

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CIVIL SUIT NO. 0032 OF 2022

1. REMMY SEMMY MOSES
2. AKAREUT BEATRICE PLAINTIFFS

VERSUS

JOHN HONORATO OCHIENG DEFENDANT

10

AND

JOHN HONORATO OCHIENG DEFENDANT/ COUNTERCLAIMANT

VERSUS

ODONGO SWALEH

ODOKPOL SAMSON..... COUNTER-DEFENDANTS

BEFORE: Hon. Justice Isah Serunkuma

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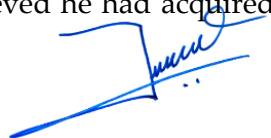
RULING ON PRELIMINARY OBJECTIONS

Brief Facts

The Defendant /Counterclaimant herein was sued by the Plaintiff for breach of contract. The crux of the matter was that on 28th December 2020, Defendant sold a piece of land measuring 9.65 acres situated at Karagalya Village, Kiryandongo Parish to the Plaintiffs for a sum of UGX. 55,680,000. The Plaintiff paid the full price on the understanding that the Defendant/Counterclaimant had a good title to deal with the land and they immediately took possession. In 2022 they faced adverse claims that the land belonged to one Alule, thus leading to this suit based on breach of contract and fraud.

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On 28th May 2022, the Defendant/Counterclaimant filed a defence in which he denied liability on the basis that he too purchased the land on 21st June 2015 from the 1st Counter-defendant in the presence of the 2nd Counter defendant for a sum of UGX. 15,000,000. He pleaded that the Plaintiffs do not disclose a cause of action against him and the suit is frivolous as he sold the land in good faith as he believed he had acquired good title from the 1st Counter Defendant from whom he



bought the land in 2015. The Defendant/ Counterclaimant therefore filed a Counterclaim against the 1st counter defendant for misrepresentation and recovery of the purchase price of UGX 15,000,000 and the 2nd Counter defendant who was the LC1 chairman of the area at the time.

The different parties to the suit raised preliminary objections which are raised and resolved as herein.

The law on preliminary objections.

10 *Order 6 rule 28 of the Civil Procedure Rules* provides that any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing. Thus, a party may raise a preliminary objection at any time before the hearing.

According to the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Limited [1969] EA 696*, it was held that a preliminary objection consists of an error on the face of the pleadings of a case which arises by clear implication out of pleadings and which if they are argued, would dismiss the suit.

The preliminary objections raised by the parties were concerning service of pleadings, misjoinder of parties and counterclaims. They are discussed hereunder.

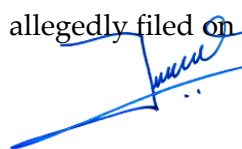
1. Preliminary Objections by the Plaintiffs

20 The Plaintiffs raised two preliminary objections under Order 6, rule 28 of the Civil Procedure Rules.

a. The Defendant's Written Statement of Defence was filed out of time and therefore invalid.

Counsel submitted that under Order 8 rule 1(2) of the Civil Procedure Rules, SI 71-1, a Defendant upon being served with a summons to file a defence is required to file their defence within seven (7) days from the date of service of summons. The Defendant was served with a summons on 13th May 2022. He should have filed a defence on or about 31st May 2022. He elected not to do so. On 7th June 2022 i.e. after a lapse of 21 days from the date of service of summons to file a defence, he had not yet filed his defence because it was not on court record. Resultantly, on 8th June 2022, they applied for ex parte judgment for the court to set down the suit for formal proof, under Order 9
30 rule 11(2) of the Civil Procedure Rules.

When they went to track the progress of the application for ex parte judgment, they were shocked to be informed that there was now a defence together with a counterclaim on the court record, allegedly filed on 28th May 2022, which was a Saturday, and endorsed by the Assistant Registrar



on 14th June 2022. This is illegal and the court is enjoined not to sanction illegalities. Even if the Defendant's story were true, courts don't open on weekends so they could not have filed on the 28th of May 2022. Secondly, the Written Statement of Defence was endorsed on 14th June 2022 i.e. after only 10 working days, which is odd because despite being a hardworking judicial officer, he would not reluctantly endorse the document after about two weeks. Accordingly, they submitted that the Written Statement of Defence was smuggled on record, out of time, without an application and/or order to have it filed out of time.

