

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

LAND CASE NO. 59 OF 2011

NICHOLAS MTEI PLAINTIFF
VERSUS
MARIAM MOHAMED SIMBA (As Adimistratrix of the
estate of the late MOHAMED) 1ST DEFENDANT
MWANAHAMISI MOHAMED SIMBA..... 2ND DEFENDANT
RAMADHANI MOHAMED SIMBA 3RD DEFENDANT
AMINA MOHAMED 4TH DEFENDANT
ASIA MOHAMED SIMBA..... 5TH DEFENDANT

R U L I N G

A.F. Ngwala, J.

In his Written Statement of Defence to the Counter claim, the Plaintiff has raised two Preliminary Objections on Point of Law against the Counter claim as follows:-

- 1. That all allegations made therein do not constitute a legal right worth enforcing in a Court of Law;*
- 2. That the Defendants do not have any cause of action against the Plaintiff.*

By leave of the Court these Preliminary Objections were argued by way of Written Submissions. Dr. Lamwai learned counsel for the Plaintiff argued in support of the Objections shortly that the Defendants cannot have a cause of action against the Plaintiff in respect of their claim to take back the money to the

defendants as part payment of the purchase price of the house. He strongly submitted that there is no remedy in law like what is sought by the Defendants.

In reply, Mr. Magessa, the learned advocate for the Defendants submitted that the Objections raised by the Plaintiff against the Counter Claim are matters of facts which require evidence to establish them. He submitted that whether a suit or a counterclaim discloses a cause of action against the defendant is a matter of fact to be shown in the Pleadings and in evidence. Mr. Magessa further submitted that the refusal to accept the borrowed money and the claim that there was an oral contract of sale of the house constitutes a cause of action. In support of his argument that the Objections raised requires evidence to be proved, Mr. Magessa cited the cases of the Registered Trustees of Tanzania Labour Party Vs. Augustino Lyatonga Mrema & 3 others, Civil Application No. 137/2004 and Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) E.A. 696. In these cases the courts held that a Preliminary Objection consists of a Point of Law and that no evidence is needed in proving the Objections.

Mr. Magessa lastly submitted that since the main prayer in the Counter-Claim is for declaration from the Court, therefore under Section 7(2) of the Civil Procedure Code, [Cap. 33 R.E. 2002] such declaration cannot be opposed by a Preliminary Objection.

After examining the Submission and the authorities to which the counsels have referred the Court, this Court is aware that a

Counter claim is an action of the defendant against the Plaintiff. The Plaintiff in the main suit becomes the Defendant and the Defendant becomes the Plaintiff. The Counter claim must carry a Cause of Action against the Defendant/ Plaintiff just as is required in the Plaint. Moreover, the Claims set up in the Counter-claim must be one in respect of which the defendant could maintain a separate action and it must be of such a nature that the court would have jurisdiction to entertain a separate suit. This principle had been set out by Sir Udo Udoma in the case of **Karole Vs. Uganda Transport Co. Ltd [1967] E.A. 774.**

In this suit the claims by the Plaintiff and Defendant are separate. For the sake of clarity and avoidance of doubt let me reproduce here under the Plaintiff's claim and the Claims in the Defendant's Counter Claim.

"That the Plaintiff claim against the defendant jointly and severally is for a Decree of specific performance of the agreement of the sale of Plot No. M 25/MOZ 15, situated at Manzese Midizini, Dar es Salaam and for an order of vacant possession thereof in favour of the Plaintiff "

The Counter Claim, on the other side, goes as follows:-

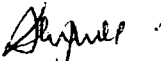
"(1). As declaration that the defendants borrowed a total sum of shs. 27,440,000/- from the above mentioned Modern Hospital, now represented by the Plaintiff and that out of this the defendants have paid a total sum of shs. 3,500,000/- so the present total indebtedness of the defendants to the said Modern

Hospital, now represented by the Plaintiff, should accept payment of shs. 23,940,000/- only;

- (2). *For an order that the above mentioned Modern Hospital, now represented by the Plaintiff, should accept payment of shs. 23,940,000/- being refund of the borrowed money, now outstanding."*

From the above, it is clear that the Defendant's claim is based on the Modern Hospital, not the Plaintiff more so the value claimed is below the pecuniary jurisdiction of this Court. Besides, the Defendants claim are mere monetary, they do not involve any landed property. This makes their claim to be out of the jurisdiction of this Court which is constrained to land matters only.

In that regard, the Defendants have not shown a Cause of Action against the Plaintiff. There is no injury or damage done by the Plaintiff to the Defendants. With this and the fact that the Defendants claim is out of the jurisdiction of this Court, I hereby dismiss the Counterclaim with costs.


A.F. Ngwala,
JUDGE,
12/11/2012.

Delivered in Court this 12th day of December, 2012.

A.F. Ngwala,
JUDGE,
12/11/2012.

12, 12, 2011

Coram : A.F. Ngwala, J.
For the Plaintiff : Dr. Lamwai.
For the Defendants : Dr. Lamwai for Mr. Magessa.

Court: Ruling is delivered in Court.

Court: Hearing o 03/04/2013 (1st PTC)

**A.F. Ngwala,
JUDGE,
12/12/2012.**