

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**LAND CASE NO. 10 OF 2021**

**SYNERGY LOGISTICS COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**HASSAN YUSUF NUR.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EQUITY BANK TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT**

**NUTMEG AUCTIONEERS & PROPERTY MANAGERS**

**COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**SEACLIFF COURT LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last Order: 16/02/2023*

*Date of Ruling: 10/03/2023*

**E.E. KAKOLAKI, J.**

Plaintiffs before this Court filed a suit against the above-named defendants claiming inter alia for declaration that, sale of plot No. 1789/1 CT NO 53142 Msasani Penisular, Dar es salaam is null and void. Upon being served with the plaint, the defendants filed their Written Statement of Defence. In his Written Statement of Defence, 3<sup>rd</sup> defendant raised a counterclaim against fellow defendant, meaning the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively, claiming for general damages in excess of USD 100,000 for breach of contract of sale

property situated on plot No. 1786/1 CT NO 53142 Msasani Penisular. It transpired that, the plaintiff and 1<sup>st</sup> defendants settled their dispute in the main suit out of court and on 29/11/2022 were able to register their deed of settlement, thus, remaining the counter claim suit for the 3<sup>rd</sup> defendant's as the plaintiff in the counter claim. As the Court was set to hear the Counter claim by the 3<sup>rd</sup> defendant (plaintiff in the Counter claim) against the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein, on 13/12/2022 suo mottu raised an issue as to whether the same was competently raised by the plaintiff in the counter claim (3<sup>rd</sup> defendant in the main suit) against his fellow defendants in the main suit. It is due to that issue on 16<sup>th</sup> February 2023, parties were invited to address the Court on the propriety of the Counter claim. Hearing of the raised issue was done viva voce, in which the plaintiff in the counter claim had representation of Mr. Jerome Msemwa, while the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the counterclaim enjoyed legal services of Mr. Tazan Mwaiteleke, both learned advocates.

It was Mr. Msemwa who took the floor first and argued that, the plaintiff raised a counter claim in her defence which was filed on 14/06/2021 against their fellow defendants. He said, the plaintiffs in the main suit were not joined on the reason that, the plaintiff in the counterclaim had no cause of

action against them, save for the two fellow defendants who breached the contract of sale of property situated in Plot No 1789/1 title deed No. 53142 situated at Msasani Peninsula Dar es Salaam. He maintained that, it was not necessary for the plaintiff in the counterclaim to join the plaintiffs in the main suit whom she had no cause of action against them, hence the counterclaim is properly before the Court. It was his further submission that, in the event this Court finds that there was such violation, then be pleased to allow the plaintiff to join the two plaintiffs in the original suit under Order VI Rule 17 of the CPC [Cap 33 R.E 2019]. In alternative, he prayed the Court to strike out the counterclaim and allow the plaintiff to institute a fresh suit against the defendants. In winding up, he implored the Court to order each party to bear its own cost as the issue was raised by the Court.

On his side Mr. Mwaiteleke with force of argument argued that, the counter claim is untenable in law. He contended that, Mr. Msemwa has not cited any law supporting his submission that, this counterclaim suit is maintainable in law. He said, counterclaim is a question of law provided under Order VIII Rule 9(1) of the CPC, where it is clearly stated that, for the defendant to file a counter claim must have claim(s) against the plaintiff who is the original plaintiff in the main suit. And that, under Order VIII Rule 10 (1) of the CPC,

the defendant (plaintiff in the counterclaim) may be allowed to join other persons sued alongside the plaintiff in the main suit. He added that, Rule 11(1) of Order VIII of the CPC, insists that reply will be made to the claim filed against the plaintiff and other persons if any. He took the view that, the counterclaim shall be brought against the plaintiff(s) in the main suit and not against fellow defendants without the plaintiff in the main suit as done by the 3<sup>rd</sup> defendant herein. Mr Mwaiteleke contended that, in his submission Mr. Msemwa admitted that plaintiff in the counterclaim does not have any claim against the plaintiffs in the main suit, and that that there was no need to join them for want of cause of action, since cause of action was existing against fellow defendants only. That being the case he contended, this counterclaim is in violation of the law specifically Order VIII Rule 9 (1), 10 (1), and 11(1) of the CPC. As regard to Mr. Msemwa's prayer to amend it, he resisted the prayer for being unmaintainable as amendment cannot be affected against the party whom the plaintiff does not have cause of action against. He implored the Court to dismiss the said prayer. Concerning the second prayer, he supported the prayer for being a proper one as the matter is in violation of the law, hence incompetent deserving to be struck out with cost. In his view, since the plaintiff to the counterclaim did not concede to

the issue raised by the court, then the defendants are entitled to the costs as a lot has been incurred in the preparation of this submission. He finally prayed the Court to strike out the counterclaim with cost.

In a short rejoinder, Mr. Msemwa submitted that, the issue raised is based on non-joinder of parties as provided under Order I Rule 13 of the CPC. The law requires the defendant to raise the objection at the earliest opportunity but in this matter defendants failed to do so, thus not entitled to cost as the issue has been raised by the Court. It was his submission that this being the court of record let it be so guided by a number of authorities on the law that once the issues is raised by the court suo motu parties are not entitled to costs.

