

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HOLDEN AT FORT-PORTAL

CIVIL SUIT NO. I OF 1989

CHRISTOPHER KATURAMU:.....:PLAINTIFF

V E R S U S

1. MALIYA

2 JAMES KATENTA

3. AUGUSTINE KASAIJA

4. VICTORIA NSUNGWA



.....:DEFENDANTS

BEFORE: THE HONOURABLE MR., JUSTICE MUKANZA .I

RULING

This is an application by notice of Motion brought under Section 83 of the civil procedure Act and order 42 Rule 1 and 8, Order 48 of the Civil procedure Rules moving this Court for Orders that the ruling of this court dated 26 June, 1991 be reviewed in as for as the Orders relating to formal proof of the counterclaim are concerted. The grounds for this application are that there is an apparent error on the face of the record in that the Court made orders relating to a counterclaim, when in actual fact no counterclaim had ever been filed in this Court.

Mr. Musana the learned counsel who appeared for the applicant submitted that the application seeks to review the Order dated 26th June, 1991 relating to the counterclaim of the formal proof. It was clear from the face of the record that there was an apparent error on the face of the record in that the court made orders relating to a counterclaim when it was clear that no counterclaim had ever been filed in this court as of the date when the ruling as made on 1st February, 1989. Nyakabwa and Co., advocates filed a Written Statement of Defence and that is how the record

reads. In the body of the Written Statement of Defence Paras 8 and 9 there were some words relating to a counterclaim. If counsel had wanted to file a Written Statement of Defence and counterclaim it should have been made clear right from the beginning which was not done.

And secondly under the provisions of Order 8 rule 2 of the Civil procedure Rules a counterclaim is a cross action. It is in fact a plaint boarded in the defence and if being such fees must be paid on the perusal of the records there were no fees paid and it was not recorded that a counterclaim had been filed nor was any fees paid in respect of the said counterclaim. The situation had not been rectified by the time the ruling was delivered. He submitted therefore that when the court made orders relating to the counterclaim that was on account of mistake or error apparent on the face of the record. He prayed that the ruling be reviewed.

Mr. Nyamutale on the other hand submitted that the application was misconceived because there was no error apparent on the record. The suggestion by his learned brother that the pleading should have been put in the Written Statement of Defence and the counterclaim as the heading, that was irrelevant because the error should go to the substance and not the format of the pleadings. There is no law under the Civil procedure Rules that the heading must read "Written Statement of Defence and counterclaim". The plaintiff or defendant is at large to take any form. So the argument on that issue must be rejected because as long as the pleading show the claim and the counterclaim. Even if there was to be such format by law that the pleadings must read counterclaim, that would be cured by Para 9 which adopted Paras 1 to 8 of the defence.

With regards to the submission by Mr. Musana that there was an error because no fees were paid. Mr. Nyamutale submitted that this court does not perform the duties of the registry. All fees were duly paid and looking at the page where they put the fees it was very clear that the Registry did not indicate on the file who paid the money the defendant or the plaintiff but just said fees were paid by the advocates and just stamped. This court could not act on mere guess whether fees were paid or not. It is a rule of evidence that he who alleges must prove. Counsel had not called any person from the registry by way of affidavit or on oath that fees were not paid and again counsel did not deposed to the effect that fees were not paid in his Notice of Motion. He submitted that at the time the ruling complained of was made all fees had been duly paid. Be that as it may and with due respect the court was not the registry. If court perused the file and

discovered that fees were paid which is denied that would merely amount to mere irregularity which does not go to the substance of the case because the error should go to the substance of the case.

On 3rd November 1992 the Chief Magistrate updated the fees at the material time and his client was made to pay 7,500/= Shillings because fees had been increased and they paid more under general receipt No X1081464. On observing the receipt it strengthened his argument what money was paid. They just indicate "Court Fees paid". It is a general weakness in the registry which could not affect the parties to the suit. In any case the counsel had not provided this court with authorities under the provisions of the Civil Procedure that failure to pay fees invalidate the proceedings. He prayed that the preliminary objection be dismissed.

