

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

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 107 OF 2019**

**SAID ALLY ATHUMAN.....1<sup>ST</sup> PLAINTIFF**

**FATMA ALLY ATHUMAN.....2<sup>ND</sup> PLAINTIFF**

**NIMEET ALLY ATHUMAN.....3<sup>RD</sup> PLAINTIFF**

**AMAR ALLY ATHUMAN.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**THE ADMINSTRATOR GENERAL.....1<sup>ST</sup> DEFENDANT**

**SUDI ATHUMAN ALLY (Holding Power of Attorney of Sophia Ali Athuman).....2<sup>ND</sup> DEFENDANT**

**RULING**

*Date of Last Order: 18.08.2021*

*Date of Ruling: 25.11.2021*

**OPIYO -J**

On 20<sup>th</sup> May,2021 when this case was scheduled for the Final Pre-Trial Conference, Mr. Muganyizi who is the learned Counsel for the 2<sup>nd</sup> defendant prayed to be allowed to amend the Written Statement of Defense owing to the changes that occurred on the status of the suit property. It came to his attention that the same was being leased. His prayer was granted on the

next day, that is the 21<sup>st</sup> May, 2021 and the document in question was amended including the counter claim. When the same was served to the plaintiffs hereinabove, five objections on point of law came up from them to the effect that:-

- i. The amended counterclaim is misconceived and bad in law for raising matters contrary to the order for amendment.
- ii. The amended counterclaim is defective and incompetent for offending Order VIII Rule 9(1) & 10 (1) of the Civil Procedure Code Cap 33 R.E 2019.
- iii. The 2<sup>nd</sup> plaintiff in the counterclaim has no *locus standi* to sue in the counterclaim.
- iv. That, the amended counterclaim is incompetent for want of signature of the 1<sup>st</sup> plaintiff.
- v. That, the 2<sup>nd</sup> plaintiff in the counterclaim has no mandate to act on behalf of the 1<sup>st</sup> plaintiff in the counterclaim.

Hearing of the objections was by way of written submissions. Mr. David Shadrack Pongolela, learned Advocate appeared for the plaintiffs while Mr. Muganyizi was for the 2<sup>nd</sup> defendant. For convenience I prefer to dispose the 2<sup>nd</sup> objection first, before embarking on the remaining four as listed above. The plaintiff has claimed in the 2<sup>nd</sup> objection that, the amended counterclaim is defective and incompetent for offending Order VIII Rule 9(1) & 10 (1) of the Civil Procedure Code Cap 33 R.E 2019. Mr. Pongolela maintained in his submissions that the counter claim as per Rule 9 (1) of Order VIII is supposed to be among parties only. The exception is available at Rule 10 (1) of Order VIII where it allows the addition of third parties only if the counter

claim is a claim against the said 3<sup>rd</sup> party along with the existing plaintiff. That is to say, a 3<sup>rd</sup> party in a suit can only be added as a defendant by way of a counter claim and not as a plaintiff in it. He argued that, this rule has been well articulated in the Black Law Dictionary, English Edition where it defines a counter claim to mean a claim for reliefs asserted against an opposing party after an original claim has been made, i.e. a defendant's claims in opposition to or as a set-off against plaintiff.

In the case at hand, Malapa Inn LTD who appears as a co-plaintiff in the amended counter claim is a stranger in the case and therefore is incapable of raising any counter claim against the plaintiffs.

In reply, Mr. Muganyizi for the 2<sup>nd</sup> defendant pegged his submissions on Mulla Code of Civil Procedure, Volume II (see page 1287) and Sarkar at page 670, to show what a counter claim really means. According to both writers as argued by Mr. Muganyizi, they have shown that, persons other than those made parties to the original action may be made parties to the counterclaim. Mr. Muganyizi further insisted that, the 1<sup>st</sup> plaintiff in the counterclaim is a necessary party, without whom the suit cannot be finally determined. He relied on the case of **Luhumbo Investment Limited versus National Bank of Commerce, Land Case No. 6 of 2016, High Court of Tanzania at Shinyanga** where Mkeha J, referring to the case of **Abdulatif Mohamed Hamis versus Mehboob Yusuph Osman & Another, Civil Revision No. 6 of 2017** observed that....

*“Our Civil Procedure Code does not have a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the court to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order I only hold good with respect to the misjoinder and no-joinder of non-necessary parties. In terms of what the plaintiff pleaded in her plaint, the disputed property is now being owned by Bundaa Oil Industries Limited, having bought the same from the defendant. An order repossessing the disputed property to the plaintiff if issued, would necessarily invite the purchaser during execution stage.”*

In his brief rejoinder, Mr. Pongolela insisted that, it is only the defendant in an existing suit that can raise a counterclaim. Further, a stranger in a suit can only be added in an existing suit as a defendant and not a plaintiff in a counter claim as per order VIII Rule (1) & 10 of the Civil Procedure Code, Cap 33 R.E 2019. He insisted that, it is immaterial whether Malapa Inn Limited is a necessary party or not, joining her in a counterclaim offends the above stated provisions of the law. If Malapa Inn Limited wants to be joined in the instant case, she should follow the proper procedures and not come through a back door as a co-plaintiff in a counterclaim.

Those were the arguments of parties, for and against the objection as presented by their respective counsels and the court has placed a high

consideration on them. The point of contention here is whether the amended counterclaim offends Order VIII Rule 9(1) & 10 (1) of the Civil Procedure Code Cap 33 R.E 2019. For easy reference I will reproduce the said provisions as here under:-

*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 defense the defendant may, in his written statement of defense, state particulars of the claim made or relief or remedy sought by him."*

*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."*

As per the above provisions, a counterclaim is simply a claim made by one party to offset another claim. It comes from a defendant in a legal action. In other words, if a plaintiff initiates a lawsuit and a defendant responds to the lawsuit with claims of his or her own against the plaintiff, the defendant's claims are counterclaims.

Generally, the right to counter the claims presented in court accrues to the one who has been sued as against the plaintiff in the said suit. That is to

say, it is an exclusive right of the defendant(s) in the original suit. The rules are clear that, no person other than the defendant has that right to counter the claims of the plaintiff which were directed to a particular defendant. If any person other than the defendant in a suit brings a counterclaim, he or she becomes a stranger to the dispute before the court. It is so because no claim or claims were directed to him or her to warrant a cross-claim. Hence the plaintiff in the original case has all rights to object such a claim as it involves persons whose locus to bring a counterclaim is in question. The rules of joinder of parties in a counterclaim as per Rule 10(1) of Order VIII allows joining defendants only even if they were not parties to the original claim. The same do not allow persons who were not defendants in the original suit to be joined as plaintiffs in a counterclaim.

At this juncture I join hands with Mr. Pongolela who insisted that, it is only the 2<sup>nd</sup> defendant in the instant suit who can raise a counterclaim. Malapa Inn Limited, is a stranger in the original suit. She can only be added as a defendant and not a plaintiff in a counterclaim in question. That is logically because the plaintiff in the suit never had claim against him which he can validly counter in a counter claim. It is clear therefore that, on the face of it, the amended counterclaim offends Order VIII Rule 9(1) & 10(1) of Civil Procedure (supra). The same is not maintainable. The 2<sup>nd</sup> objection is therefore sustained. That being the case, I see no reasons to go into discussion of the other four objections remained in the case at hand as the findings in the 2<sup>nd</sup> objection are enough to dispose the matter in dispute.

In the event, the amended counter claim is hereby struck out owing to the reasons explained herein above. No order as to costs.



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**M.P. OPIYO,**

**JUDGE**

**25/11/2021**