

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 129 OF 2019**

**EXIM BANK TANZANIA LIMITED.....PLAINTIFF**

**VERSUS**

**1. EL NASR EXPORT & IMPORT CO. LIMITED.....1<sup>ST</sup> DEFENDANT**

**2. BAY INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**3. ONYX VILLA LIMITED.....3<sup>RD</sup> DEFENDANT**

**4. LAKE HOLDINGS LIMITED..... 4<sup>TH</sup> DEFENDANT**

**5. BAY INVESTMENT LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Date of last order:** 19/02/2020

**Date of Ruling:** 16/03/2020

**MLYAMBINA, J.**

**1. Introduction**

Exim Bank Tanzania Limited (hereinafter referred as the Plaintiff) filed an interpleader suit as against the Defendants El Nasr Export & Import Co. Limited (1<sup>st</sup> Defendant), Bay Investments Limited (2<sup>nd</sup> Defendant), Onyx Villa Limited (3<sup>rd</sup> Defendant), Lake Holdings Limited (4<sup>th</sup> Defendant), Bay Investment Limited (5<sup>th</sup> Defendant) seeking for a declaration as to who is the rightful

recipient of rent arrears amounting to United States Dollars Six Hundred Thousand (USD 600,000) arising from Lease Agreement on Plot No. 747/39 along Samora Avenue in Dar es Salaam City.

Apart from filling a Written Statement of Defence (WSD), the 5<sup>th</sup> Defendant raised a counter-claim as against the Plaintiff and the 1<sup>st</sup> Defendant Bay Investment Ltd (the Plaintiff in the cross suit) claimed for the total of United States Dollars Eight Hundred and Fifty Thousand (USD 850,000.00) being rent arrears due for plot No 747/39 along Samora Avenue which was previously leased by the 1<sup>st</sup> Defendant to the Plaintiff under a long term lease agreement which was later on assigned to the counter-claim Plaintiff as a new owner.

The Plaintiff in the main suit filed a WSD to the counter-claim together with a *plea in limine litis* against the counter-claim to the effect that; *the counter-claim by the 5<sup>th</sup> Defendant is misconceived and bad at law due to the reason that the Defendant cannot raise it in an interpleader proceedings under Order XXXIII of the Civil Procedure Code, Cap 33 R.E. 2002. This ruling will answer the issue; whether a counter-claim can be raised in an interpleader suit.*

## **2. Submission on the *plea in limine litis* by Counsel Roman Masumbuko for the Plaintiff (2<sup>nd</sup> Defendant in the Counter-claim)**

The noble and learned Counsel Roman Masumbuko, began to tell the Court that one cannot raise a cross suit in an interpleader suit. In his firm view, that is the suit under *Section 63 and all the rules under XXXIII of the Civil Procedure Code, Cap 33 R.E. 2002.*

The Counsel drew the attention of the Court that interpleader suit as provided under *Section 63 and rule 1-6 of Order XXXIII* is a particular suit. It is not a normal suit. In view of the Counsel, if one goes by interpretations, *Section 63 as provided under part IV of the Civil Procedure Code* includes suits against public officers, aliens and foreign states and interpleader suit. Under Section 63, the claim of the suit is against the Defendant. It is not for the Defendant to claim against the Plaintiff. Otherwise that can do away with the spirit of interpleader suit.

The Counsel went on to draw attention of the Court on *rule 1(1) of Order XXXIII (supra)* by asserting that the claims are against the Defendants only. Under rule 3, a claim has to come after establishing right. On that note, the Counsel invited the Court to go through *Mulla on the Code of Civil Procedure* abridged 14<sup>th</sup> edition, page 417.

In view of the Counsel, if one puts a counter-claim, he makes the Plaintiff a rival. To back up such position, the Counsel invited the Court to go through the case of the *Groundnut Extractions Export v. State Bank of India* (1977) 79 BOMLR 184.

While winding up his submission in Chief, the Counsel submitted that the counter-claim raised by the 5<sup>th</sup> Defendant is bad in law as it is meant to turn the Plaintiff a rival party. The Counsel therefore prayed the counterclaim be dismissed and costs follow events.

