

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

**IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

LAND APPEAL 81 OF 2023

(Arising from Land Application 74 of 2020 of Babati District Land and Housing Tribunal)

JULIUS DUKHO MATLE.....APPELLANT

VERSUS

1. MALISH GWANGAY GETAGNO.....
2. MALOMBA MALISH GWANGWAY.....
3. WADO MALISH GWANGWAY..... } **RESPONDENTS**

JUDGMENT

29th February and 19th April 2024

MIRINDO, J:

The three respondents, Malish Gwangway Getagno, Malomba Malish Gwangway and Wado Malish Gwangway sued, the appellant, Julius Dukho Matle over the ownership of a plot measuring one hundred and fifty acres located at Gijetamohog Village in Hanang District. In his written statement of defence, the appellant raised three objections on points of law, pleaded his defence and raised a counterclaim. When the matter came for hearing on 5th January 2022 before Babati District Land and Housing Tribunal, the action was dismissed for want of prosecution.

On 5th November 2022, the appellant's counsel wrote a letter pleading with the Chairman to assign hearing date for the counterclaim. When the parties appeared on 14th February 2023, the respondents' counsel questioned the validity of the letter from the appellant's counsel. On 8th March 2023, the Tribunal ruled that there was nothing wrong with the letter and it was merely an oversight not to fix the hearing date of the counterclaim subsequent to the dismissal of the respondents' case. After the ruling, the Tribunal directed the respondents to file a written statement of defence to the counterclaim and they did so on 21st March 2023. But on 3rd August 2023, they lodged a notice of preliminary objection that the counterclaim was defective. These objections, argued by way of written submissions, were sustained and the counterclaim was struck out. The Tribunal reasoned that as the counterclaim did not state the value of the disputed land it contravened the provisions of Regulation 3 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2013. The second reason was that the counter claim offended the provisions of Rule 9 (1) and (2) of Order 8 of the Civil Procedure Code [Cap 33 RE 2019] in that it did not state the names and addresses of the parties, cause of action and value of the disputed land. The Tribunal concluded that as a counterclaim is an independent suit, it should comply with conditions for instituting actions before the Tribunal.

As already stated, the Tribunal struck out the counterclaim and Joseph Dukho Matle has come to this Court with two grounds of appeal. He complains that the Tribunal had misdirected itself on the principles governing

counterclaims and misconceived pleadings and parties' submissions in connection with the preliminary objections. The appellant was represented by Mr Festo Jackson, learned counsel who argued that the appellant's written statement of defence was still valid notwithstanding the dismissal of the respondents' case for want of prosecution. He pointed out that the counterclaim was valid since Paragraph No 9 of the Written Statement of Defence made reference to what was stated in its preceding paragraphs. On this account, the counterclaim contained sufficient particulars in relation to parties and description of the disputed land. He concluded that the Tribunal neither appreciated parties' arguments in relation to the preliminary objection nor scrutinised the written statement of defence before striking out the counterclaim.

In opposition, the respondents' counsel, Mr Omari Gyunda argued that a counterclaim is an independent suit and it cannot be supported by particulars set forth in the written statement of defence. The learned counsel pointed out that none of the paragraphs under the counterclaim states the names of the parties, description of the disputed land and its value. The omission of these facts violated the requirements of Regulation 3 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2013. It was difficult, the learned counsel argued, to distinguish the counterclaim from the Written Statement of Defence because parties in the counterclaim change but in the present counter claim there was no change of parties. He asked the Court to uphold the decision of the Tribunal and dismiss the appeal with costs.

In the course of the hearing of this appeal, I asked the parties whether the order striking out the counterclaim was appealable to this Court. Mr Festo Jackson, learned counsel argued that after the counter-claim was struck out they could not return to the Tribunal with a counterclaim that formed part of the written statement of defence. Mr Omari Gyunda, on the other hand, asserted that when a matter is struck out the party is required to rectify the defect, return to the Tribunal and not to appeal to this Court.

The provisions of Regulation 7 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2013 authorise the respondent to raise counterclaims in their written statement of defence and the applicant to file a written statement of defence to the counterclaim. This wording implies that a counterclaim filed in a District Land and Housing Tribunal is an independent suit. This much, the Tribunal conceded. The only point of departure is the mode in which particulars are to be represented in the counterclaim. On this point, the trial tribunal took the view that the counterclaim must contain its own particulars separate from those stated in the written statement of defence.

