



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC CASE NO. 63 OF 2015**

**THE TRUSTEES (REGISTERED)**

**ELDORET CHURCHES URBAN PROJECT TRUST FUND.....PLAINTIFF**

**VERSUS**

**THE NATIONAL LAND COMMISSION .....1<sup>ST</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF UASIN GISHU.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, UASIN GISHU COUNTY .....3<sup>RD</sup> DEFENDANT**

**DOUGLAS NJUGUNA KARIUKI, SOPHIA NJOKI NGUGI,**

**EUNICE WAMBUI NDUNGU & JARED AKONGA**

**OWASHIKA (ON BEHALF OF OTHERS).....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff has filed the notice of Preliminary Objection dated 20<sup>th</sup> December 2018 raising the following grounds;

- a. **“THAT** the 2<sup>nd</sup> Defendant’s counterclaim is far-fetched, misplaced, legally untenable in that the 2<sup>nd</sup> Defendant has no authority to seek an order that the property namely Eldoret Municipality/Block 14/1653 be registered in the names of the 2<sup>nd</sup> Defendant and 4<sup>th</sup> Defendant;
- b. **THAT** there is no provision in law to permit the church and state to own property jointly, in common or in any manner as may be construed by the 2<sup>nd</sup> Defendant;
- c. **THAT** the plaintiff is now the registered proprietor of the property Eldoret Municipality/ Block 14/1653 and hence any available option or avenue is for any party having any claim perceived or otherwise to file suit and challenge the legality or otherwise of ownership;
- d. **THAT** the suit by the plaintiff having been withdrawn, the 2<sup>nd</sup> Defendant’s counterclaim simply died with the suit and the 2<sup>nd</sup> Defendant can only file a fresh suit to perpetrate its weird and perceived counterclaim.”

2. The record confirms that the plaintiff had commenced this suit by way of the plaint dated 5<sup>th</sup> March, 2015 seeking for the prayers that a permanent injunction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants to among others restrain them from interfering with the operations of the health project, selling, mortgaging or doing any other thing in any other manner affecting all that parcel of land known as Eldoret Municipality/ Block 14/1653 pending the hearing and determination of the suit; the 3<sup>rd</sup> defendant be ordered to issue a certificate of lease over the parcel of land known as Eldoret Municipality/ Block 14/1653 to the plaintiff and costs. The 2<sup>nd</sup> Defendant in turn filed a statement of defence dated the 23<sup>rd</sup> March, 2015, that was amended on 6<sup>th</sup> December, 2017 and 13<sup>th</sup> November, 2019 to among others include a counterclaim that the 3<sup>rd</sup> Defendant to register Eldoret Municipality/ Block 14/1653 in the names of the 2<sup>nd</sup> defendant; that title issued to the plaintiff be revoked and costs. The hearing of the plaintiff’s case started on the 30<sup>th</sup> October 2018 when Bishop Thomas Kogo testified as PWI, after which the matter was fixed for further hearing on the 13<sup>th</sup> and 14<sup>th</sup> December 2018. That come the 13<sup>th</sup> December 2018, the plaintiff filed the Notice of Withdrawal of Suit of the same date. The proceedings of that day shows that the plaintiff’s withdrawal of the suit was allowed with costs by the court, which then fixed the hearing of the counterclaim on the 21<sup>st</sup> December 2018 by consent. That the

Plaintiff then filed the notice of preliminary objection dated the 20<sup>th</sup> December 2018 subject matter of this ruling, and subsequent notice dated the 15<sup>th</sup> June, 2020 seeking for their Preliminary Objection to be heard. The court gave directions on the 14<sup>th</sup> April 2021 and 23<sup>rd</sup> June 2021 on service, filing and exchanging of written submissions within the set timelines.

3. The Plaintiff filed their submissions dated the 21<sup>st</sup> day of September 2021 while the 2<sup>nd</sup> Defendant filed theirs dated the 5<sup>th</sup> day of October 2021.

4. The following are the issues for the determination by the court;

- a) Whether the 2<sup>nd</sup> Defendant's counterclaim can be prosecuted independently of the plaintiff's withdrawn suit; and,
- b) Whether the 2<sup>nd</sup> Defendant has raised a competent counterclaim.

5. The court has after carefully considering the grounds on the notice of preliminary objection, submissions and the superior court decision cited thereon come to the following conclusions;

a. That on the first issue of whether the 2<sup>nd</sup> defendant's counterclaim can be prosecuted after the withdrawal of the plaintiff's suit, the Plaintiff has submitted that the 2<sup>nd</sup> defendant's counterclaim ought not proceed to hearing after withdrawal of their suit on 13<sup>th</sup> December 2018. That the Plaintiff had prosecuted its case diligently, and has subsequently obtained a certificate of title to the suit property. In turn, the 2<sup>nd</sup> Defendant has submitted that the withdrawal of the Plaintiff's suit was legally inconsequential to its counterclaim. The 2<sup>nd</sup> defendant has relied on the decision in the case of **BEATRICE MUMBI WAMAHIU vs MOBIL OIL KENYA [2011] eKLR**, in urging that it be allowed to proceed with its counterclaim. That *Order 7 Rule 13 of the Civil Procedure Rules* provides as follows;

***“Discontinuance, stay or dismissal of suit.***

***13. If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”***

That flowing from the foregoing provision, it follows that a counterclaim raised by a defendant can exist independently or separately from the plaintiff's suit, as was held in the ***Beatrice Mumbi Wamahu*** case (supra), which decision was cited by the 2<sup>nd</sup> Defendant. Therefore, the finding of this court on the first issue is that indeed the 2<sup>nd</sup> Defendant's counterclaim may proceed notwithstanding the withdrawal of the Plaintiff's suit, so long as it raises a competent claim.

b. That on the second issue for determination, of whether the 2<sup>nd</sup> Defendant's counterclaim is competent, Order 7 Rule 3 of the Civil Procedure Rules provides as follows;

***“3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall 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 and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”*** [emphasize mine].

