

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**MISCELLANEOUS APPLICATION NO. 1199 OF 2013**  
*(Arising from Civil Suit No. 326 of 2013)*

**OMUMBEJJA NAMUSISI**  
**FARIDAH NALUWEMBE aka**  
**NAMIREMBE BWANGA**  
**BWAMIREMBE::: APPLICANT/DEFENDANT**

**VERSUS**

**MAKERERE UNIVERSITY ::: RESPONDENTS/PLAINTIFF**

**BEFORE: HON. MR JUSTICE BASHAIJA K. ANDREW.**

**R U L I N G:**

This application is brought under **Order 6 rr.9 & 31 CPR; S.98 CPA; S.33 Judicature Act** seeking orders that:-

- (a) Leave be granted to the Applicant/Defendant to amend her Written Statement of Defence.**
- (b) Leave be granted to the Applicant/Defendant to amend her Written Statement of Defence to include a counter claim against the Respondent and the Commissioner Land Registration.**
- (c) Costs of this application be provided for.**

The grounds of the application supported by the affidavits of the Applicant are that:-

- 1. The Respondent herein filed the head suit for a declaration of property rights in the land alleged to be comprised in Freehold Register Volume 521 Folio 25 land at Makindye measuring approximately 15 acres among other prayers against the Applicant/Defendant.**

2. ***That in her personal capacity as the administratrix of the estate of the late Princess Namirembe Hilda Bwanga Bwamirembe the actual and rightful owner of the suit land and also as the head and guardian of the Buganda cultural heritage and regalia, the Applicant instructed her former counsel M/S Wameli and Company Advocates to file a defence against the claims that had been preferred by the Respondent/Plaintiff in the head suit.***
3. ***In fact the Applicant gave her former counsel a detailed background supported with documentary evidence regarding the former's ownership of the suit land and indeed instructed counsel to file an action challenging the Respondent/Plaintiff alleged proprietary interest in the suit land in form of a counterclaim.***
4. ***In spite of all the evidence documentary and otherwise, the Applicant's previous counsel out of inadvertence failed to raise the said facts in material particular and indeed did not omit to annex the necessary documents but also omitted and failed to raise a suit within a suit against the Respondent/Plaintiff.***
5. ***The Defendant has a meritorious defence and counterclaim against the Respondent which ought to be heard by this Honourable Court and the Applicant has since instructed fresh counsel.***
6. ***It is necessary that this Honourable Court be pleased to grant the applicant in the orders sought to enable court determine the real question in controversy between the parties and to avoid a multiplicity of actions.***
7. ***It is just, fair equitable and in the interest of both parties that this application is granted.***

The Respondent filed an affidavit in reply of Mr. David Kahundha Muhwezi, the Respondent's University Secretary, opposing the application. The Applicant's Counsel in their submission (at page 2) listed three issues which they sought this court to pronounce itself upon as regards this application. They are:-

- (i) ***Whether the Applicant/Defendant has a right to raise a counterclaim/whether the Respondents can block the Defendant from doing so.***

**(ii) Why the amendment to include a counterclaim?**

**(iii) Whether this Honourable Court has powers to allow the orders sought in that application?**

Counsel for the Applicant proceeded to submit on these issues; and Counsel for the Respondent responded to them. The submissions are on record and I will not reproduce them in this ruling. It is, however, noted from the outset that the submissions and authorities cited by Counsel for the Applicant are not quite relevant to the fact in issue, but simply skirt around the main subject of the application. They essentially dwell on whether the Applicant has a right to raise a counterclaim; the reasons as to why the amendment is needed to include the counterclaim, and whether this court has power to allow such an amendment. These issues, in my view, are beside the point. The main issue, as I understood it, ought to be; **“Whether a Written Statement of Defence can amended to introduce a counterclaim after the expiry of the time prescribed for filing a defence.”**

**Order 8 r.2 (1) CPR** allows a defendant to set up a counterclaim against claims of the plaintiff, and the counterclaim shall have the same effect as a cross-action. **Rule.7** thereof provides that where a defendant seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in his or her statement of defence, state specifically that he or she does so by way of counterclaim. Under **rule 11(1)** thereof, a reply to a counterclaim is supposed to be delivered within fifteen days after the service of the counterclaim.

The instant application was brought under **O 6 rr.19 & 31 CPR** as the enabling provisions. **Rule 19 (supra)** which is a general provision governing amendment of pleadings gives court discretion, at any stage of the proceedings, to allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be necessary for the purpose of determining the real question in controversy as between the parties.

The above provision gives court wide discretion to allow a party to amend or alter pleadings which are already filed. In this case, the plaint and written statement of defence already filed would be the pleadings that would require amendment. Given the provisions of **Order 8 rr.2 (1) (2) (7) (8) and (12) CPR**, it would appear that a counterclaim sought to be introduced is not a defence or “pleadings” that would be amended in the context of **O.6 r.19 (supra)** but a fresh a cross-action; and hence ought to be regarded a separate suit with a distinctive cause of action.

In my opinion, an application for leave to amend the defence would properly seek to amend a counterclaim if the counterclaim is part of the pleadings filed with the written statement of defence. In this case there was no counterclaim set up in the written statement of defence, and hence there can be no amendment to pleadings that did not exist in the first place.

The instant application seeks orders to introduce a counterclaim as a fresh matter for the very first time. As such, the Applicant should have sought leave to file the counterclaim out of time since the period within which to file a defence raising a counterclaim had lapsed; rather than seek leave to amend the pleadings to include the counterclaim.

It is a mandatory requirement under **Order 8 r.7 CPR** that where a defendant seeks to rely upon any ground as supporting a right of counterclaim, he or she must include the counterclaim in his written statement of defence. In the instant case there was no indication in the pleadings that the defendant intended to rely upon any ground as supporting a right of counterclaim in her written statement of defence. Therefore, the Applicant cannot apply to amend the defence to include a counterclaim because a defence is not a separate suit but simply a defence to an action.

Given the above position of the law, it is erroneous for the Applicant to submit that the counterclaim is not a separate suit. It is further erroneous to maintain that a

defence can be amended to incorporate a counterclaim, and that an application in that case would be for leave to amend the defence to introduce a counterclaim. On the contrary, it is settled law that a counterclaim is a separate action pursuant to provisions of **O.8 rr.12 and 13 CPR** which stipulate that a counterclaim can be excluded as being more appropriate to be filed as a separate suit, on application of the plaintiff or defendant to the counterclaim without even affecting the defence. See also: **British General Insurance Co. Ltd. v. Moshanlul Sulank, CACA No. 30 of 1997; Charles Lwanga v. Centenary Rural Bank, SCCA No.33 of 1999.**

Additionally, since a counterclaim is a separate action, an application seeking leave to amend the defence to introduce a counterclaim would in essence be seeking leave to amend pleadings to introduce a new cause of action; which would be legally untenable. See: **Nambi v. Bunyoro General Merchants [1974] HCB 12.** Such an application would not be granted because apart from amounting to exonerating a party from complying with provisions of the law, it would also involve a complete change in the nature of the action and set up an entirely different claim from that the parties came to meet, and would require an entirely new counterdefence. See: **Biiso v. Tibamwenda [1991] HCB 92; Hill & Grant Ltd v. Hodson [1934] Ch. D 53.** The net effect is that the Applicant should have sought leave of court to file a counterclaim out of time, but not to amend the defence. She did not seek the leave and the application is incompetent, and it is dismissed with costs.

**BASHAIJA K. ANDREW**

**JUDGE**

**12/02/2014**