In response, the Defendant's Counsel submitted as following.

10 The time within which to file a Defence under **Order 8 rule 1(2) of Civil Procedure Rules** is 15 days from the date of service of the summons and not 7 days as the Plaintiffs' Counsel submitted. The Defendant admits that he ought to have filed a Defence on or before 31st May 2022 and that he engaged his lawyers to file the Defence before the 15 days lapsed. This can be inferred from the dating of the Defence by counsel for the Defendant.

20 The mistake as appears on the court receiving stamp was perpetuated by the staff at the Court Registry who failed in their responsibility to endeavour to see to it that the documents entering the court record reflect the right date on which the same had been received. Negligence cannot be imputed on the litigant or his counsel as the responsibility of receiving documents squarely lies on the court. However, even if the fault is to be attributed to counsel, it cannot be imputed on the Defendant who entrusted Counsel with their defence. It is trite law that mistake, negligence, oversight, or error on the part of Counsel should not be imputed on the litigant. Such mistakes entitle the judge to use his discretion to try the matter on merits. In the same light, the fault of the court should not be imputed on the litigant.

In the alternative, *Article 126(2)(e) of the Constitution* is to the effect that the substantive justice shall be administered without undue regard to technicalities and thus vehemently submit that the honourable court disregards the technicality of the improper dating by the court registry staff.

30 Regarding the allegation that on 8th June 2022, the Plaintiff filed an application for ex-parte judgment but when they came back to track the progress of the same, they were informed that there is a Defence; it is unrealistic for Counsel to assume that Defendant who is not in any way affiliated with the court knows how his Defence was handled i.e. whether it went on record immediately or not. The negligence exhibited in dating the documents could be the same negligence involved in the transmission and filing of the Defence. The competence of the Registrar is not doubted thus it is inconceivable to instead impute it on the Defendant.

He who alleges must prove *as per Section 101 of the Evidence Act Cap 6*. The burden to prove that filing was done out of time squarely falls on the Plaintiff, who has not dispensed of this duty.



It would be unfair and contrary to the spirit of Article 28 on fairness to impute the Court and/or Counsel's mistake on the litigant.

Resolution of court.

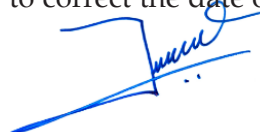
10 **Order 8 rule 1(1) of the Civil Procedure Rules** provides that the Defendant may, and if so, required by the court at the time of issuing of summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his or her defence. Order 8 rule 1(2) requires the Defence to be filed within 15 days from the date after the date of service of summons. As was held in the case of **Carlton Douglas Kasirye v. Sheena Bageine; Misc. Application No. 0148/2020**, it was also held that filing a Defence must be done in time to allow service of a copy of the Defence on the Plaintiff and that if the Defendant does not effectively file the Defence in time, the suit can be set down for default judgment.

In the Supreme Court decision in the case of **Simon Tendo Kabenge v. Barclays Bank (U) Limited and Anor; SCCA No. 017 of 2015** it was held that a written statement of defence must be filed and served within fifteen days. That the filing of a Defence is a two-step process inclusive of the Defendant filing the defence and having the proper officer affix a court seal and then service upon the opposite party. However, the Court has also created an exception to this rule that where the Written Statement of Defence is filed within fifteen days and for unexplainable delays on the part of the court, it is not signed and sealed to enable it to be served on the plaintiff within the fifteen days, then the defendant is allowed to serve the same outside the fifteen days.