Considering that Regulation 7 (2) does not address this issue and the provisions of Civil Procedure Code are applicable to supplement the inadequacy in Rule 7 (2) the practice governing counterclaims under the Civil Procedure Code is of particular significance.

Before proceeding further, it is important to state under Rule 7 (2) and the Civil Procedure Code, a counterclaim is a separate unit in a written statement of

defence. This structure was restated by Judge Mackanja in *Arther F Kibona v Transcan Timber Co Ltd*, Civil Case No 8 of 1999, High Court of Tanzania at Mbeya (2000)m Judge Mackanja had the occasion to address this issue:

...A counter claim is a case in its own right, completely different from the plaintiff's case. It will fall or succeed on its own merits. In fact it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant although they retain their titles as shown in the plaint. So a suit is instituted by a plaint, since a counter claim is a suit distinct from the plaintiff's suit, it must be headed by the term COUNTERCLAIM in bold capital letters which implies that although it is contained in a written statement of defence it is also a suit to which a written statement defence is required...

Justice Chipeta alludes to the same structure in his guidebook for magistrates, entitled *A Magistrate's Manual*, (Tabora: TMP Book Department) at page 182.

This brings me back to the bone of contention in the present appeal which is the appropriate location of the particulars of a counterclaim in a *written statement of defence*. In addressing this issue, it is important to distinguish two types of counter claims. The first and the most common form of a counterclaim consists of a cause of action relating to the plaintiff's cause of action. The second type of a counterclaim consists of a cause of action independent from that of the plaintiff. The modern form of counterclaim, originating from the English Judicature Act of 1873 and introduced under different codes of civil procedure including the Tanzanian Civil Procedure Code, recognises the second form of

counterclaim. The description of this form of counter claim is to be found in one of the leading commentaries of English law by Right Honourable the Earl of Halsbury and other Lawyers in *The Laws of England Being a Complete Statement of the Whole Law of England*, Vol 25, London: Butterworth and Co, 1913 at paragraph 916:

Counterclaim is not confined to money claims, and is not confined to causes of action of the same nature as the original action...; and except where a person other than the plaintiff is made a defendant to it, it need not relate to or be connected with the original subject of the cause or matter... , and a defendant is entitled to set up any counterclaim which is not so incongruous as to be incapable of being tried with the original action A claim founded on tort may be opposed to one founded on contract..., and in an action *in rem* the defendant may set up a counterclaim *in personam* The defendant by his counterclaim may ask for any form of relief, for example, a declaration..., a vesting order or relief against forfeiture ... , an injunction ..., a receiver...,specific performance... , revocation of a patent ...,an account... ,payment of money claim, or damages.

[References omitted].

References to the second type of the counterclaim are equally found in commentaries on the Indian Civil Procedure in Prasad BM and Mohan M, *Mulla: The Code of Civil Procedure*, Vol 2, 18th edn, Haryana: Lexis Nexis, 2013; at pages 1925-1934; Dhingra SN and Mogha GC, *The Law of Pleadings in India with precedents*, 18th edn, New Delhi: Eastern Law House Private Ltd, 2013 at page 337.

From this classification the following points emerge: Firstly, a counterclaim has the trappings of a plaint; the written statement of defence in which it is written has the effect as a plaint in a cross-suit. In *Honourable Attorney General v Morogoro Auto Spares*, Civil Appeal 111 of 2004, the Court of Appeal reaffirmed that:

The collapse of the claim by the original plaintiff in a suit where there is a counterclaim does not automatically result in the collapse of the counterclaim.

On this account, the trial tribunal erred by overlooking the fact that the dismissal of the respondents' case for want of prosecution had nothing to do with the appellant's counterclaim. The tribunal was bound to set a date for hearing of the appellant's counterclaim.

The rule in *Morogoro Auto Spares*, applies more strongly to the second type of the counter claim and is of limited application to first type of the counterclaim. Depending on the facts, a counterclaim may collapse where the plaintiff's case collapses. In *Mohamed Medraza Dharamsi and 3 Others v Ali Mohamed Versi*, Civil Appeal 103 of 2002, (2003), the High Court Zanzibar dismissed the plaintiff's case for vacant possession on account of being time-barred notwithstanding the defendant's counterclaim. The Court of Appeal upheld the ruling on the ground that "both the claim and counterclaim were time barred."

