdrawal by either party. The counsel has also stated that, in the notice it is only the 2nd plaintiff in exclusion of the 1st plaintiff herein who has filed the same against the defendant and according to him they are different parties from the matter at hand. Well, in the eyes of the law Mr. Mughwai might be correct, however as already stated above, the key party here is the defendant herein who is also the respondent in the said notice. I am saying so because irrespective of the fact that the 1st plaintiff is not the party there at, but yet it is the office of the administration which is being challenged at the Court of Appeal and it is the same office of administration which is the subject matter in the current suit.



That being said, and without further ado, this court having found that there is a notice of appeal to the Court of Appeal of Tanzania the best



way is to halt these proceedings to pave way for the appeal to proceed or withdrawal of the said notice. Consequently, this matter is hereby struck out with no order as to costs taking into account the relationship of the parties herein.

It is so ordered.

DATED at **ARUSHA** this 19th Day of September, 2023.



N. R. MWASEBA
JUDGE