

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CIVIL SUIT NO. 17 OF 2019

(Arising out of Administration Cause No. 203 of 2018)

5 1. AUGUSTINE KIZITO MUTUMBA
2. LAWRENCE NSEREKO
3. JAMES MAGALA

} ..COUNTER CLAIMANTS/DEFENDANTS

VERSUS

1. NSEREKO JOSEPH }1ST COUNTER DEFENDANT/PLAINTIFF
10 2. ADMINISTRATOR GENERAL }2ND COUNTER DEFENDANT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

Ruling

15 The counter defendants raised a number of preliminary objections at the commencement of the hearing to the effect that;

1. The Counter-Claimants brought the Counterclaim in representative character without first obtaining a representative order in accordance with **Order 1 Rule 8** of the Civil Procedure Rules (as amended).
- 20 2. The Counter-Claimants have no cause of action against the 1st Counter-Defendant.
3. The Counter-Claimants have no locus to bring the Counter Claim.

25 The Counter-Claimants also raised counter preliminary objections to the Preliminary objections raised by the 1st Counter-Defendant in their submissions. The Counter-Claimants contended that the said objections were brought under the wrong law and were also time barred.

Background:

The 1st Counter-Defendant's case is that he applied for Letters of Administration for the Estate of his late father, Leonard Kiragga Namwama.

That the Counter-Claimants caveated the application following which the 1st Counter-Defendant sued them on the basis that the Counter-Claimants had no caveatable interest in the estate of the late Leonard Kiragga Namwama and as such the caveat lodged on the grant was misconceived.

- 5 The Counter-Claimants then filed a written statement of defence together with a counter-claim in which they asked court to decree different pieces of land, including, Buzimwa Estate formerly comprised in F.C 15752 measuring 3,200 acres as belonging to the Kkobe Clan, Teketwe Estate formerly comprised in MRV 197 Folio 1 FC No. 16381 measuring approximately 4.370 square miles, Rubaga
10 Estate measuring 5.86 square miles formerly comprised in MRV 197 Folio 1 FC No. 16551 among others as belonging to the Kkobe Clan.

- Further, that when the matter came up for hearing before this court, it was brought to the attention of Court that the deceased had died intestate and as such questions of ownership of the land claimed by the Counter-Claimants as
15 belonging to the Kkobe clan could not be determined by the Court without first issuing Letters of Administration in accordance with Section 191 of the Succession Act.

- The court accordingly issued the Letters of Administration to the Plaintiff/1st Counter-Defendant for the purposes of entertaining the suit after it had been
20 mutually agreed by the parties.

Representation:

- M/s Kabega, Bogezi & Bukenya Advocates represented the 1st Counter – Defendant, Mr. Kuloba Wesaka Henry appeared for the 2nd Counter – Defendant, M/s Kityo & Co. Advocates jointly with M/s Crimson Associated Advocates
25 represented the Counter Claimants. All parties filed written submissions.

Submissions:

Counter-Claimants Submissions on counter preliminary objections to the preliminary objections raised by the counter - defendants:

- It was submitted for the Counter-Claimants that a preliminary objection that
30 disposes off the entire suit is a preserve of the defendant and not the Plaintiff and proceeding under Order 7 of the Civil Procedure Rules was the wrong law.

Secondly, that the counter claim should have been objected to by the 1st of February 2020 as the same had been received by 17th January 2020. That the objections are therefore time barred as per the provisions of **Order 8 Rules 11 and 12** of the Civil Procedure Rules which give a time line of 15 days from when one receives the Counter-claim to reply to the same or exclude the counter – claim. .

Counsel added that the exclusion of the counter claim does not dispose of the counter-claim, it must dispose of the suit. That the contentions by all the parties cannot be finally disposed of as preliminary objections of law without court evaluating evidence. Therefore, the preliminary objections should be overruled.