20 The Plaintiffs pleaded that the last date for filing a defence would be 31st May 2022 but by the time they filed their application on 8th June 2022, there was no defence on record. However, when they followed up, they found a defence had been filed on 28th May, which was a Saturday and believed that the defence was smuggled onto the file. To this, the Defendants have explained that it was an error on the side of the court.

30 I agree with the Defendant's submission that under **Section 101 of the Evidence Act** a person who desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. 28th May 2022 was indeed a weekend and thus not a date on which the defence could have been filed. However, the authenticity of the court stamp has not been contested. The Defendant has submitted that the date thereon was stamped in error by the court. In the circumstances, if Plaintiff does not contest the authenticity of a stamp but does not also agree with Defendant's claim that the date was included in error, it would raise questions of fraud to explain how the seal of the court was smuggled onto the document, which has not been proved.

The court notes that there was negligence by Counsel for the Defendant by failure to take steps to correct the date on the documents. Counsel ought to have noticed that the dating of the court



documents was in error and taken steps to apply to the registrar to have the same amended. Instead, he stuck with the documents until the error came up here. Irrespective of that, I agree with him that his negligence or error as Counsel should not be imputed on the litigant. In the case of *Banco Arabe Espanol v. Bank of Uganda; SCCA No. 8 of 1998*, the court held that “*a mistake, negligence, oversight, or error on the part of Counsel should not be visited on the litigant. Such mistake, or error, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on merits*”.

10 In the absence of evidence to the effect that the Defence was smuggled onto the file, and the fact that even if it were, the fault lies with Counsel, the court shall overrule this Preliminary Objection and the suit be heard on its merits.

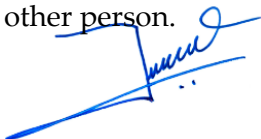
The second objection was concerning the Defendant's counterclaim.

According to *Order 8 rules 2 and 8 of the Civil Procedure Rules*, for a defendant to set up a counterclaim, he/she should have a case between himself or herself and the Plaintiff together with any other persons. In the instant case, the Plaintiff is not a named party to the Counterclaim and besides, the counterclaim discloses no cause of action against the Plaintiff. The Defendant has nothing to counterclaim against the Plaintiff to set a counterclaim. Under *Order 6 rule 30 of the Civil Procedure Rules*, where a pleading does not disclose a cause of action, the courts have the power to strike it out or have it dismissed. If the counterclaim is to be maintained, the remedies sought therein cannot be implemented against the Plaintiff. If the Defendant has claims against
20 other parties, he ought to have filed a separate suit against them, but not through an irregular process. The counterclaim is an abuse of the court process.

The Defendant's Counsel counterclaimed as follows.

He submitted that the Plaintiff's lack of locus standi to raise the said preliminary objection as the counterclaim from which the Plaintiff raises the same is between the Defendant and counterclaimant and other parties/counter respondents not being the Plaintiff in the main suit.

Without prejudice to the, in the spirit of *Order 8 rules 2, 7 and 8 of the Civil Procedure Rules SI 71-1*, a counterclaim is substantially a cross action, and not merely a defence to the Plaintiff's claim. It is a crossclaim that Defendant may raise in the very action brought against him by Plaintiff, instead of himself bringing a separate, independent action against Plaintiff. Accordingly,
30 while filing the Defence together with the counterclaim, if he/she so wishes, adds another person, not the Plaintiff in the suit as a defendant as may be inferred from *Order 8 rule 8 of the Civil Procedure Rules* instead of bringing a separate independent action against the Plaintiff and the other person.



It is the import of *Order 8 rules 2, 7, 8, 9, 10 and 11 of the Civil Procedure Rules* that where a suit is against a Defendant, the Defendant may either as a cross plaintiff or counter claimant introduce a new party or parties either as cross defendants or counter respondents. Under *Order 8 rules 12 and 13 CPR* where the court finds that trial of the cross action introducing new parties to the matter cannot be conveniently disposed of with the Plaintiff's suit, the court may order that it is tried independently of the plaintiff's suit.

