



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 221 OF 2013**

**JOHN KISESE NTHENGE.....PLAINTIFF/APPLICANT**

**VERSUS**

**TOEDA MWASARU**

**NYONGESA WAFULA**

**ROSEMARY WANJIRU**

**AMOSE MUSYOKA (Sued in their capacities as**

**Office Bearers of Ushirika Boma Welfare Society)**

**.....DEFENDANTS/RESPONDENTS**

**RULING**

This application is brought under **Order 7 Rule 12 of the Civil Procedure Rules** filed by the Plaintiff and is dated **28/3/2012**. The Plaintiff seeks an order that the counterclaim filed by the Defendants be excluded. The application is premised on grounds that the counterclaim may not be conveniently disposed off together with the Plaintiff's claim,

for reasons that, first, it is based on contract which does not disclose any privity as between the Plaintiff and Defendant and thus no specific performance may be ordered as against the Plaintiff. Secondly that the Plaintiff may not be answerable to the Defendant's perceived right to interest in land title, Mavoko Town Block 3/2101. Thirdly, if the Defendants herein claim to have a genuine and reasonable claim against the 2<sup>nd</sup> – 7<sup>th</sup> Defendants in the counterclaim, then it is only just and fair that the claim be ventilated in an independent suit. Further, that unless the counter-claim is excluded, it will only serve to prejudice and delay the fair trial of the Plaintiff's action.

The application is supported by an affidavit sworn by the Plaintiff on 27/3/2013 wherein he deposed that he is absolute registered proprietor of Mavoko Town Block 3/2101 and that no sale has ever materialized as between himself and Mbukoni Holdings Limited as implied in the Defendant's counterclaim. Consequently Mbukoni Holdings Limited having not acquired title to the said property, it has never been in a position to pass title to the Defendants. The Plaintiff reiterated that the counterclaim would serve to

prejudice and delay trial as the issues therein are divergent to those in the Plaintiff.

In response to the application, the Defendants filed Grounds of Opposition dated 12/4/2013 wherein they averred that the application is frivolous and bad in law and thus an abuse of the court process. It is their averment that to grant the application would result to a multiplicity of suits and that different orders from two different courts may result to confusion and settlement of the matter will be prone to uncertainty. Further that the Plaintiff will not be prejudiced as his suit and the counterclaim relates to the same subject matter and that the issues arising are similar, that is, ownership and proprietorship. The Defendants contend that it is just, expeditious, proportionate and affordable resolution that the matters in the pending suit and the counterclaim be disposed off together.

By mutual consent, this application was canvassed by way of written submissions. F.M. Mulwa, counsel for the Plaintiff filed submissions dated 5/7/2013. It was counsel's submission that the Plaintiff's case is based on a simple claim of trespass but the Defendants in their defence allude to a purported purchase from a third party who they claim purchased it from the Plaintiff. Further that the Plaintiff was not privy to any arrangement between the Defendants and the 3<sup>rd</sup> Party and consequently no legal relation exists between the Plaintiff and Defendants. In respect to the prayers made therein, counsel submitted

that the Defendants are not entitled to an order for specific performance against the Plaintiff in the absence of an agreement to be performed. Secondly, the Plaintiff's title had no defect and lastly, the Plaintiff's silence of 10 years cannot confer any proprietary rights to the Defendants as acquisition of title by way of adverse possession is by having uninterrupted occupation of 12 years or more. In effect, counsel submitted, the Defendants' counterclaim does not disclose any cause of action against the Plaintiff.

Mr.Arusei, counsel for the Defendants filed submissions dated 15/7/2013. It is counsel's submission that the common ground is that there are rivaling claims between the Plaintiff and Defendants in respect to the same property. Counsel submitted that the issue for determination before the court is whether the Plaintiff in the original suit has proprietorship over the suit property and in the counterclaim, whether he has lost his proprietorship by operation of the law and title passed to the Defendants. Counsel also submitted that it will also be convenient, appropriate and will save the Court's time if the Plaintiff's claim and Defendant's counter-claim are heard together. Counsel submitted at length on the powers of the court donated to it by the **Civil Procedure Rules and Act, to wit, 'to make such orders as may be just.'** Counsel contended that the court's purpose is to render justice to both parties. Additionally, counsel submitted, having both the claim and counter-claim disposed off together would avoid multiplicity of suits. Counsel referred the Court to the decision in the case of **Standard Chartered Bank Ltd v Jenipher Atieno Odok Kisumu HCCC No. 124/2001** where the Court observed,

***"It is not within the rights of the parties to engage in a multiplicity of suits as the multiplicity is meant to obstruct the due process of the law, and when a party shows design to abuse the powers of the court, such actions must be stopped to avoid unnecessary cost and waste judicial time."***

The question that arises is whether the counterclaim filed by the Defendant can be conveniently disposed off in this suit. Mr.Mulwa for the Plaintiff contends that the Plaintiff's claim against the Defendants is that of trespass whereas the Defendants allude to a purported purchase from third parties. Mr.Mulwa also submitted that he was not privy to the alleged contract between the Defendants and the third parties and therefore no legal relation exists between them. Further, he stated that the prayers sought by the Defendants herein cannot lie as against the Plaintiff. In response to this submission, Mr.Arusei for the Defendants maintained that the subject matter of the suit and the counter-claim is the same and that it is only just and fair that the suit and counterclaim be disposed off at once. Mr.Arusei also submitted that disposing off the suit and counterclaim would be appropriate, convenient and avoid multiplicity of suits, the results of which is to save the judicial time.

Evidently, the Defendants in their counterclaim have listed other parties as Defendants alongside the Plaintiff. This is acceptable under the Civil Procedure Rules which provisions in Order 7 Rules 8, 9, 10, and 11. The exclusion of the counterclaim, the crux of this application, is a matter for the discretion of the

Court in taking into account the circumstances of the case. I have perused the Plaintiff and the counterclaim. Undoubtedly, both parties have an interest on property known as Mavoko Town Block 3/2101. The Plaintiff avers to be the registered proprietor whereas the Defendants aver to have acquired proprietorship from purchase from the 2<sup>nd</sup> Defendant in the counterclaim. I agree with counsel for the Defendants that to have the suit and counterclaim disposed off together will not only be convenient, but will also enable the court effectually and completely adjudicate upon and settle all questions surrounding the ownership of the suit property.

In effect, the Plaintiff's application is dismissed. I hereby order the Defendants to serve the Defendants in the counterclaim with the Defence and Counterclaim together with the supporting documents. The Plaintiff herein and Defendants in the counterclaim shall file and serve on all the parties their replies within 15 days of receipt of service.

Costs of this application shall be in the cause.

Application dated 28/3/2012 is hereby dismissed.

It is so ordered.

Dated, signed and delivered this 25<sup>th</sup> day of February 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Defendants

.....Court Clerk

**L.N. GACHERU**

**JUDGE**