Counsel for the 1st Counter – Defendant in reply submitted that the contention was on the mode of bringing the Counter – Claim as far as capacity of the Counter-Claimants is concerned. And with lack of locus standi, they would not only be barred from bringing a Counter – Claim but also any form of suit whether independent or not. That the argument by the Counter – Claimants that the preliminary points can only be raised on a plaint and a preserve of the defendant is unfortunate. Counsel relied on the case of **Joselyn Kenyana Vs Saramugo Investments Ltd HCCS No. 142 of 2014**, where court was of the view that a counterclaim is a distinct suit on its own and held as follows;

“The argument that a counterclaim is a separate suit from the main claim is correct. Order 8 Rule 2 Civil Procedure Rules directs that the counterclaim be filed together with the written statement of defence and thereby has the same effect as a cross-action..... in a suit where a counterclaim is raised, the court is required to consider the counter claim and make specific findings on it as a distinct action.”

Thus, a Counter – Claim as a suit on its own applies rules as those of a plaintiff and defendant. Under **Order 6 Rule 30** of the Civil Procedure Rules, the pleading may be struck out for not disclosing a cause of action or is frivolous and vexatious and **Order 7 Rule 11** on grounds for rejection of a plaint is also applicable to a Counter – Claim.

In the case of **ASHOK KUMAR KALRA v. WING CDR. SURENDRA AGNIHOTRI and Others, SLP (C) No. 23599 OF 2018** the Supreme Court of India observed as follows;

"The counter – Claim shall be treated as a plaint governed by the rules applicable to plaints. Order VIII Rule 6 G says that the rules relating to a Written Statement by a defendant shall apply to a written Statement filed in answer to a Counter – Claim."

- 5 Counsel for the 1st Counter – Defendant concluded that the preliminary objections if sustained can dispose of the entire Counter – Claim and the submissions of the Counter – Claimants should hence be disregarded.

Analysis of court:

- 10 It is my considered view that a counter – claim is a suit on its own and the law applicable to a counter – claim is the same as that applicable to a plaint. (See: **Order 6 and Order 7 of the Civil Procedure Rules**). It is therefore, not correct as submitted by counsel for the Counter-Claimants that a preliminary objection is only a preserve of the defendant, a counter – defendant can also raise a preliminary objection. I therefore, do concur with the submissions of the 1st Counter – Defendant in this regard.

15 I have carefully read the provisions of **Order 8 Rule 12** of the Civil Procedure Rules, on Exclusion of a counterclaim. It provides as follows;

- 20 *"Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to the counterclaim contends that the claim raised by the counterclaim ought not to be disposed of by way of counterclaim, but in an independent suit, he or she may, at any time before reply, apply to the court for an order that the counterclaim may be excluded; and the court may, on the hearing of the application, make such order as shall be just."*

- 25 In the case of **Omumbejja Namusisi Faridah Naluwembe v. Makerere University**, HCMA No. 1199 of 2013, court noted that under **Order 8 Rules 12 and 13** of the Civil Procedure, a Counter – Claim can be excluded as being more appropriate to be filed as a separate suit.

- 30 My understanding of **Order 8 Rule 12** of the Civil Procedure Rules is that any contention made against the counter – claim that the same should have been filed as a separate suit ought to be made to court by way of a formal application. In the instant case the contention is not in regard to the content of the counter – claim but rather the capacity in which the Counter – claim was brought before this Court.

I therefore find that this Order is inapplicable in the instant case.

This preliminary objection is accordingly overruled as an application to exclude a counter-claim is distinguishable from the instant case.

Submissions on preliminary objections raised by the Counter-defendants:

- 5 1. Whether the Counter – Claimants’ suit is barred in law and ought to be dismissed for lack of a representative order?

Counsel for the 1st Counter-defendant submitted that the counter-claimants in their pleadings indicate that they intend to recover land belonging to the Kkobe clan and not personal property. That all the Counter-Claimants hold leadership
10 positions in the Kkobe clan. That in the circumstances the counter claimants should have sought a representative order under Order 1 Rule 8 of the Civil Procedure Rules. Counsel also cited the cases of Omutaka Joseph Musisi v. Nsamba Michael & Commissioner Land Registration, HCCS No. 643 of 2019 and Ocan Ensio Wanyama v. Okeny Caesar, HCCA No. 0019 of 2018 to support his
15 argument.

Counsel added that the Counter-Claimants have no exclusive rights in respect of the suit land and therefore can only sue in their individual capacity if they had independent interests in the suit land. Thus, the Counter-Claimants ought to have brought the suit in a representative capacity with the leave of court. That the
20 same should therefore be struck out with costs.

