THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS CAUSE NO. 290 OF 2014

(ARISING FROM CIVIL SUIT NO.350 OF 2013)

STANBIC BANK UGANDA LTD…….APPLICANT

VERSUS

1. **POPINA GENERAL SUPPLIES LIMITED**
2. **INNOCENT MUGISHA**
3. **JACKIE BAYONGA …… RESPONDENTS**

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

In this application the applicant sought by notice of motion the following orders;

1. The time limited for filing a counterclaim in HCCS No. 350 of 2013 be enlarged to enable the applicant file its counterclaim against the respondents in the said suit.
2. Costs of this application be provided for.

The motion was supported by the affidavit of Francis Niwagaba a legal officer in the applicant bank where he briefly stated that on 4/4/11, the applicant granted the 1st respondent credit facilities amounting to UGX 3,000,000/= which were guaranteed by the 2nd and 3rd respondents. The 1st respondent defaulted and on the 19/2/13, the applicant sold the 2nd respondent's property and recovered part of the said dues. That on 2/8/13, the respondents filed HCCS No. 350 of 2013 against the applicant for inter alia declaratory orders in respect of the said sale and accountability for rent. He explained that the applicant inadvertently omitted to file its

counterclaim for outstanding dues on the loan facility at the time of filing its defence and amended defence. That since the hearing of the said suit has not yet commenced, the filing of the said counterclaim will avoid a multiplicity of suits between the parties.

The respondents through Tom Samuel Magezi an Advocate practicing with M/s Tumusiime, Kabega & Co. Advocates (counsel for the respondents), in an affidavit in reply to the motion, contended that the application is misconceived, untenable and an abuse of court process and should be struck out with costs. That the suit instituted by the respondents is challenging the purported sale of the suit property at a price perceived to be substantially below its value. That the respondents have raised matters of fraud and illegality perpetuated by the applicant during the process of sale, and if the applicant raises a counterclaim for the purported loan arrears they will be benefitting from its fraud. He further reasoned that the issue of the purported loan arrears owed to the applicant, would be conveniently handled in a separate independent suit.

The applicant through Francis Niwagaba in rejoinder, contended that the outstanding dues under the facilities to the applicant from the 1st respondent and guaranteed by the 2nd and 3rd respondents, are unsettled and therefore, the applicant has a cause of action against the respondents for recovery of the said dues. The applicant further denied the claims of fraud or illegality and argued that the respondents still bore the burden to prove those allegations after hearing evidence.

In the suit, they also argued that hearing the counterclaim in the present suit would enable the court determine all matters in controversy and thus save time. Both counsel were directed to file written submissions which they complied with. The submissions are on file land therefore, I will not reproduce them.

Order 8 rule 2 CPR permits a defendant to file a counterclaim together with the defence within 15 days from the date of service of summons on the defendant. However, where a defendant fails to file a defence and counterclaim in the prescribed time, they may seek recourse to **Order 51 rule 6 CPR** which permits enlargement of time for taking certain steps during proceedings generally. It stipulates that;

"Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by order of the court, the court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order."

In the instant case, counsel for the applicant conceded that the counterclaim ought to have been filed with the written statement of defence, which was an inadvertent omission on their part, and that of the applicant.

In defence to the application, it was submitted for the respondent that since the entire transaction is being challenged for fraud and illegality, a counterclaim in the same suit would be misconceived, an abuse of court process, untenable at law, and at the very least, the counterclaim ought to be handled as a separate suit. Counsel for the respondent also complained that the application was filed long after the defence, making it an afterthought and dilatory conduct by counsel for the applicants.

I do agree with counsel for the respondents that this application being lodged after such a long period of time points to dilatory and even negligent conduct of the applicants and their lawyers. They were fully aware after the sale was concluded that there was a balance outstanding and therefore ought to have at that opportune time, filed a suit to claim that balance. It may well be that they were galvanized into action when the respondents filed the main suit. However, not only do the rules permit extension of time, but my powers under 0.51 r. 6 CPR, appear to grant me wide discretion in such matters even where the application is being made after the time for taking requirired step has lapsed. I am only confined by the justice of the case and a provision to set conditions that suit the circumstances of each case. Also going by the authority **of Leticia Magembe Vs Uganda electricity board, HCCS No.613 of 1990**, my powers being discretionary, have to be exercised judiciously.

There has been a strong contest by respondent's counsel, that to include a counterclaim (on the basis that the sum realized from the sale of the suit property was insufficient) in the same suit, in

which the entire sale is being challenged on the basis of fraud and illegality perpetuated by the applicant, is misconceived and untenable in law. That this is a matter that ought to be handled in an independent suit. Counsel cited the case of **Omumbejja Namusis Faridah Naluwembe Vs Makerere University HCMA No.1199 of 20 13** where a court noted that under Order 8 rules 12 and 13 of the CPR, a counterclaim can be excluded as being more appropriate to be filed as a separate suit.

To assist my decision on this point, I found the narration of my brother Justice Madrama in the case of **Nakanyonyi Development Association (NADA) Ltd and 2 Others Vs Stanbic Bank (U) Ltd HCMA No.61 of 2013** to be instructive.

> *"… the court cannot decide on the merits of the counterclaim at this stage. All that the applicants need to show is that they need to file a counterclaim. A counterclaim filed against the respondent is devoid of merit, the respondent would have an opportunity not only to file a defence in which it raises the question of the merits of the counterclaim, but also have it dismissed on a preliminary point of law. However, the plaintiff or counterclaimant should not be barred for filing an action on the basis of an anticipatory merit of the counterclaim. Every person is free to commence an action well knowing that the consequence of filing an incompetent action is the payment of costs. Right now, the only matter which the court would consider is whether the respondent would be prejudiced if time is extended for the applicants to file a counterclaim. The underlying principle is that anybody has a right to sue whomsoever he or she wants to sue, and the court cannot be seen to restrain the exercise of that right."*

In my opinion, save for the dilatory conduct of the applicants and their lawyers, the other strong objection against the application sadly attempted to descend into the merits (or lack of it) of the counterclaim. As Justice Madrama rightly observed, the respondents will have time and opportunity to challenge the counterclaim and concluding at this point of time that such a claim would be misconceived, would be bordering on mere conjecture. I hasten to add that the dilatory conduct of the applicants could have inconvenienced the respondents, but since the application is coming early in the proceedings, the applicants can still be accommodated.

It is evident that the claims by both parties arose out of the same transaction and as such, it would be impractical to have the counterclaim heard as a separate suit. In any case, under Order 8 rule 12 CPR, such proceedings can only be achieved after a formal application by the party contesting the inclusion of the counterclaim which has not been done here. It would therefore be opportune for this court to hear the counterclaim in the same suit to avoid multiplicity of proceedings. Again, in the present circumstances, if I were to weigh the burden on public resources of allowing separate suits as opposed to allowing one suit with a counterclaim, the result would be obvious. Therefore in my view, the justice of the matter would be that I allow this application to enlarge time.

I accordingly allow enlarging the time within which the applicant/defendant may file a counterclaim in the main suit, such filing to be concluded within seven days of this order. The respondents may then file a response to the counterclaim within the time allowed by statute.

The costs of this application shall be borne by the applicant as stipulated in Order 51 Rules 6 CPR.

I so order.

EVA K. LUSWATA

JUDGE

24th June 2015