

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

AT DAR ES SALAAM

LAND CASE NO. 40 OF 2018

**ALOYCE ELIAS KITAMBI (Administrator of the
estate of the late Joseph Elias Kitambi.....1ST PLAINTIFF/DEFENDANT**
**MICHAEL ELIAS KITAMBI (Administrator of the
estate of the late Joseph Elias Kitambi.....2ND PLAINTIFF/DEFENDANT**
HILUX HOTEL LIMITED.....3RD PLAINTIFF/DEFENDANT

VERSUS

CRDB BANK PLC.....1ST DEFENDANT/PLAINTIFF
COMRADE AUCTION MART AND COURT BROKERS.....2ND DEFENDANT
GREAT VISION ADVENTURE LIMITED.....3RD DEFENDANT

RULING

Date of last Order: 09th June, 2023.

Date of Ruling: 16th June, 2023.

E.E. KAKOLAKI, J.

This ruling seeks to address the issue raised suo motu by the Court in respect of counter claim (suit) by the 1st defendant in the main suit or plaintiff in the counter claim against the 1st, 2nd and 2rd plaintiffs/defendants after the main suit was struck out on 30/05/2023, for want of 3rd plaintiff company board resolution authorizing her to institute it as 3rd plaintiff together with the 1st and 2nd plaintiffs herein. After striking out the main suit between parties and

upon perusal of the counter claim this Court suo motu raised an issue as to competence of the counter claim (suit) before the Court for want of company's board resolution. Parties were therefore invited to address the Court on the raised point on 09/06/2023 and it emerged that all were represented and ready to proceed, as the plaintiff above mentioned was represented by Mr. Mr. Pascal Kamala, while the 1st, 2nd and 3rd defendants were defended by George Masoud, both learned counsel.

Addressing the Court on the issue it was Mr. Kamala's submission relying on the case of **Simba Papers Convertes Limited Vs. Packaging and Stationary Manufactures Limited and Another**, Civil Appeal No. 280 of 2017 (CAT) page 18 that, the counter claim is competently before this Court as board resolution is not a requirement when the company is sued like the situation obtained in the instant case. He argued that, in this case Land Case No. 40 of 2018, it is the plaintiffs or defendants in the counter claim who instituted a suit against the 1st defendant/plaintiff in the counter claim together with two others in which the 1st defendant raised her defence by filing the Written Statement of Defence that contained a Counter Claim subject of this ruling as part of her defence, pursuant to Order VIII Rule 1 of the Civil Procedure Code, [Ca. 33 R.E 2019] (the CPC). He took the view

that, in filing this counter claim the plaintiff was exercising her right under Order VIII Rule 9 of the CPC, providing that, where the defendant has a claim against the plaintiff on the same cause of action, shall set up a counter claim in the written statement of defence. Thus she never instituted a suit against the 1st, 2nd and 3rd plaintiffs/defendants and that is why the counter claim retained the same case number to the main suit which was struck out as Land Case No. 40 of 2018. In his further view since a counter claim is a continuation of the suit or proceedings then this Court be pleased to find the same is properly before this Court and therefore allow it to proceed to the next stage.

On adversary, Mr. Masoud relying on the case of **Nic Bank Tanzania Limited Vs. Hirji Abdallah Kapikulila**, Civil Application No. 561/16 of 2018 (CAT) which defined a counter claim as substantially cross suit which should in all purposes and intent be treated as independent action, took opposite views to that of Mr. Kamala. He disagreed with his submission that, a counter claim is a continuation of the defence in the main suit originally instituted. He held the view that, under Order VIII Rule 9(1) and (2) of the CPC, it is clear that the defendant in the original suit can take up a counter claim against the defendant but the same is treated as a cross suit and that

is why it is also governed by rules of the suit under Order VII of the CPC. He invited this Court to rely also in the case of **Simba Papers Converters Ltd** (supra) on the mandatory requirement of the Company board resolution before institution of the case by the company as it was ruled in the Land Case No. 40 of 2018. The learned counsel therefore implored the Court to strike out the counter claim with costs for want of board resolution.

In his brief rejoinder Mr. Kamara while in agreement with the position of the law as submitted by Mr. Masoud that, a counter claim is an independent suit stressed that, company board resolution is a requirement only at the time on institution of original suit and not when the counter claim is raised in the course of defence. On the prayer for cost by Mr. Masoud it was his submission that, the issue has been raised by the Court hence the defendants herein are not entitled to costs. Otherwise he reiterated his submission in chief and prayers thereto.