Counsel for the 2nd Counter-Defendant associated himself with the submissions for the 1st Counter-defendant and added that the provisions under Order 1 Rule 8 of the Civil Procedure Rules are in mandatory terms and relied on the case of Olweny & Others v. Oloo and Others, HCCA No. 32 of 2018, where the suit was
25 held to be incompetent for failure to obtain a representative order.

Counsel concluded that the counter-claim before this court is incompetent and should be struck out.

Counsel for the Counter-Claimants on the other hand submitted that this preliminary objection does not pass the test of what amounts to a preliminary
30 objection in law as per the case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696, where a preliminary objection was stated to be;

35 *“A point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit.*



5 *A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if the fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The court considers that this improper practice must stop."*

10 Counsel further submitted that the word "may" in any substantive or procedural provisions has been interpreted as a discretionary term and thus, the word "may" disqualifies the preliminary objections.

Analysis of court:

15 I have carefully considered the submissions of the parties in regard to this preliminary objection. Suffice to note is that whereas counsel for the Counter – Claimants submitted that the word "may" is discretionary he did not guide court on where the word was being inferred from.

I have however, taken the liberty and directed my discussion to the provisions of Order 1 Rule 8 of the Civil Procedure Rules in regard to representative suits which provides as follows;

20 *"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or,*
25 *where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct."*

30 In the instant case the Counter – Claimants stated that the suit land is part of the properties of Kkobe clan and not a private estate or personal land. This indicates that the interest in the suit property is not only limited to the Counter – claimants but rather to the entire Kkobe clan. This was also the reason why the Counter – Claimants lodged a caveat against the application for Letters of Administration by the 1st Counter – Defendant.

35 The provisions of this order indicate that for one to proceed with representing other persons with the same interest in the same property one **may** do so but with

the permission of court and the persons being represented are notified by court through being effectively served. I therefore, do not understand what the counter – claimants mean by the word “may” being discretionary.

5 The representation in this matter is subject to approval by court which is an indication that the person so wishing to represent has the discretion to do so and a representative order ought to be extracted after the court has granted permission in regard to the same. The discretion here is upon the party who may choose to represent in a court matter on behalf of others with whom he/she shares an interest in the same property and not on applying for a representative order. The counter – claimants in this case ought to have obtained a
10 representative order before instituting their counter – claim.

This preliminary objection is hereby upheld.

2. Whether the Counter-Claim discloses a cause of action against the 1st Counter-Defendant?

15 Counsel for the 1st Counter-defendant submitted that the suit does not disclose a cause of action against the counter-defendants and the suit land is Kkobe Clan land and does not belong to the Counter-defendants nor have they ever owned the same. That the counter-claimants therefore, did not have a right, which right was violated and that the counter-defendants were liable for the violation. (See:
20 **Auto Garage v. Motokov, No. 3 (1971) E.A 514**). Thus, the counter-claim should be rejected under **Order 7 Rule 11(a)** of the Civil Procedure Rules.

Counsel for the Counter-claimants in this regard relied on **Order 8 Rule 2(1)** of the Civil Procedure Rules and submitted that the counter – claimants have a duty to protect the properties of the Kkobe clan.

25 Counsel for the 1st Counter – Defendant submitted in rejoinder that whether or not the Kkobe clan claims any interest in the subject matter of the suit, it does not give the Counter – Claimants the right to sue in respect of the rights alleged to be for the Kkobe clan. That the proper procedure should have been as follows;

- 30 i. To sue as a communal land ownership committee, incorporated under **Section 18 (3)** of the Land Act (Community as a legal person) or;
- ii. Sue in a representative capacity in accordance with **Order 1 Rule 8** and **Order 7 Rule 4** of the Civil Procedure Rules or;
- 35 iii. Initiate public interest litigation under **Article 50** of the Constitution of the Republic of Uganda, 1995. (See: **Ocan Ensio Naryama v. Okeny Caesar, HCCA No. 0019 of 2018**).

Thus, the Counter – Claimants have no cause of action.

Analysis of court:

5 I have found that the counter – claimants ought to have obtained a representative order by virtue of the fact that they intended to protect the interests of the Kkobe clan at large. The Counter – claimants do not state to have any personal interests in the suit land as against the counter – defendants and thus the Counter – Claim disclosed no cause of action.