### **3. Reply submission on the *plea in limine litis* by Counsel Mosha for the 5<sup>th</sup> Defendant (Counter-claim Plaintiff)**

In response, Counsel Stephen Mosha told the honourable Court that the objector has not advanced any provision of the law to have been violated with the filing of counter-claim.

The Counsel invited the Court to pay attention to *Section 63 and Order XXXIII* with all the rules, as nothing bars a counter-claim suit in an interpleader suit. In view of the Counsel, there is no any provision specifically barring counter-claim in interpleader suit.

The Counsel conceded that it is true an interpleader suit is a special suit. The word to be underlined according to Counsel, is the word *suit*. In his view, an interpleader is the suit like any other suit and it is guided with the *Civil Procedure Code Cap 33 (R.E 2002)*. The Counsel submitted that an interpleader suit being a suit ought to be treated like any other normal suit. The law that guides a counter-claim is specific. It does not bar a party in a an inter pleader suit from raising it.

The Counsel argued that, *Order VIII rule 9 of the Civil Procedure Code and rule 10* of the Civil Procedure Code does not bar from raising a counter-claim in an interpleader suit. Thus, having no law barring raising a counter-claim in an interpleader suit defeats the preliminary objection.

The Counsel argued that, a preliminary objection according to the case of *Mukisa Buiscuit Manufacturing Company Ltd v. West End Distributors Ltd* (1969) EA 696 has to be a pure point of law. But there is no pure point of law in this case.

It was the submission of the Counsel that an interpleader suit has two stages. On the first stage, the Plaintiff ought to deposit the proceeds in the Court and be discharged. The second stage is when the competing claimant litigates their entitlement.

According to Counsel, in the case where the Defendant brings a counter-claim, the Plaintiff will be kept to litigate against the counter-claim. In the scenario at hand, parties are just at stage one where the Plaintiff deposited the proceeds but she was not discharged and the counter-claim was filed against her. In that manner, the Plaintiff ought to remain calm and wait the Court order to discharge her or to keep her litigate against the counter-claim.

The Counsel asserted that the preliminary objection is premature. He referred the Court to two cases. The case of *United States v. High Tech Production Inc* 497 f39-637, 641-42 (6<sup>th</sup> CIR. 2007). Also, *Wayzata Bank and Trust co v. A & B Form* 855 F. 2d 590, 593 (8<sup>th</sup> CIR.1988). The Counsel aptly told the Court that the principle of keeping the Plaintiff to litigate against the counter-claim was established in those cases.

The Counsel went on to tell the Court that the Plaintiff seems to have come to this honourable Court for equity. It is a principle of law those who goes for equity should do so with clean hands.

At the heart of the Counsel's reply was that, in this case, the counter-claimed amount stated in the interpleader suit is not a

correct amount of money. That being the case, the Plaintiff has come to the Court with dirty hands because they have liabilities.

The other reason of raising a counter-claim, according to Counsel are that: *One*, the 5<sup>th</sup> Defendant will not have other avenue of claiming the rent balance because it is the principle of law that no Court shall try any suit in which the matter directly and substantially were tried in the former suit. The matters which are substantial in this matter are rent matter. *Two*, to avoid multiplicity of cases on matters which can be determined in the same case. *Three*, it serves time of the Court and of the parties.

Therefore, the Counsel prayed the preliminary objection be dismissed. In the alternative, if this honourable Court finds the counter-claim is misconceived, he prayed the counter-claim be expunged and he be allowed to amend the WSD to accommodate the rent balance.

#### **4. Rejoinder submission by Counsel Roman Masumbuko on the *plea in limine litis***

In his rejoinder, Counsel Masumbuko told the Court that the only remedy is to dismiss the counter-claim. The Defendant can only initiate claims basing on judgement. He noted that there is a gap in understanding what the counter-claim involves.

In his view, counter-claim is raised in an ordinary transaction where the Defendants can raise a claim arising from the same transaction as per *Order VIII rule 9 (1) of the Civil Procedure Code*. The Counsel maintained that the 1<sup>st</sup> -5<sup>th</sup> Defendants have not established their rights. They cannot raise counterclaim. They have to establish their entitlement i.e. their ownership of that property.