I have taken time to chew out and internalize the submissions by the two legal minds on the issue raised by the Court suo motu. Deduced from both parties submission and the expositions of the law in Order VIII Rule 9(2) of the CPC and the case of **Nic Bank Tanzania Limited** (supra), which I embrace, it is patent clear to this Court that, a counter claim when raised in

the written statement of defence acquires the status of the plaint in a cross suit and the provisions of Order VII shall apply to the same as if it is a plaint.

For the purposes of clarity Order VIII Rule 9(2) of the CPC reads:

(2) Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint.

Further to that it was held by the Court of Appeal in the case of **Nic Bank Tanzania Limited** (supra), on the status of the counter claim thus:

"...a counter claim is substantially a cross suit which should be treated, for all purposes as an independent action."

Much as is now settled law that, a counter claim is substantially a cross suit in which for all intent and purposes should be treated as an independent act, the remaining issue is whether the plaintiff herein being a company can maintain its independent suit without obtaining the board resolution. Mr. Kamala argues that since the counter claim by the plaintiff is raised out to the written statement of defence in the original suit, the same forms part of defence and that is why it maintained the same case number Land Case No. 40 of 2018, hence exempted from such requirement of obtaining the board

resolution first before the same is preferred as per the case of **Simba Papers Converters Ltd** (supra). Mr. Masoud is of the different view in that, since the same is an independent suit the plaintiff ought to have obtained the board resolution too before filing his counter claim as it was held in the defendants' case as plaintiffs which was struck out for want of board resolution. It is true and I agree with Mr. Masoud that, a counter claim by the plaintiff having obtained the status of plaint in a cross suit has to be treated as an independent suit from the original suit which was struck out. As regard to the requirement of the plaintiff to obtaining a board resolution as a company before preferring this counter claim (independent suit), while I am in agreement with Mr. Kamala that, the same does not apply when the company is sued, I differ with his submission that, the Counter claim formed part of the plaintiff's defendant in the original suit which was struck out for want of board resolution. The reason I am so holding is not fat-fetched as it is already held that, a counter claim is substantially a plaint in a cross suit and is treated independently from the original suit, hence cannot be treated as a defence rather as suit under Order VII of the CPC. Since the plaintiff's counter claim is a suit I hold she ought to have obtained first the company board resolution before bringing her claims against the defendants herein.

This settled position of the law was adumbrated by the Court of Appeal in the case of **Simba Papers Converters Ltd** (supra), when spoke its mind on the requirement of the company to obtain the board resolution first before preferring a suit against any party and effect of its non-compliance. The Court said:

"In the premises, since the claimant was a company, it was not proper to institute a suit on behalf of the company without its formal authority. This required the express authority by way of resolution of the Board of Directors to institute a case in the absence of which, the suit in the name of the company was defective and it ought to have been struck out."

In this counter claim which is an independent suit, Mr. Kamala is not disputing the plaintiff herein to have not secured consent of the board of directors through resolution, duly pleaded in the pleadings. As the plaintiff in the counter claim failed to comply with the mandatory requirement of the law for obtaining the company resolution before preference of this independent suit, I embrace Mr. Masoud's proposition that, this matter is incompetent before this Court, thus deserve to be struck out. Hence the issue is answered in negative that, plaintiff's company cannot maintain independent suit without obtaining the board resolution first.

Lastly is on the prayer by Mr. Masoud for costs of this suit in which Mr. Kamala submitted the defendants herein are not entitled to as the issue disposing of the suit came suo motu from the Court. I think this issue need not detain much this Court, as it is settled now that, once the issue disposing of the case is raised by the court then no party is entitled to costs. It is on that account of settled law refrain from exercising that discretion of granting costs.

In the event this Court is convinced and therefore hold that, the counter claim (suit) by the plaintiff above is incompetent, hence proceed to strike it out of the register of this Court.

No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 16th June, 2023



E. E. KAKOLAKI

JUDGE

16/06/2023.

This Ruling has been delivered at Dar es Salaam today this 16th day of June, 2023 in the presence of Ms. Ester Msangi, advocates for the 1st and

2nd plaintiffs, Mr. George Masoud and Mr. Godfrey Ambet, advocates for the
1st and 2nd defendants and Ms. Asha Livanga, Court.

Right of appeal explained.



E. E. KAKOLAKI

JUDGE

16/06/2023