10 For one to say that they have a cause of action against another according to the case of **Auto Garage v. Motokov (No. 3) (1971) EA. 514** they must prove the following:

- a. That they enjoyed a right;
- b. That right has been violated; and
- c. That the defendant is liable.

15 In the instant case the counter – claimants do not show how they enjoyed a right over the suit property and how this right was violated by the counter – defendants.

In the case of **Atunya Valiryano v. Okeny Delphino, HCCA No. 0051 of 2017** cited with approval the South African case of **Alexkor v. Richtersveld Community and Others, 2004 (5) S.A 460** where it was held that; communal land ownership was said to be characterized by;

- i. Communal;ity;
- ii. Inalienability;
- iii. Exclusive use and occupation by the community;
- 25 iv. The right to exploit natural sources above and below the surface, including the minerals.

30 Communal ownership therefore presents the idea of collective property of that community and the entire community is said to have interest in this property. In the instant case, the authority over the Kkobe clan land is vested in the Kkobe clan and not private individuals. Thus, the Counter – Claimants cannot be said to have a cause of action against the Counter – Defendants in alienation of a representative order which would cover the interests of the entire Kkobe Clan.

This preliminary objection is hereby upheld.

3. Whether the Counter-Claimants have locus standi to bring the suit in their own right and the suit is frivolous and vexatious?

Counsel for the 1st counter - defendant submitted that the Counter-Claimants did not attach any form of authority from the other members of the Kobe clan authorizing them to sue on their behalf since they also claim interest in the suit land belonging to the Kkobe clan. Thus, the Counter-Claimants have no right to be heard as they did not bring any proof to show that they were deprived of any right by the Counter-Defendants. The suit is therefore, frivolous and vexatious and ought to be dismissed with costs.

Counsel for the Counter-Claimants on the other hand submitted that the Kkobe clan is a traditional or cultural institution under the Buganda Kingdom and is a corporate sole with perpetual succession. (See: Article 246 (3) (a) of the Constitution of the Republic of Uganda, 1995). That the Counter-claimants described their traditional or cultural capacities as Namwama – the traditional leader of the Kkobe clan, Katikiro – Chief Administrator and Kyana SSabalangira – Chief Prince respectively.

Further, that the Counter-claimants having fully pleaded their official traditional or cultural capacities in the Kkobe clan and the Kkobe clan being a cultural institution in the kingdom of Buganda, they directly derive and enjoy the constitutional right in law and have locus standi to sue or be sued. And that the clan assets are held in trust by the person registered thereon as the cultural leader of the clan. That the cultural or traditional leader is only a trustee of the estate. Thus, there was no need to apply for a representative order and have locus standi.

Counsel for the 1st Counter – Defendant in rejoinder submitted that the definition of a Cultural leader under Article 246 (6) of the Constitution of the Republic of Uganda, 1995, does not cover the Counter – Claimants who are not kings or at any such level. That Kkobe clan is not a cultural institution as per what is provided for under Section 16 of the Institution of Traditional Cultural Leaders Act, 2011, where there is a clear difference between a cultural leader as a king and others in similar capacity from a clan leader.

Section 16 of the Institution of Traditional or Cultural Leaders Act, 2011, provides that;

5 *"Any conflict or dispute within the traditional or cultural institution or within the community shall be handled by a council of elders or clan leaders or a representative body chosen and approved by the community, in accordance with the traditions, customs and norms of dispute or conflict resolution pertaining to that community."*

Counsel also, cited Section 2 of the Institution of Traditional Cultural Leaders Act, 2011, on the definition of a traditional or cultural Leader which is similar to that in the Constitution of the Republic of Uganda, 1995 as follows;

10 *"Traditional or cultural leader" means a king or similar traditional leader or cultural leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader."*

And;

15 *"Corporation sole" means a continuous legal personality that is attributed to successive holders of certain monarchical positions such as kings."*

That the Namwama cannot therefore, be equated to a king who is a traditional leader. That according to Section 6 of the Institution of Traditional or Cultural Leaders Act, 2011, where a traditional leader has been declared, the same should be caused to be gazetted by the Minister. That in the instant case the Counter –
20 Claimants have not shown court anywhere they were gazetted as traditional leaders and of what institutions.

