

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO 137 OF 2015

BIABANA LIMITED.....PLAINTIFF

VERSUS

CRDB BANK PLC.....1ST DEFENDANT

ABANA LIMITED.....2ND DEFENDANT

DATE OF RULING- 03/12/2021

RULING

The plaintiff, Biabana Limited filed a suit against the two defendants, the first defendant was CRDB Bank PLC, and the 2nd defendant was Abana Limited. The suit was filed on 15th May, 2015. The 1st defendant filed a written statement of defense and a counter claim against the plaintiff and the 2nd defendant. On 30th October, 2017, the plaintiff, Biabana Limited and the 1st Defendant agreed to settle their dispute amicably, and the suit of the plaintiff against the 1st defendant was marked settled, and the counter

claim of the 1st defendant against the plaintiff was also marked as settled. The Decree of the Court was extracted and clause 1.5 of the Compromise Decree stated that the Decree shall not relive the 2nd defendant from paying the remaining balance of their obligation, and thus the case between the 1st defendant and the 2nd defendant was not affected by the Compromise Decree.

On 7th October, 2021, the Counsel for the 1st Defendant wrote a letter to Court, reminding the Court to hear and determine the Counter claim which was filed by the 1st defendant as against the 2nd defendant in the main suit. The plaintiff had withdrawn the suit against the 2nd defendant on 17th November, 2021.

Upon the withdrawal of the main suit by the plaintiff against the 2nd defendant, the 2nd defendant took the objection on the competency of the counter claim stating that the counter claim is in violation of Order VIII Rule 10 of the Civil Procedure Code, Cap 33 R: E 2019 in that the counter claim cannot be preferred against the co-defendant alone, as the plaintiff has already withdrawn the suit against the 2nd defendant, and so no suit existed upon which the

counter claim could be raised. Counsel Mussa Maghimbi who appeared for the 2nd defendant argued that the counter claim can be maintained only against the plaintiff along with the co-defendant and not against the co-defendant alone. As the counter claim made by the first defendant has been preferred against the co-defendant alone, the counter claim is not maintainable. According to the Learned Counsel, the first defendant has to file a separate suit. In support of his contention, the Learned Counsel for the 2nd defendant relied on the provisions of Order VIII Rule 10 (1) and (2) of the Civil Procedure Code, Cap 33 R: E 2019.

A perusal of Order 8 Rule 9 (1) of CPC, no doubt contemplates that a counter claim in a suit has to be made against the plaintiff. A careful perusal of Rule 10 (1) and (2) would indicate that it is not very specific that the counter claim by a defendant has to be made only against the plaintiff. In other words, in a given circumstances, it does not specifically bar the filing of a counter claim against the co-defendant as well.

In fact, when a counter claim is made, the defendant who makes such claim becomes the plaintiff insofar as that claim is concerned and a person against whom such claim is made becomes the defendant. Sub-clause (2) of Rule 9 of Order 8 of CPC makes it clear that such counter claim shall have the same effect as a cross suit. Even if the plaintiff in the said suit discontinues or the suit itself is stayed or dismissed, still the counter claim can be proceeded with as contemplated under Order 8 Rule 9(2) of the CPC. Therefore, a combined reading of Order 8 Rule 9(2) with Order 8 Rule (10)(1) and 9(2), makes it abundantly clear that the counter claim in a suit can be made even against the co-defendant.

At this juncture it is useful to refer to the decisions of **NIC BANK TANZANIA LIMITED vs HIRJI ABDALLAH KAPIKULILA, Civil Application No. 561/16 of 2018**, Court of Appeal of Tanzania relied on by the learned counsel for the 1st Defendant. In the said decision, the Honorable Justices of Appeal has held at page 13 of the typed judgment that.....*"a counter claim is substantially a*

cross suit which should be treated, for all purposes as an independent action.”

Thus, a counter claim has necessarily to be directed against the plaintiff in the suit and incidentally or along with the plaintiff it could also be claimed against the co-defendant. Therefore, in my considered view, that initially, in this matter, the counter claim was raised against the plaintiff along with the 2nd defendant, then the plaintiff in the said suit decided to discontinue with the suit as against the 2nd defendant and had settled the suit with the 1st defendant, still the counter claim can be proceeded with since it is a cross suit, thus it must be determined to its finality.


The very language of Order VIII Rule 9(1) and 9(2), of C.P.C., shows that a defendant in a suit can seek for a counter-claim. Such counter-claim will have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter- claim. The counter-claim shall be treated as a plaint and it is governed by the Rules applicable to plaints under order VII which applies mutatis

mutandis. Even if the main suit is stayed, discontinued or dismissed, counter-claim can be proceeded with independently. Since the counter-claim is considered like an independent suit, in the eyes of law, any order passed in the counter-claim is considered to be a decree. The counterclaim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and verifications.

Counter-claim being in the nature of cross-suit, is not affected by the dismissal or withdraw or settlement of the plaintiff's suit. The counter claim has to be disposed of on merits. Therefore, the dismissal or withdrawal of plaintiff's suit would not affect the counter claim of the defendant.

Thus, in view of the above, the preliminary objection is hereby overruled.

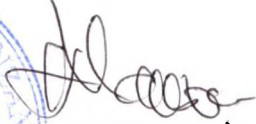
In view of the legal position under Order 8, Rule 9 of the C.P.C, a counter-claim or set-off can be made in the form ^{of} in a suit, and since the format used by the 1st defendant in lodging the cross suit was not in compliance with the provisions of the CPC, and since the



2nd defendant was not prejudiced by the use of the format adopted by the 1st defendant in filing the cross suit, and based on the principles of overriding objective stated in the case of **Yakobo Magoiga Gichere vs Peninah Yusuph, Civil Appeal No. 55 of 2017** (unreported), which requires the Court to deal with cases justly, and to have regard to substantive justice, I order the counter to claim be amended so as to comply with the format prescribed by the law. The amended counter claim be filed in court within 7 days from the date of this decision.

It is so ordered

**DATED AND DELIVERED AT DAR ES SALAAM THIS 3RD DAY OF
DECEMBER 2021**


(L MANSOOR)
JUDGE
3RD DECEMBER 2021