The Plaintiff has argued that the 2<sup>nd</sup> defendant's counterclaim ought not to be allowed to be prosecuted for reasons that it has since acquired title to the suit property. That further, as the counterclaim essentially challenges its ownership of the suit property, it should particularize the facts upon which their title is being impugned in order to be competent and sustainable. The plaintiff referred to *Section 26 of the Land Registration Act No. 3 of 2012* that sets out instances where a certificate of title can be challenged;

26(1)“The certificate of title issued by the Registrar.....shall not be subject to challenge, except-

- a) on the ground of fraud or misrepresentation to which the person is proved to have been a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Plaintiff has therefore submitted that the 2<sup>nd</sup> defendant has not pleaded in their counterclaim any particulars of fraud, misrepresentation, corrupt scheme or any other illegality alleged to have been committed by the Plaintiff in the acquisition of the title to the suit property, and there is therefore no grounds upon which the certificate of title it holds should be cancelled.

c. The 2<sup>nd</sup> Defendant has responded to the foregoing by submitting that the court was empowered by section 13 of the Environment and Land Court Act No. 19 of 2011 to make orders of restitution in this case where land was registered in the name of the plaintiff unlawfully.

d. That having taken into consideration the submissions by the two learned counsel for the plaintiff and 2<sup>nd</sup> defendant, the court has reminded itself of the following passage in the decision **MUKISA BISCUIT COMPANY Vs WESTEND DISTRIBUTORS**

LIMITED (1969) EA 696 wherein the court pronounced itself as follows on what constitutes a Preliminary Objection;

**“So far as I’m aware, a preliminary objection *consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings*, and which if argued as a preliminary point may dispose of the suit.”**

This was followed up by the judgment of Sir Charles Newbold in the same case:

***“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop” (emphasis added).***

The court has perused the 2<sup>nd</sup> defendant’s Further Amended Defence dated the 13<sup>th</sup> November 2019 and it’s crystal clear that it does not set out any grounds of either fraud, misrepresentation, illegality, corrupt scheme, or unprocedural acquisition of title to the suit property attributable to the plaintiff. That as the plaintiff has submitted, it is a fact that the 2<sup>nd</sup> defendant’s counterclaim has not particularized the grounds relied upon to sustain the challenge of the certificate of title held by the Plaintiff. That the failure by the 2<sup>nd</sup> defendant to plead the particulars to bring their counterclaim within the parameters set under section 26 of the Environment and Land Act, that provides guidance to what would be a competent challenge to the title to the suit property, places the plaintiff in a prejudiced position to mount a defence to the 2<sup>nd</sup> Defendant’s general claim.

e. That some of the grounds upon which title to property may be successfully challenged, for instance fraud, is a matter which courts have pronounced time and again that it needs to be specifically cited. In the case of ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR*** the court held that;

***“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:***

***“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).”(emphasis added)***

The foregoing passage demonstrates the importance of particularizing the basis of a claim. The requirement to particularize the claim not only goes to the heart of free and fair trial, but it’s a demonstration that the claim is not just a spurious afterthought, but one that is founded on certain damning facts. Based on this, the court finds that while the 2<sup>nd</sup> Defendant had a right include a counterclaim in its defence, and that the counterclaim survived the withdrawal of the plaintiff’s suit, the counterclaim as drawn is incompetent to go to prosecution and ought not to be admitted. That on that basis alone, this court is inclined to allow the preliminary objection.

f. That needless to state the 2<sup>nd</sup> defendant will be at liberty to consider pursuing the claim in the counterclaim through a fresh suit as provided for under Order 7 Rule 3 of the Civil Procedure Rules.

g. That though under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya the plaintiff, as the successful party would have been entitled to the costs in the preliminary objection, the court finds this to be a suitable instance where each party should bear its own costs as the proceedings were initiated by the plaintiff.

6. That flowing from the foregoing the court upholds the plaintiff’s preliminary objection. The 2<sup>nd</sup> defendant’s counterclaim is therefore rejected and struck out.

**DATED AND VIRTUALLY DELIVERED THIS 16<sup>th</sup> DAY OF FEBRUARY, 2022.**

**S M KIBUNJA - J.**

**ELC ELDORET.**

**IN THE VIRTUAL PRESENCE OF;**

**PLAINTIFF: ...ABSENT...**

**DEFENDANTS: ...ABSENT...**

**COUNSEL: ...MR. MIYIENDA FOR PLAINTIFF,**

**MR. KURIA FOR 3RD DEFENDANT AND MR. OKAWA FOR 4TH DEFENDANT**

**ONIALA: COURT ASSISTANT.**

**S M KIBUNJA - J.**

**ELC-ELDORET.**