

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.185 OF 2021
(BY WAY OF COUNTER CLAIM)

GLORY GERSONI KIZINGA 1ST PLAINTIFF

JOHN CHULLA CONSTANTINO 2ND PLAINTIFF

VERSUS

AMANA BANK LIMITED 1ST DEFENDANT

AHADI COMPANY LIMITED 2ND DEFENDANT

MERAUSY BETES CHENGULA 3RD DEFENDANT

CHRISTOPHER MICHAEL KADEO 4TH DEFENDANT

RULING

Date of last Order 14.02.2022

Date of Ruling 18.02.2022

A.Z.MGEYEKWA, J

The 4th Defendant in the counter claim who is the Plaintiff in the main suit lodged a suit before this Court, touching on vacant possession of the premises in dispute, being the House situated at Plot No. 41 Block 'A' with

a certificate of Title No. 37261 at Yombo Vituka within Temeke District. The 1st Plaintiff in the Counter Claim claims for judgment and decree against Christopher Michael Kadeo and Amana Bank Limited and declare the property on Plot No.41, Block 'A' registered under Certificate of Title No. 37261 located at Yombo Vituka – Temeke at Dar es Salaam to belong to the 1st and 2nd Plaintiffs in the counter claim.

The Counter Claim has encountered an impediment, coming by way of preliminary objections, raised by the learned counsel for the 4th Defendant. The objections are to the effect that:

- 1. The Counter Claim is bad in law and unmaintainable for contravening section 10 and Order XXIII Rule 1 (3) of the Civil Procedure Code, Cap.33 [R.E 2019].*
- 2. That the Plaint in the Counter Claim does not disclose a cause of action against the 4th Defendant.*

These preliminary objections were argued by way of written submissions, filed by the learned counsels consistent with the drawn schedule. Commencing the submission was Mr. Sylvester Sebastian, learned counsel for the 4th Defendant opted to drop the second objection.

In his submission, Mr. Sebastian was brief and straight to the point. He submitted that, on 23rd September, 2020 the 1st Plaintiff instituted a Land

Case No. 155 of 2020 against the 2nd Plaintiff and the rest of the Defendants in the Counter Claim. The learned counsel for the 4th Defendant contended that the subject matter in the said land case was land in Plot No.41 Block Yombo Vituka area at Temeke District within Dar es Salaam Region. He went on to submit that the central issue was that the mortgage processes, as well as the subsequent sale of that land, were tainted with irregularities hence illegal. Mr. Sylvester Sebastian further submitted that on 25th October, 2021 when the suit was called for hearing the 1st Plaintiff prayed to withdraw the suit, and her prayer was granted and the Judge his Lordship F.H Mtulya did not grant leave to refile this suit. He referred this court to page 4 of this court Ruling.

The learned counsel for the 4th Defendant premised his counsel on the provisions of section 10 and Order XXIII Rule 1 (3) of the Civil Procedure Code Cap. 33 [R.E 2019]. He contended that once a Plaintiff has withdrawn her suit without leave of the court to refile the same, then she is precluded from refiling the same. Thus, it was his view that the Plaintiff's counter claim in the instant matter is nothing but a replica of the withdrawn suit. Insisting, Mr. Sebastian contended that there is no room at all for the Plaintiffs to institute the matter therefore, the counter claim by virtue of Order VIII Rule 9 (2) of the Civil Procedure Code Cap.33 cannot be maintained by this court.

On the strength of the above submission, Mr. Sebastian beckoned upon this court to find that the counter claim in the instant suit is offending the lucid provision of the law, thus, he concluded by urging this court to dismiss the counter claim with costs.

Submitting in reply, Ms. Glory Sandewa, counsel for the Plaintiff, opposed the learned counsel for the 4th Defendant's submission. She argued that the pleadings in the counter claim are not complete yet the learned counsel for the 4th Defendant insisted to be heard. Ms. Sandewa valiantly contended that the preliminary objection does not hold water and has nothing to do with section 10 and Order XXIII Rule 1 (3) of the Civil Procedure Code Cap.33. It was her contention that the counter claim is governed by Order VII Rule 9 (1) and (2), Rule 10 (1) and (2), Rule 11 (2) of the Civil Procedure Code Cap.33 only.

Ms. Sandewa continued to submit that Order VIII Rule (1) of the Civil Procedure Code Cap.33 states that the Defendant may make any claim, seek any relief or remedy against the Plaintiff. She went on to submit that the Plaintiffs in their counter claim did precisely what the law allows them to claim such as what relief to be sought and what remedy is due to them. It was her submission that the rules in counter claim are clear that withdrawal of the 1st Plaintiff suit with or without leave of the court is not a bar to the 1st Plaintiff benefiting from the counter claim rules. She referred

this court to page 4 of the court ruling where the judge allowed the withdrawal because the Plaintiff had time for instituting a fresh suit. The learned counsel for the Plaintiffs went on to submit that the objection does not touch the 2nd Plaintiff in the Counter Claim since he has not any point in time withdraw any suit.

On the strength of the above submission, Ms. Sandawe forcefully argued that the objection is misconceived thus the same be disregarded.

As clearly gathered from the counsel's submission, the tussle revolves around the counter claim that the Plaintiffs cannot lodge a counter claim since the 1st Plaintiff suit in Land Case 155 of 2020 was withdrawn without leave of the court thus she cannot lodge a suit before this court in regard to the subject matter which was in Land Case No. 155 of 2020.

I will not take much time of the court to determine this objection. I preface my analysis by addressing the issue whether the Plaintiff in Land Case No. 155 of 2020 were required to obtain the leave of the court to withdraw this suit or not. This is the issue which the learned counsels have butting heads in course of their submissions. First of all, it worth noting that it is indisputable fact that counter claim is a separate suit. The term counter claim is defined in the Black's Law Dictionary, 8th Ed 2009 at page 1060, to mean:-

" A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a set off against the plaintiff's claim."

Applying the above provision of the law, it is clear that a counter claim is treat as an independent suit. The records reveal that the Plaintiff on 23rd September, 2020, instituted a suit before this court and on 25th October, 2021, the Plaintiff prayed to withdrew the Land Case No. 155 of 2020 without leave to refile. I understand that the law permits a party to withdraw and refile a suit in the court. However, this unfettered position of the law will only be exercised in favour of the Plaintiff upon leave to refile. Otherwise, without leave of the court to refile, the Plaintiff is precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. This is the tenor and import of Order XXIII Rule (3) of the Civil Procedure Code, Cap.33 [R.E 2019] which I take the liberty to reproduce hereunder. It reads:

" (3) Where the Plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. "

Therefore, since it was the 1st Plaintiff who withdrew the Land Case No. 155 of 2020 without leave hampers her to institute another suit in respect

to the same subject matter. On the other hand, since the 2nd Plaintiff was not a party of Plaintiff's case in Land Case No. 155 of 2020, his counter claim remains intact.

In the upshot, I am of the settled view that the preliminary objection raised by the learned counsel for the Defendant in the counter claim is laudable. Therefore, I proceed to dismiss the 1st Plaintiff counter claim suit. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 18th February, 2022.




A.Z MGEYEKWA
JUDGE
18.02.2022

Ruling delivered on 18th February, 2022 in the presence of Mr. Godfrey Lukangwa, counsel for the Plaintiff, Ms. Glory Venance for the 2nd Plaintiff, Mr. Sylvester Sebastian, counsel for the 4th Defendant and Ms. Angel Mwesigwa, counsel for the 1st Defendant.




A.Z MGEYEKWA
JUDGE
18.02.2022