The Counsel submitted that *Order VIII rule 9 (1)* requires ascertaining rights. In his view, the submission that the Plaintiff has not cited any law is not proper as the Plaintiff cited *Section 63 and Order XXXIII rule 1-6 of the Civil Procedure Code*; Mulla on Civil Procedure; and *the Groundnut case*.

The Counsel pointed out the fact that learned Counsel Mosha has admitted that interpleader is a special suit, it has to be kept as a special suit. It cannot be turned to an ordinary suit.

On the two stages of interpleader suit, Counsel Masumbuko said that there are no stages. Whether one remain in Court or not interpleader suit will remain interpleader suit. It is not for the Plaintiff to show ownership.

Counsel Masumbuko distinguished the *Wayzata case* in that it was a normal civil case. It was not an interpleader suit.



On clean hands point, the Counsel submitted that once one ascertains the rights, he can come to claim the balance. Counter-claim cannot be raised here. What the Plaintiff claims here is not an equitable remedy.

On *res judicata* point, Counsel Masumbuko maintained that there will not be any *res judicata* because the Plaintiff deposited 600,000 USD, anything left out will not be counted on this. They can bring a suit to claim the same.

## **5. Analysis and Application of the Law**

In the light of the Counsel submissions, the Court will first make a cursory look of the provisions governing interpleader suit. *Section 63 of the Civil Procedure Code, Cap 33 of 1966* (R.E. 2019) provides for the avenue as to where interpleader suit may be instituted. It states:

Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the

claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of parties can properly be decided, no such suit of interpleader shall be instituted

The reading of *Section 63 of the Civil Procedure Code (supra)*, does not bar anyhow filling of a counter-claim as against the interpleader Plaintiff. It bars filling of an interpleader suit if there is another matter by parties who are litigating on rights over the same property.

On the other hand, *Order XXXIII rule 1-6* provides for the contents of a plaint in interpleader suits, payment of thing claimed into Court, procedure where Defendant is suing Plaintiff, prohibition of agents and tenants from instituting interpleader suits, procedure at first hearing, and charge for Plaintiff's costs.

It would follow, therefore, that neither *Section 63 nor Order XXXIII rules 1-6* prohibits counter-claim suits from being filed in interpleader suit. The submission that under rule 3, a claim has to come after establishing right, in my opinion, is a mistaken position of the law.

Equally, the submissions that interpleader suit is a special suit seems to me paradoxical. The reason is that special suits are governed under *Order XXIV of the Civil Procedure Code (supra)*. They are not governed under *Section 63 and Order XXXIII of the Civil Procedure Code (supra)*.

In the circumstances, the Court agrees with Counsel Mosha that an interpleader suit is like other suits as it is commenced by way of a plaint with same contents and together with three statements, namely that; *one*, the Plaintiff claims no interest in the subject matter in dispute other than for charges or costs; *two*, the claims made by the Defendants severally; and *three*, that there is no collusion between the Plaintiff and any of the Defendants.

Given that the *Civil Procedure Code (supra)* does not prohibit or expressly allow counter-claim being raised in interpleader suit, the Court has found it necessary to explore this area by making a survey over the same issue in another jurisdiction.

In the case of *Krishnappa Ramappa Byadagi v. Kotraiah Devaru*, Miscellaneous Second Appeal No. 689 of 2013, Karnataka High Court, India, the claim was regarding payment that was deposited by the Plaintiff as a matter of entitlement. The trial Court held

that; *the counterclaim was not maintainable*. Before the first appellate Court, the matter was remanded to the trial Court to consider the issue comprehensively along with the main matter. Being aggrieved by the said order, the Plaintiff lodged an appeal to the High Court challenging *inter alia*, maintainability of the counter-claim. The issue was; *whether a counter-claim was maintainable in a suit filed for interpleader under Section 88 of the Civil Procedure Code of India*. The High Court held:

In that view of the matter there is no illegality in remanding the matter for readmission and to decide all the issues comprehensively. There is no error committed by the lower appellate Court in remanding the matter. All issues be reconsidered and answered by the trial Court.

Further, a most cautious and careful reading of the agitated argument of Counsel Masumbuko was on the point that counter-claim cannot arise against the interpleader plaintiff. In order to unmask this controversy, the Court has searched on the meaning of the term counter-claim.