Further that the Kkobe clan is merely a clan in a cultural institution of Buganda and only the Kabaka has a corporate sole and clans derive all their culture, traditions or aspirations from the cultural institution of Buganda.

25 **Analysis of Court:**

It should be noted that counsel for the counter – claimants in his submissions stated that the counter claimants gave their traditional or cultural capacities and not cultural leadership. The positions as stated, none are equal to what a traditional leader is defined to be. Counsel also argued that the Kkobe clan is a
30 traditional/cultural institution which I disrespectfully disagree with.

In my view, a cultural/traditional institution as in this case is the Buganda kingdom and the Kkobe clan is a unit that makes up the kingdom.

Section 2 of the Institution of Traditional Cultural Leaders Act, 2011, defines an

"Institution of traditional or cultural leader" to mean the throne, station, status or other position held by a traditional or cultural leader and "institution" shall be construed accordingly".

5 And;

"Traditional or cultural leader" to mean a king or similar traditional leader or cultural leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader".

10

Section 7 of the same Act provides that; the institution of a traditional or cultural leader is a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned.

15 It is evident from the above provisions of the law that the titles of the Counter – Claimants do not come in as equal to the definition of a Traditional or cultural leader. Even though the leadership in the Kkobe clan system is by continuity through succession; the counter – claimants are not cultural leaders, but rather clan leaders. And in Buganda, the son succeeds in leadership after his father's death.

20

The Kkobe clan hierarchy is as follows; Ssabasajja Kabaka, Namwama (Omutaka Owakasolya), Abaamasiga, Abeemituba, Abennyiriri, Abakulu B'empya and Abakulu Benju. The clan is therefore headed by the Ssabasajja as the Cultural leader who is different from a clan ahead.

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25 The counter – claimants are therefore, different from the cultural leader who has corporate sole and has the capacity to sue or be sued. The counter – claimants therefore lack locus standi to lodge the Counter – claim, they did not even provide any proof to show this court that they were officially gazetted as cultural leaders and for which particular institution.

30 This preliminary objection is accordingly upheld.

Objection to the grant of the Letters of Administration:

Counsel for the counter - claimants contended that the Letters of Administration were illegally granted to the 1st Counter – Defendant while there was a caveat in contravention of **Sections 253 and 265** of the Succession Act. That this was an
5 injustice and that the Letters of Administration should be recalled and the status quo maintained as at 29th March 2021. That court having not determined if the estate was private or not should not have issued the Letters of Administration. That the Counter – Claimants ought to have been heard over the grounds under which the caveat was lodged, hence the estate is an official estate and not covered
10 under **Section 191** of the Succession Act.

That the estate which is a subject of the grant of the Letters of Administration is under the name “Kiragga Namwama Leonard.” And that as an official estate, the Letters of Administration should not be granted to the 1st Counter – defendant. That the suit land is not a private estate but rather clan customary land and the
15 application for Letters of Administration by the 1st Counter-defendant was a constitutional violation.

Counsel for the 1st Counter – defendant on the other hand submitted that the grant of the Letters of Administration was conditioned on the completion of the suit . And that the 1st Counter – Defendant applied for Letters of Administration
20 for the estate of his late father Leonard Kiragga Namwama.

That the Counter – Claimants brought a suit seeking a declaration on rights of the deceased’s estate. That if the court did not grant the Letters of Administration it would never have had jurisdiction to try the matter. That **Section 265** of the Succession Act is not applicable where **Section 191** is applicable. Therefore, the
25 Letters of Administration were granted in order for court to be able to determine the issues of ownership of the suit land.
26

Analysis of Court:

The Letters of Administration granted in the instant case were done so with the consent of all the parties with the intention of being able to handle the case. The
30 Letters of Administration are solely for the purpose of determining the suit at hand and not to be used in any other way until the determination of the suit. The counter objection by the counter – claimants in this regard is therefore overruled.



This court upholds all the preliminary objections as raised by the 1st Counter – defendant and overrules all the counter preliminary objections raised by the Counter – Claimants.

5 The Counter – Claim is accordingly struck out. Let the main suit be heard on its merits. Costs in the cause. I so order.

Right of appeal explained.



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OYUKO ANTHONY OJOK

10 JUDGE

09/02/2022