Secondly, a counterclaim must contain all material facts upon which the defendant relies with the same particularity required for complaints. The general practice in which facts supporting counterclaim are set forth has been summed up in *Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice*, 12th edn (by Harwood, G Francis), (London: Sweet and Maxwell, 1971) at page 221:

...All the facts relied on by way of counterclaim must be stated in numbered paragraphs (following on in the same serial from those of the defence, not starting a fresh series) under the heading: "Counterclaim," so as to distinguish them from facts alleged by way of defence. If any of the facts on which the counterclaim is founded have been already stated in the defence, they need not be restated in the counterclaim, but may be incorporated by reference thus: "And by way of counterclaim the defendant repeats the allegations contained in paragraphs 3,4, 5 and 8 of the defence." ...

In the present appeal, the appellant's counterclaim was in relation to the respondents' cause of action and was set in the written statement of defence as follows:

COUNTERCLAIM

That the above-named Respondent by way of Counterclaim state as follows:

9. That in this Counterclaim, leave of this Honourable Tribunal is sought to refer to the parties to this suit, and annexures to the Written Statement of Defence consistently as they appear in the Application and the Applicant's Written Statement of Defence. The Respondent shall further crave leave of the Honourable Tribunal to repeat all factual events leading to the institution of this suit as laid out in the defence above.

There is no doubt that the description of the applicants (respondent before the Tribunal) is set out in the first paragraph of the applicants' application while in the written statement of defence the description of the appellant is admitted with changes on the appellant's address. In the written statement of defence, the appellant provided his own description of the suit land in the third and fourth paragraphs. For this reason, I am satisfied that the counterclaim was properly pleaded and the respondent's objections, alluded to at the beginning of this judgment, should have been dismissed.

Assuming that the format of the counterclaim was not proper, the Tribunal was supposed to be guided by its content and not its format. The provisions of Regulation 7 (4) do not confine a respondent to a specific format in preparing their written statements of defence and the trial Tribunal is directed to "be guided by the contents and not the format." There is no reason why that direction cannot apply to the counterclaim.

The next question for consideration is what should have been done after the dismissal of the respondents' case in relation to hearing on the counterclaim. As stated at the beginning of this judgment, the appellant's counsel, wrote a letter

praying for hearing date on the counterclaim. Technically, in view of the rule reaffirmed in *Morogoro Auto Spares*, the counterclaim was still in court unless there was specific finding or order regarding it. The order of the Tribunal dismissing the case for want of prosecution under Regulation 15 (a) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2013 was clearly restricted to the respondents' application. The counterclaim was still in court.

While it is not good practice to address courts and tribunals with letters, peculiar circumstances may dictate so. In *Edmund Mjengwa and 6 Others v John Mgaya and 4 Others*, Criminal Appeal 18 of 1999, (2001), the the Court of Appeal granted an adjournment after accepting the counsel request addressed in a letter and accompanied by a medical certificate that he was ill. Requests for judicial recusal have occasionally been presented by letters. A letter formed the basis of judicial recusal in *Jayantkumar Chandubhai Patel v A-G*, Civil Appeal 59 of 2012, Court of Appeal of Tanzania at Dar es Salaam (2014) (unreported). The appellant wrote a letter to disqualify two Justices of Appeal who were part of the full bench and the letter was acted upon. A letter to the same effect was written by an accused in *Charles Mayunga v R*, Criminal Appeal 493 of 2015, Court of Appeal of Tanzania at Tabora (2017) and it was acted upon by the trial court and on appeal, by the Court of Appeal. From these cases, there is some authority that letters may be acted upon. In the special circumstances of the present case, the trial tribunal properly acted upon the appellant's letter.

Considering that the counterclaim was part of the written statement of defence and that the written statement of defence was dismissed together with the respondents' application, the counterclaim had no leg from which it could be restored to the trial tribunal except through institution of a separate suit. There was no way in which the appellant could have returned to the trial tribunal. I am satisfied that this was an appealable interlocutory matter which had the effect of finalising the case and was therefore appealable to this Court.

For these reasons, I allow the appeal with costs and remand the application to Babati District Land and Housing Tribunal for hearing on the counterclaim on merit before a different chairperson and set of assessors. For avoidance of doubt the earlier preliminary objections before the trial tribunal have been overruled on this appeal. The Tribunal is hereby directed to summon the parties for hearing on the counterclaim within forty-five days after the return of the records of appeal from this Court. It is so ordered.

DATED at BABATI this 14th day of April, 2024


F.M. MIRINDO

JUDGE

Court: Judgment delivered this 19th day of April, 2024 in the presence of the appellant in person, his advocate, Mr Festo Jackson and Advocate Omari Gyunda for the respondent. B/C: William Makori (RMA) present.




F.M. MIRINDO

JUDGE

19/4/2024