In reply Mr. Musana submitted that he did not have to depone because the facts speak for themselves. It was clear from the records that on 1st February, 1989, Nyamitale and Company Advocates filed their Written Statement of Defence and that it was also clear from the records if fees had been paid they should have been recorded as it is done in the usual procedure. It is clear therefore that no counterclaim had been filed as at the time of the referred to ruling. Any subsequent payments after the ruling had been delivered could not rectify the mistake because the mistake was apparent at that time. He maintained his earlier prayer that the preliminary objection be sustained. Under **Section 42 (1) of the Civil procedure Rules** an application to review a Court Order is made on discovery of new and important matter of evidence, and for a mistake or error apparent on the face of the record. The learned counsel appearing for the respondent/plaintiff submitted that there was a mistake apparent on the record because no counterclaim claimed had been filed at the time of the Ruling and also that no court fees had been paid.

The facts briefly were that the Applicant /Plaintiff filed a Civil suit against the respondents/defendants for trespass on his land and prayed for a number of reliefs among which were a permanent injunction to restrain the respondents/defendants, their servants and or agents/workman from committing their diverse acts of trespass and for compensation for the damage caused by the said defendant/Respondent.

After several adjournments and the failure on the part of the respondent to fix the case for hearing, the matter was order dismissed under Order 15 Rule 5 of the Civil Procedure Rules for lack of prosecution.

The record show that in the Written Statement of Defence Paragraph 9 there is a heading titled “Counterclaim” in which the applicants had this to say.

“ The defendants repeat paragraph 1 to 8 (inclusive) of the defence and shall further aver that on diverse occasions in June, 1983 the plaintiff trespassed on the kibanja of Maliya Kiiza and Augustine Kisembo (C.M Augustine Kasaija) and have suffered loss and damages.”

Whereas paragraph 9 gives particulars of the counterclaim; Order 8 Rule 8 of the Civil Procedure Rules provides:—

“Where a defendant by his defence sets any Counterclaim which raises questions between himself and the plaintiff together with any other persons he shall add to the title of his defence similar to the title in a plaint setting forth the names of all the persons who, if such counterclaim were to be enforced by cross action would be defendants to such cross action and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within which he is required to file his defence”.

In the instant case the defendants set up the counterclaim between themselves and the plaintiff. They did not add to their defence a further title similar to the title in the plaint by setting forth the name of the defendants and deliver to the court their defence for service oil the plaintiff. There was nothing to indicate the filing of a counterclaim paying fees for the same and delivery of the same to the plaintiff.

The provisions of Order 8 Rule 8 appear to be mandatory because it says, “he shall add to the title of his defence Extra”. That was not complied with by the plaintiff. This could be a mistake or error apparent on record calling for review of my order but that error or mistake could not be considered in isolation of what is on the record. The Written Statement of Defence which

embodies the counterclaim as explained above was filed on 6th February 1989. March, 1989 Nyakabwa and Company Advocates is quoted as having filed a reply to the counterclaim and said a copy of the same should be served to the defendants through their lawyers. Mr. Nyamutale submitted that there is no reply to his counterclaim wherefore Mr. Musana replied that the “Reply’ was served on 2nd March, 1989 and that it dealt specifically with the counterclaim.

From what has transpired above it defeats my imagination when Mr. Musana argued that there was no such thing as Counterclaim on the record. It is true that the format was not followed as prescribed by the rules. I am of the opinion that Mr. Musana is estopped from claiming that no such counterclaim existed. The respondent /defendants were supposed to file their defence within fifteen days after they had entered appearance in the suit as laid down in the rules. See Order 5 Rule 1 (a) of the Civil Procedure Rules. It is almost four years since they filed in their defence. To review my order as laid down under Order 42 Rule 1 Civil Procedure Rules that my occasion an injustice to the respondent as the counterclaim would be dismissed. Justice requires that the counterclaim as embodied in the written Statement of Defence be proceeded with. The applicant was aware all along that it existed and could not at this stage try to have it thrown out because it did not comply with the format.

As regards the contention by Mr. Musana that no fees were paid by the defence there is authority to the effect that there is no action filed unless fees have been paid. The records of the court file did not show the fees paid for the counterclaim. It only indicated fees paid for the written Statement of Defence which as I said earlier on embodied the counterclaim. I feel that was an irregularity On the part of the registry staff coupled with the fact that the format was not followed. I am of the view that the respondent should not suffer for this irregularity. In the end the application to review my Order of 28th June, 1991 is dismissed with costs to the respondents.

I.MUKANA

JUDGE

27/4/1992