

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO.304 OF 2002**

ERINEST KABYANGA ::: PLAINTIFF

VERSUS

SANYU PATRICK & 4 OTHERS::: DEFENDANTS

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

The plaintiff by this suit claims that the defendants are not bonafide owners of land comprised in Gomba Block 28 plot 11 (hereinafter called the suit land) as their ownership was obtained by fraud and thereby seeks cancellation of their titles, a permanent injunction damages and costs. The defendants deny the allegations and in their defence, the 1st, 3rd and 4th defendants raised a counterclaim seeking a permanent injunction restraining the plaintiff from claiming an interest in the suit land general and general damages in trespass.

Before hearing of this case could recommence, counsel for the plaintiff raised an objection that the counterclaim offends the provisions of 0.8 r 8 CPR in that it does not bear a title and as such, the court is left to speculate who is the counterclaimant or counter-defendant. Relying on the cases of **Western Uganda Cotton Co. Ltd Vs George Asaba CS.353/09** and **Namuddu Gasta T/a Electrol Centre Vs Kansanga Miracle Centre HCCS. No.417/05** he argues that the rule is mandatory and its breach means that the counterclaim is not properly before court. He argued in addition that the counterclaim being a separate suit it required to have a summary of evidence. He prayed the same be struck out with costs as being incompetently filed

In reply, counsel for the named defendants stated that the counterclaim has existed in the current form since 2001 with no objection being raised and that in any case, the absence of a title is only a want of form which does not render the WHOLE suit nugatory. He argued that the court in the case of **Western Uganda Cotton Co. (supra)** clarified that a title would be required only where a defendant has added other parties to the

counterclaim or where issues have changed, which is not the case here. He prayed that should the court find merit in the objection, then the respondent be given leave to file the counterclaim afresh in the format the plaintiff considers proper and that his prayer would cause no injustice to the plaintiff, which would save court from a multiplicity of suits. In response, counsel for the plaintiff argued that a suit without parties cannot be amended and in any case, there is no prayer to amend the counterclaim.

Both parties were permitted to file authorities in support of their brief arguments which they did.

The relevant law on the nature and format of counterclaims would be 0.8 CPR and in particular 0.8(2) which provides as follows;

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

It is then provided under rule 8 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 persons, he or she shall add to the title of his or her defence a further title similar to the title in the plaint, setting forth the names of all the persons who, if the counterclaim were to be enforced by cross-action, would be defendants to the cross-action and shall deliver to the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence. (Emphasis added)

When read together with the authorities provided by both counsel, the two sources of law are quite instructive. Although the court in **Western Uganda Cotton Co. Ltd Vs Asaba (supra)** was resolving an objection for failure to serve a counterclaim within the statutory period, it had

opportunity to make comments similar to the objection before me. In particular, I find the quotation **from Odger on pleadings and practice, 20th Ed.** at pages 222 and 233 useful.

“The defendant can also plead a counterclaim against the plaintiff along with some other person, not already party to the action, described as a “defendant to counterclaim”.....whenever such a counterclaim is pleaded, the defendant must place at the head of his defence an additional title, stating the names of all persons whom he has thus made defendants to his counterclaim and serve the counterclaim upon them”.

It seems to me that the requirement for a heading in a counterclaim would apply only where the defendant has introduced a new party to the proceedings as a defendant to the suit. This would serve to avoid any confusion on who are the old and new parties to the counterclaim, and the actual parties who are the claimants and defendants to it. This would not be the case where the parties in the suit have remained the same but interchanged only as a result of the counterclaim. Indeed, Justice Lameck Mukasa in **Nile Breweries Ltd Vs Brunal Ozunga T/a Nebbi Boss Stores HCCS 580/06** was of the view that Rule 8 should be read together with all the other rules in Order 8 which concern a counterclaim. It follows therefore in O.8 r.9 that a person who is added as a new party by reason of the counterclaim, is after the counterclaim is filed, summoned to court by service upon them of the statement of defence and counterclaim in accordance with the rules for regulating service of summons. Thereafter, they will join the suit as if they have been served with summons in a suit.

Other than in the above circumstances, the law did not require a counterclaim to have a title where the parties in the suit and counter suit are the same. Since a counterclaim is a suit by itself, it is sufficient that the counterclaim contains the nature of the claim and the remedies sought. This in my view has been satisfied by the 1st, 3rd & 4th defendants who on page 12 of their written statement of defence clearly show a heading “**COUNTERCLAIM**”; and thereafter succeeding paragraphs of their claim and reliefs sought. In any case, plaintiff’s counsel did not indicate or show that the plaintiff had suffered any prejudice or misunderstood the nature of and contents of the counterclaim only for the reason of the fact that the counterclaim did not bear a heading in which the parties are mentioned.

I have confirmed that the defendants did file a summary of evidence attached to their pleadings (see page 10 of their trial bundle). Although it did not specifically mention the counterclaim, its absence would not be prejudicial to the plaintiff's case.

In summary, it is my considered view that the two defects of the counterclaim are the type for which the counterclaimants would have recourse to Article 126 (2) of the Constitution to allow this court to have undue regard to those particular technicalities in preference to the tenets of justice; see for example **Utex Industries Vs AG SCCA No.52/95** which was adopted in **Kasirye Byaruhanga & Co Advocates Vs UDB SCCA 2/97**. This is because, the default by the counterclaimant does not go to the root of the pleadings and can be cured by amendment. Again if I were to allow the objection, the counterclaim would be struck off and the defendant would be compelled to file a fresh claim which may be complicated by limitation and result into multiplicity of suits.

In conclusion, the objection is disallowed. However, I am unable to allow the alternative prayer to re-file the counterclaim, which is not tenable in law where there is no withdrawal. Instead, using my discretion under 0.6 r.19 and S.98 CPA, I permit the 1st, 3rd and 4th defendants to amend their counterclaim by inserting a full heading clearly specifying the parties intended to be addressed therein. They are also permitted to file a summary of evidence that specifically addresses the contents of the counterclaim. My orders are to be fulfilled within 14 days of this ruling following which, hearing of the suit will commence.

I make no order for costs in respect of this ruling.

I so order.

EVA K. LUSWATA

JUDGE

12/5/2015

