



CIVIL PRACTICE AND PROCEDURE

- A party who did not counterclaim in the lower court claiming ownership of the property cannot at the appeal stage seek eviction.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL NO. 75 OF 2005

CHRISTIAN BROTHERHOOD NKIBWE

TRUSTEE

CHURCH REGISTERED APPELLANT

VERSUS

BROTHERHOOD GOSPEL CHURCH 1ST RESPONDENT
PASTOR JOHNSON NKAABU 2ND RESPONDENT
HENRY MITHIKA (SECRETARY) 3RD RESPONDENT
GEOFFREY NKUNJA (TREASURER) 4TH RESPONDENT

RULING

The appellant in this appeal filed a suit against the respondent being CMCC Meru No. 709 of 2004. By that action, the appellant sought an order for permanent injunction to restrain the respondents from entering or destructing the services or interfering with the affairs of the appellants Nkibwe Church. That church is built on *No. 75 Athiru/Ruujine/Ndoleli Adjudication Section (suit property)*. By that claim, the appellants averred that they were the owners of the suit property and that the respondent led by the 2nd respondent purported to claim the church built on the suit property belonged to the brotherhood gospel. It is alleged in that claim that the respondent in furtherance to that claim were barring the faithful of the appellant to worship at their church. The respondents by their defence in that action denied the appellant's claim and further stated in that defence that the suit property was registered in their name. The respondents however did not make a counterclaim but simply made a final prayer in their defence seeking the dismissal of the appellant's claim with costs. By a ruling of the lower court dated 24th August 2005, the court found that the appellants had failed to obtain requisite consent from the adjudication officer as required under section 30 of the Land Adjudication Act Cap 284. The court found that that consent was required under that section to have been obtained by the appellants before filing the lower court suit. The appellant's suit was struck out on that day due to the lack of that consent. The appellants filed this appeal

appealing against the striking out of their suit. However, on 3rd November 2009, the appellants withdrew their appeal. The respondents have now brought a Chamber Summons dated 3rd November 2010 which is the subject of this ruling. By that application, the respondents seeks an order for the eviction of the appellant from the suit property. They base their prayer on the following grounds:-

- a) ***That the respondents were put in possession by an ex parte order dated 25th November 2004.***
- b) ***That after the dismissal of CMCC No. 709 of 2004 and withdrawal of High Court Appeal No. 75 of 2005 the respondents have no right to the disputed plot.***
- c) ***That the appellants are difficult people and would not comply with the order of court.***

The respondent in their affidavit in support of that application referred to an order in CMCC Meru No. 709 of 2004 which was made on 25th November 2004. It was an *ex parte* order granting the appellants (who were then the plaintiffs) an injunction restraining the respondents (who were then the defendants) from entering, interfering with the operations of the appellants Nkibwe Church built on the suit property. The respondents argued that the appellants were put in possession of the suit property by that order and had since refused to vacate despite their lower court case having been struck out and their appeal having been withdrawn. Learned counsel Mr. Gituma for the respondents submitted in support of that application that to file another action to seek the eviction of the appellants would only prolong the dispute between the parties. The application was opposed by the appellants. The appellants' learned counsel Miss Mwangi submitted that it was not correct to state that it was the injunction order of the lower court that installed the appellants onto the suit property. Learned counsel further argued the ownership of the suit property had never been determined by the court and therefore the respondent could not in this appeal seek the eviction of the appellants. The latter submission by learned counsel Miss Mwangi is in my view absolutely correct and states the correct position of the law. The appellants filed their case in the lower court and in response the respondents filed a defence. The respondents did not file a counterclaim claiming ownership of the suit property. It therefore follows as correctly stated by Miss Mwangi that the ownership of the suit property was not determined by the court. Order 7 Rule 3 of the Civil Procedure Rules provides that a counterclaim has the same effect as a cross-suit and enables the court to pronounce a final judgment on a dispute. The rule provides as follows:-

“7 (3) A defendant in a suit may set-off or set-up by way of whether such set-off or counterclaim sound in damage or not, and whether it is for a liquidated or unliquidated amount, and such set-off 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.”

The learned author *Stuart Sime* in the book “*Civil Procedure*” 9th Edition stated thus in regard to a counterclaim:-

“A defendant with a cause of action against the claimant can raise it either by bringing separate proceedings or by counterclaiming in a present action. The subject matter of a counterclaim need not be the same nature as the original action, or even analogous to it. The only limitation is that the parties to the counterclaim have to sue and be sued in the same capacities as they appear in the main claim. A counterclaim is in substance a separate claim.”

It follows that the respondent having failed to raise a counterclaim either claiming ownership of the suit property or seeking the eviction of the appellants cannot at this appeal stage seek the court to determine ownership of that property. It is for that reason that I dismiss the Chamber Summons dated 3rd November 2010. The costs thereof are awarded to the appellants.

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE