

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CIVIL SUIT NO. 17 OF 2018

JOHN CHRISTOPHER MPALAMPA

5 (Suing through his Attorney Samuel }**PLAINTIFF**
Wako Majoli)

VERSUS

SSEMAKULA FREDRICK }**DEFENDANTS**
ABDUL MUBIRU

10

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

Ruling

The plaintiff instituted this suit against the two defendants for trespass and ownership of the suit land, the 1st defendant is now however deceased.

15 In reply to the plaint the 1st defendant in his Written Statement of Defence denied the claims of the plaintiff and also made a counter claim where he was joined by four other counter- claimants.

Upon the death of the 1st defendant it was conceded that the claim in trespass being personal in nature against him automatically abated.

20 The 2nd defendant did not file a Written Statement of Defence and has never appeared in Court despite being served.

Representation:

25 Mr. Majoli Charles together with Mr. Musa Baale and Mr. Renato Kania appeared for the Plaintiff and Mr. Nuwagira Gerald together with Mr. Agaba James and Rubeizi Jacob for the Counter-Claimants. Oral submissions were made in court by both sides.

Preliminary objection:

5 A preliminary objection was raised for the plaintiff to the effect that the counter-claimants came up as Administrators of the Estate of the late Sefirina Katende Sebugulu. That these were not the defendants in the original suit and therefore, not the proper counter-claimants. That the two defendants were sued in their personal capacity and not Administrators. Thus, the counter-claimants are illegal and this is an abuse of court process.

10 Further, that **Order 8 Rule 7** of the Civil Procedure Rules preserves the right to make a counter-claim to only the defendant. Thus the current counter-claimants are strangers to the suit or 3rd parties and should therefore be struck out with costs.

15 In reply it was submitted for the counter-claimants that the suit land was property of Sefirina Katende Sebugulu and not personal property of the 1st defendant. That **Order 8 Rule 8** of the Civil Procedure Rules allows a party with an interest in the subject matter to join the suit by way of counter-claim.

20 Secondly, that **Order 8 Rule 12** of the Civil Procedure Rules gives court the powers in the event that any party who institutes a counter claim as a suitable avenue to resolve the question in dispute, such party may apply to court to have the counter claim separated from the main suit or ask court not to dismiss it but separate it.

Further that where a party replies the counter claim it means that the party has accepted and the counter-claim is meant to avoid multiplicity of suits.

25 Counsel added that under **Section 273** of the Succession Act, the counter-claimants are not strangers to the suit but have the duty to defend the estate. And besides there is no prejudice the plaintiff will suffer if the matter is determined as is and this will also save on expenses. And that Administrators are considered as one and cannot be separated.

30 In rejoinder it was submitted for the plaintiff that the 1st defendant denied being in occupation of the suit land and ever carrying out any activity on the suit land or carrying out any activity yet the plaintiff alleged that the 1st defendant was utilizing part of the land. ~~AA~~

Analysis of court:

I have carefully considered the submissions for and against the preliminary objection from both sides.

5 It is trite law that points of law can be raised at any stage of the proceedings whether or not they were pleaded in the pleadings. (See: **Mathias Lwanga Kaganda v. UEB CS No.124 of 2003**).

10 **Order 15 Rule 2** of the Civil Procedure Rules provides that once points of law are raised, Court has to resolve them first in a Ruling or Judgment. In the case of **Uganda Telecom Ltd v. Zte Corporation CA No.03 of 2017**, Court held unanimously that; a trial Court has discretion to dispose of a preliminary objection either at or after the hearing explaining, however, that the exercise of the discretion depends on the circumstances of each case.

15 In the circumstances of this case and in view of the above authorities, I find it necessary to first determine the propriety of the counterclaimants which is very pertinent on the way forward of this suit.

The 1st defendant in his Written Statement of Defence denied occupation of the suit land however, he made a counter-claim with 4 other Administrators of the late Sefirina Katende Sebugulu as counter-claimants who alleged that the plaintiff fraudulently obtained title to the suit land.

20 The law on counter-claims is provided for under **Order 8** of the Civil Procedure Rules and **Order 8 Rule 7** particularly makes it a preserve of the defendant.

Order 8 Rule 7 of the Civil Procedure Rules provides that;

25 *"Where any 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".*

It is my considered view that the authority of **Erinest Kabyanga v. Sanyu Patrick, and 4 Others, Civil Suit No. 304 of 2002** and **Order 8 Rule 8** of the Civil Procedure Rules as relied on by counsel for the counter-claimants are misconceived. I will quote provision for ease of reference as here under;

30 *"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*

5 *her defence a further title similar to the title in a 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 the plaintiff within the period within which he or she is required to file his or her defence."*

10 The above authority and provision are very clear; the preserve to add a counter-defendant is given to a counter-claimant who is already a party to the original/head suit and a defendant. The provision does not provide for additional counter-claimants who are not party to the original/head suit as defendants. The counter-claimants in the instant case were hence illegally added.

15 **Order 8 Rule 9** of the Civil Procedure Rules, only allows addition of a counter defendant and not a counter claimant who is summoned to court upon service of the Written Statement of Defence and Counter-claim in accordance with the rules regulating service of Summons. Whereof, they join the suit as if they had been served the Summons in the suit.

20 The counter claimants in their desire to want to defend the estate of the late Sefirini Katende Sebugulu should have applied to court to be added as parties Under **Order 1 Rule 13** of the Civil Procedure Rules and not smuggle themselves as parties/counter-claimants.

25 **Order 8 Rule 12** of the Civil Procedure Rules is also inapplicable in the instant case however, it could be true that the counter-claimants have a valid interest in the suit land as Administrators of the estate of the late Sefirina Katende Sebugulu. The counter-claimants can still go ahead and file a fresh suit as against the plaintiff as they already did against 6 other defendants as opposed to smuggling themselves onto the current suit.

30 In regard to the 1st defendant, I find and hold that the suit abated against him since it was filed against him in his individual capacity as claimed by the plaintiff upon his demise and this was also already conceded to by the parties. The suit will therefore, proceed as against the 2nd defendant and determined on its merits.

In regard to the other counter-claimants, I find and hold that the counter-claimants in the instant case were illegally added as parties and an illegality once brought to the attention of court cannot be ignored. The counter-claimants are

accordingly struck out with costs. The preliminary objection is hereby upheld with costs. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

11/11/2021.