The purpose of a counterclaim is to avoid a multiplicity of suits so that where the counterclaim can be conveniently determined together with the main suit, it is prudent for the court to entertain such a cross-action.

- 10 Secondly, the Plaintiff's claim is inseparable from the claim against the counter-defendants. There is nothing that bars the two actions being heard together in one suit. The remedies sought in the counterclaim need not be enforced against the Plaintiff's suit. The counterclaim is aimed at avoiding a multiplicity of suits.

About the counterclaim not disclosing a cause of action, the law is settled that to disclose a cause of action, the court must examine the plaintiff. And for cause of action to exist, Plaintiff must prove that he enjoyed a right, that right was violated, and that Defendant is liable. Incidentally, the defendant/counterclaimant is claiming from the respondent's UGX. 15,000,000 being the purchase price of the suit land, interest thereof and damages. Once the counterclaimant paid the purchase price for the suit land, a right immediately accrued to him as he was entitled to free and quiet possession which to the ultimate occurrence has been disturbed by the Plaintiffs by their claim in the mainland. In the circumstances, the liability for the violation lies squarely on the counter-defendants.

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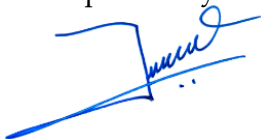
Resolution of court

Counterclaims arise under *Order 8 of the Civil Procedure Rules*. *Order 8 rule 2(1)* provides that.

" A Defendant in any action may set off, or set up by way of counterclaim, against the claims of the Plaintiff, any right or claim, whether the set-off or counterclaim sounds in damages or not, and the set-off or counterclaim shall have the same effect as a cross action, to enable the court to pronounce a final judgment in the same action, both on the original and the cross-claim".

- 30 Further, the law provides for instances by which a counterclaim is introduced in a suit.

Order 8 rule 7 of the Civil Procedure Rules provides that where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in her statement or defence, state specifically that he or she does so by way of counterclaim.



Order 8 Rule 8 of the Civil Procedure Rules provides that.

“Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the Plaintiff together with any other person, he or she shall add a title of his or her defence a further title similar to the title in the plaint.....”

In both instances, the overriding factor is that the Plaintiff must be part of the Defendants in the counterclaim. In the matter of *Suuta Proscovia v. Mugabane David & Anor; Civil Appeal No. 0123 of 2016*, the court held that the rules on counterclaim envision that the counterclaim is against a Plaintiff and any other 3rd Party that may be added.

10 The Black’s Law Dictionary 8th edition has also defined it as a claim for relief asserted against an opposing party after an original claim has been made.

Accordingly, it is this court’s holding that every counterclaim must have the Plaintiff as the counter-defendant or at least one of the counter-defendants. In circumstances such as these where the Plaintiff is alien to the proceedings between the Counterclaimants and Counter-defendants, the introduction of a counterclaim is done in error, and it should therefore be struck off.

Preliminary Objection by the Defendant/Counterclaimant

The Defendant/Counterclaimant in the Written Statement of Defence submitted that they would raise a preliminary objection to the effect that the suit is a proxy, frivolous, vexatious and discloses no cause of action at all and that the Plaint ought to be struck out with costs.

20 The term, “cause of action” was defined in the case of **Auto Garage v. Motokov (1971) EA Page 314** as a bundle of facts which the Plaintiff or Defence must assert, and respective parties can prove if denied obtaining a remedy in court.

The elements of a cause of action were also set out in the same case, of **Auto Garage v. Motokov (1971) EA Page 314** and these are.

- a. The Plaintiff enjoyed a right.
- b. The right was violated.
- c. The Defendant is responsible.

In the case of **Attorney General vs. Oluoch (1972) EA page 392**, it was held that the question of whether a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true.

30 The Plaintiff plead that they purchased land from the Defendant for which they paid the full consideration and were entitled to quiet possession of the same. However, their occupancy has since been interfered with by other people who claim to have the title to the property and



therefore, the Defendant did not have good title to pass on to them, thus the suit for breach of contract. It is my finding that all the elements of a cause of action have been exposed and therefore, the preliminary objection fails.