Order VIII rule 9 of the Civil Procedure Code defines a counter-claim as a cross suit. In common parlance a counter-claim is an

aspect of dealing with a matter more broadly than a single aspect of dealing with it. In that regard, a counter-claim in any suit would serve seven purposes.

*First*, it is the interest of the State that there should be an end to litigation "*interest reipublicae ut sit finis litium*". The argument of Counsel Masumbuko that the 5<sup>th</sup> Defendant can file a counter-claim after establishing their rights, is against the principle of finality to litigation because the same idea attracts dealing with the matter on the same issue on another independent suit.

*Second*, the argument by Counsel Masumbuko splits substantial matter arising from the same transaction into two independent suits which is unnecessary. As argued by Counsel Mosha, the Plaintiff has interpleaded rent arrears to the tune of USD 600,000 but the 5<sup>th</sup> Defendant claims that the total rent arrears is not USD 600,000 but USD 850,000.00. Though the Court has not decided as to who is the rightful owner of the demised property, it is the findings of this Court that both the interpleader suit and the counter-claim can best be dealt with in a single proceeding.

*Third*, interpleading a certain amount of rent in Court cannot be deemed as a *Church's dogma*. The Court has a duty to ascertain if the interpleaded amount is true. The Court can do so only if

there is a raised counter-claim. Each relevant party will have a duty to prove its case. In so doing, the certainty of rent due and rightful ownership will be determined in a single proceeding.

*Fourth*, entertaining a counter-claim in an interpleader suit prevents incurring case costs twice.

*Fifth*, entertaining a counter-claim in interpleader suit gives a Judge/Magistrate with an opportunity of dealing with a matter that is substantially over the same issue. It is mete and proper for all related issues over the same transaction to be dealt with in a single proceeding by the same judicial officer. Otherwise, two judicial officers can come to conflicting decisions on the same subject-matter involving the same parties.

*Six*, as submitted by Counsel Mosha, entertaining a counter-claim in this interpleader suit will serve time of the Court and of the parties as the substantial issues of rent will be broadly determined in a single proceeding.

*Seven*, to avoid multiplicity of cases. The argument by Counsel Masumbuko that after establishing ownership rights the owner will have to bring a suit claiming rent balance, in the found view of the Court, is to entertain unnecessary multiplicity of cases. The issue of ownership has to be determined along with proper rent

due in a single proceeding to avoid re-filing of the same matter in the same Court competent to try the same.

Thus far, I respectfully agree with Counsel Mosha that a counter-claim can be filed in an interpleader suit. However, that stands a general rule with two exceptions.

*One*, a counter-claim cannot be lodged against the interpleader Plaintiff who have no interest in that property. In that regard, the interpleader Plaintiff cannot be exposed to liability on the asset that she/he has no interest. The essence here is that an interpleader suit is meant to remove a party who has no real stake in the outcome of a struggle for an asset held by the party.

*Two*, a counter-claim, though based on a different cause of action, has to be directed against the Plaintiff in the interpleader suit or along with the co-Defendant. It cannot solely be directed against co-Defendant.

In view of the above findings, I would conclude that the *plea in limine litis* raised by Counsel Masumbuko is devoid of merits and it is dismissed. Taking into consideration that the objection raised has added value in our jurisprudence, I award no costs.

I understand that in cases of this nature, this decision has to be followed by mediation in terms of Order VIII C of the *Civil*

*Procedure Code, Cap 33 R.E. 2019.* I am of considered view that mediation in cases relating to interpleader suits is unnecessary and waste of time of litigants and of the Court as in substance there is nothing for the parties to agree upon.

I would therefore recommend an exception to be inserted to the applicable law so that matters of this nature should not be hampered by the necessity of a mediation which is futile and does not serve any useful purpose.



**Y. J. MLYAMBINA**

**JUDGE**

**16/03/2020**



Ruling delivered and dated 16<sup>th</sup> March, 2020 in the presence of Counsel Roman Masumbuko for the Plaintiff and Mark Juma holding brief of Counsel Shehzada Walli for the first Defendant, Killey Mwitasi for the second Defendant, Shuma Kisenge for the third Defendant, Oliver Mark for the fourth Defendant and Steven Masha for the fifth Defendant.



**Y. J. MLYAMBINA**

**JUDGE**

**16/03/2020**