On the issue of cause of action, he submitted that the plaintiffs' concentration was on the fellow defendants who breached the contract. Regarding to the 3<sup>rd</sup> defendant's violation of the law governing counterclaims, the learned counsel left it to the Court to decide and reiterated his prayers.

I have dispassionately considered rivalry arguments by the two legal minds and thoroughly perused the pleadings as well as the law applicable. The issue that calls attention of this Court for determination is whether the

counter claim before this court is tenable for being filed against fellow defendants with exclusion of the plaintiffs in the main suit. Mr. Msemwa is of the view that, the counterclaim is tenable thus, properly before the Court, while Mr. Mwaiteleke is of the contrary view. To him the law does not allow filling counterclaim against fellow defendant in exclusion of the plaintiff in the main suit. In order to disentangle parties on the disputed legal issue, I had to look at the law which govern issues of counter claim as provided under provisions of Order VIII rule 9 (1) and 10 of the CPC. Rule 9(1) states that:

***9.- (1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence the defendant may, in his written statement of defence, state particulars of the claim made or relief or remedy sought by him; (Emphasis added)***

And Rule 10(1) reads:

***10.-(1) Where a defendant, by a written statement, sets up any counterclaim which raises questions between himself and the plaintiff along with another person (whether or not a party to the suit), he may join that person as a party***

***against whom the counterclaim is made.*** (Emphasis supplied)

From the above exposition of the law is categorical that, for the defendant in the suit to raise a counterclaim which for that matter is a cross suit, *firstly*, there must be a main case in existence against him, *secondly*, the defendant must have claims against the plaintiff in the main suit and such counterclaim must be brought against the said plaintiff, though in such counterclaim the claims might be alongside other person(s), whom the law allows to join, whether such other person is a party to the suit or not. In other words the law does not allow counterclaim against fellow defendant(s) in exclusion of the plaintiff in the main suit. And that is the law unless otherwise amended. In this case it is uncontroverted fact that, the 3<sup>rd</sup> defendant/the plaintiff in the counter was sued by the plaintiff in the main suit who she had no cause of action in the counterclaim, instead preferred a counter suit against her fellow defendants only. In my view, if she had any claim of right against her fellow defendants in exclusion of the plaintiff(s) in the main suit, the only remedy for her was to file fresh and independent suit against them and not otherwise. To bring a counterclaim against her fellow defendants in exclusion of the plaintiff in the main suit I hold was in contravention of the provision

of Order VIII Rule 9(1) of the CPA. Hence it is the finding of this Court that the 3<sup>rd</sup> defendant's Counterclaim is untenable in law.

Having so found, the follow up question is what is the remedy under such blatant contravention of the law? Mr. Msemwa invited the Court to either allow amendment so that the 3<sup>rd</sup> defendant/plaintiff in the counter claim can join the plaintiffs in the original suit under order VI Rule 17 of the CPC [CAP 33 R.E 2019, the prayer which is strongly resisted by his opponent party Mr. Mwaiteleke on the ground that, since she has no cause of action against them, in law cannot be allowed to join them. I am in the same line of argument with Mr. Mwaiteleke on this point for two reasons, **one**, Mr. Msemwa in his submission admitted that, the plaintiff in the counterclaim has no cause of action against the plaintiffs in the main suit, and for that matter 3<sup>rd</sup> defendant had no justification in joining them in the main suit. Second, the court having raised and found the counterclaim to be untenable in law hence incompetent before the Court, the same cannot be amended now.

As to the alternative prayer, Mr. Msemwa implored the Court to strike out the counterclaim, and allow the 3<sup>rd</sup> defendant/ plaintiff in the counterclaim to institute a fresh suit against the defendants, the prayer which is seconded



by Mr. Mwaiteleke as the proper remedy in law to an incompetent matter. It is true and I am at one with both counsel that, the settled position of the law is that, when the petition/application, suit or appeal is held incompetent before the Court, the only available remedy is to struck out. See the cases of **Ngoni- Matengo Cooperative Marketing Union Ltd Vs. Ali Mohamed Osman** (1959) EA 577, **Cyprian Mamboleo Hizza Vs. Eva Kiosso and Another**, Civil Application No. 3 of 2010 and **Mic Tanzania Limited Vs. Minister of Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004 (CAT-unreported).

Finally on the prayer for cost as prayed by Mr. Mwaiteleke, I am not prepared to heed to his prayer for two reasons, **firstly**, the matter has not been determined on merit and **secondly**, the issue under determination was raised by the court suo motu. As a matter of practice and as rightly submitted by Mr. Msemwa, when an issue is raised by Court suo motu, an order for costs is waived.

All said and done, the counterclaim by the 3<sup>rd</sup> defendant in this suit is incompetent before the Court and the same is hereby struck out without costs.

It is so ordered.

Dated at Dar es Salaam this 10<sup>th</sup> March 2023.



E. E. KAKOLAKI

**JUDGE**

10/03/2023.

The Ruling has been delivered at Dar es Salaam today 10<sup>th</sup> day of March, 2023 in the presence of Ms. Julieth komba, advocate holding brief for Mr. Jerome Msemwa, advocate for the plaintiff in the counterclaim, Mr. Stanslaus Halawe, advocate for the defendants in the counterclaim and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

10/03/2023.