2. *Preliminary Objection by the Counter defendants*

The Defendant in the main case and/or the Plaintiff/counterclaimant mis-joined the counter respondent on the suit without leave of court. Counsel relied on the case of **Benares Bank Limited v. Bhagwandas (1945)** which sets out the test as to whether a party is a necessary party in the proceedings and the considerations as being.

- 10 1. There must be a right to some relief against such a party in respect of the matter involved in the proceedings in question; and
2. It should not be possible to pass an effective decree in the absence of such a party.

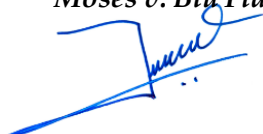
It was submitted that where two or more persons have joined as Defendants in the suit but the right to relief alleged to exist against each Defendant does not arise out of the same transactions and if separate suits were brought against each Defendant, no common question of law would have arisen, there is a misjoinder of Defendants. In that case, it was held that in the circumstances where a party is added to the suit without leave of court and where the cause of action does not arise from the same transaction, the suit is barred for Multifariousness.

20 Counsel referred to *Orders 1 Rule 9, Order 8 Rules 7, 8 and 9* to support the pleading that they were mis-joined as Counter-defendants. Counsel referred to *Justice Lameck Mukasa in Nile Breweries Limited v. Brunal Ozunga t/a Nebbi Boss Stres; HCCS No. 580/06* in which it was held that all the rules in Order 8 concerning the counterclaim should be read together.

30 *Order 8 rule 9 of the Civil Procedure Rules* only allows the addition of a counter-defendant and not a counterclaimant who is summoned to court upon service of the written statement of defence and counterclaim under the rules regulating service of summons. That the defendant having been served with the summons to file a defence, did so and added a counterclaim under which he added the counter-respondent without seeking leave of court, and even never bothered to serve the counterclaim and the defence onto the counter-respondent. It was only after hearing the rumour that he had been added to the suit for him to file a reply.

Further, the Defendant violated all the requirements for one to be added as a counter respondent and yet he was never a party to the main suit.

They referred to *Order 1 Rule 14 CPR* on third-party notices and to the case of *Semanda Isima Moses v. Blu Flamingo Limited; HCMA No. 0996 of 2020 arising from HCCS No. 0812 of 2020,*



wherein it was held that where the defendant has a direct right to indemnify which expressly arises from the contract, then a need to issue a third-party notice together with a copy of the Plaint upon the third party ought to be served. Therefore, if the Defendant wanted to seek indemnity from the 1st counter-defendant, he ought to have moved court under **Order 1 Rule 14 of the Civil Procedure Rules**, instead of wrongly adding the Counter-defendants to the main suit. Counsel prayed that the suit be struck out because they were wrongly made parties to the suit.

Resolution of court.

10 The holding of the court in respect to the addition of parties as Counter-Defendants as discussed under the preliminary objection by the Plaintiffs shall apply herein too and we reiterate that a counterclaim is a consideration only in instances where the Plaintiff is one of the Counter-defendants. In the absence of that, the new parties were wrongly introduced to the suit. I shall concur with the Respondents that instead of introducing the Counter-defendants in such an irregular manner, the Defendants should have applied to add the counter-defendants as parties to the main suit under *Order 1 rule 10 of the Civil Procedure Rules* or applied to court for leave to issue a third party notice under *Order 14 rule 1 of the Civil Procedure Rules* on the basis that the Counter-defendants, being the ones that sold to him and/or witnessed the sale of the land to him were partly liable for the Plaintiff's cause of action and should indemnify him or make a contribution to the suit.

20 Accordingly, the preliminary objection is upheld, and the counterclaim is struck out.

I so rule and Order.

DATED and Delivered on this 29th Day of February 2024.



Isah Serunkuma

JUDGE