



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 103 OF 2009

NGURUMAN LIMITED.....PLAINTIFF

VERSUS

OL DONYO LARO ESTATE LIMITED.....DEFENDANT

RULING

On 7/4/2008, Nguruman Ltd, the plaintiff herein, filed this suit against Ol Donyo Laro Estate Ltd. The plaintiff claims to be the registered proprietor of all that property known as **No. NAROK/NGURUMAN/KAMORORA/1** (hereinafter referred to as the suit land). However, the defendant by its directors servants/agents has unlawfully entered onto the said land and taken possession without the consent of the plaintiff and the plaintiff has been denied enjoyment of the said land and therefore claims mesne profits, general damages, a permanent injunction restraining the defendant from entering or being on the said land and a permanent injunction restraining the defendant from claiming, advertising the property or any portion of the said land.

On 7/6/2010, the defendant filed an amended defence and counter claim. In the counter claim, the Ol Donyo Laro Ltd is the plaintiff while Nguruman Ltd and Hermannus Steyn are named as the defendants. To avoid confusion of the parties I will refer to the parties as in the main suit. Though the defendant admits that the plaintiff is the registered proprietor of the suit land, the defendant claims to be lawfully in occupation of the land, following a partnership between Steyn and Jan Bonde Nielsen, who permitted the defendant to take possession of the property and the defendant has incurred costs developing a luxury camp by name Ol Donyo Laro Camp, airstrips, road networks and engaged employees. In the alternative, it is alleged that the plaintiff has committed fraud against the defendant and it wants the corporate veil to be lifted ; that this suit be stayed pending the hearing of NRB HCC No. 332/10 **Jan Bonde Nielsen v. Hermannus Philipus Steyn, Hedda Steyn and Nguruman Ltd**; that the camp is properly on the suit land, and that the plaintiff be restrained from interfering with Ol Donyo Laro Camp. In the alternative, a sum of US\$ 14,000,000,000, costs incurred by Ol Donyo Ltd in managing the Nguruman property and improving the roads be paid to the defendant.

On 2/7/2010 the plaintiff filed the Chamber Summons of the same date seeking the following orders:-

- 1. Spent;**

2. ...;
3. ...;
4. ***The defendant's counter claim dated 3/6/2010 and filed herein on 7/6/2010 be excluded from the proceedings in NKU 103/09;***
5. ***That the defendant's counter claim dated 3/6/2010 and filed herein on 7/6/2010 be and shall be disposed of by way of and in an independent suit.***

The application is based on grounds found on the face of the application and an affidavit sworn by David Mongeri, the plaintiff's counsel. The application was urged by Mr. Nowrojee Advocate. The application was opposed and Peter Bonde Nielsen, a director of Ol Donyo Laro Ltd (the defendant) swore an affidavit dated 8/10/2010 in opposition. Mr. Singh Advocate appeared for the defendant.

The 2nd application is dated 27/7/2010 brought pursuant to **Order VIII Rule 11 and 20** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 95** of the **Civil Procedure Act**. Prayer A is spent.

B. That the time within which the 2nd defendant in the counter claim should file his defence to the counter claim be and is hereby extended for a period of fifteen (15) days from the date of the final determination of the urgent Chamber Summons application dated 27th July 2010 in respect of prayers D, E, F, G and H thereof;

C. That an urgent hearing date for the inter partes hearing of prayers D, E, F, G and H below be given by this Honourable Court.

D. That the counter claim dated 3rd June 2010 and filed herein on 7th June 2010 be and is hereby excluded from the Original Action in Nakuru HCCC No. 103 of 2009;

E. That the counter claim dated 3rd June 2010 and filed herein on 7th June 2010 be and shall be disposed of by way of and in an independent suit;

F. That the Original Action to continue for hearing on 16th and 17th November 2010 as set down by this Honourable court on 30th June 2010;

G. That this Honourable Court does give such consequential, further or other order(s) as it may deem just.

The application is also based on grounds and facts found on the face of the application and affidavit of David Mongeri. The plaintiff, now the 1st defendant in the counter claim contends that the counter claim dated 3/6/2010 and filed in court on 7/6/2010 cannot be conveniently, expeditiously and effectively disposed of in the original suit filed by the plaintiff because the counter claim raises a cause of action in the law of contract and under the tort of misrepresentation and has no relationship with the proceedings in the plaint. It was urged that the cause of action in the plaint is in trespass against the defendant who is in occupation and the plaintiff seeks general damages, mesne profits and vacant possession. It was urged that the defendant who is a trespasser cannot set up permission by a 3rd party, as a defence against the registered proprietor who is entitled to possession. It was also submitted that the defence of misrepresentation is a different cause of action arising from one of the directors of the company. Counsel urged that a trespasser cannot rely on the rights of a third party as a defence to trespass. Counsel relied on the decision of Law J in **JUBILEE INSURANCE CO. LTD V REX HOTEL LTD (1973)EA 437** where it was held that a trespasser cannot rely on the right of a 3rd party. Counsel further argued that the

counter claim herein is based on the right of a 3rd party to justify a trespass on the suit property. It was urged that even if the counter claim was successful, it cannot be a defence to trespass but a claim in damages or specific performance of the contract between the parties. Mr. Nowrojee also argued that the defendant's case is not yet crystallized as it is yet to be heard. He submitted that the defendant had filed Miliman HCC No. 332/2010 on 18/5/2010. It then filed the amended defence and counter claim on 7/6/2010 and yet the defendants has not indicated as required that there are other proceedings pending before another court. At paragraph 37 of the counter claim the defendants claim to be relying on HCC No. 332/2010 and it is the plaintiff's contention that they should then proceed with that in that case. It is he plaintiff's case that the defendant does not dispute the plaintiff's ownership of the suit land and that the counter claim is not intrinsically connected to the main claim which amounts to an abuse of the court process and that is why the counter claim should be separated from the suit. Counsel adopted the decision in **MACHIRA V GRACE WAHU HCC 333/95** where the judge held that a counter claim should be intrinsically connected to the main suit. In **JOHN MUNGAI ITIRU V JAIRUS NDUNGU MUNGAI (2006)** the court said that a counter claim has to be the "*flip side of the coin*" to the cause of action which the plaintiff has raised. In conclusion, Mr. Nowrojee submitted that the defendants are alleging that somebody else gave them permission to enter the property. The claim is unlinked to the plaintiff's claim and should be heard in a separate suit.

In opposing the applications, Mr. Singh who urged the defendant's case submitted that the issues in the defence and counter claim are so intertwined that filing a separate suit would lead to duplication of costs, likely conflict of decisions and waste of the court's time. Counsel also submitted that this application is an abuse of the court process, the filing of the counter claim having been by consent; that the applicants have not shown the grounds upon which a consent can be set aside e.g. collusion. He urged that the applicants are indirectly seeking a review of the consent order and should have brought this application under **Order 44** of the **Civil Procedure Rules** and annexed the extracted order. Counsel also submitted that the application is bad in law for having been brought as a Chamber Summons instead of a Notice of Motion under **Order 50 Rule 1**. Secondly, counsel faulted the affidavit sworn by Mr. Mongeri, counsel for the applicant, in that he was gone into the realm of evidence and yet he cannot be called as a witness. Counsel relied on **PATTNI V MULI (2005)1 EA 339**, where the Court of Appeal said that advocates should not swear affidavits on behalf of their clients when their clients are readily available. It was submitted that paragraph 5 of the replying affidavit does demonstrate how the defence and counter claim are intertwined in that the defendants were initially known as Rift Valley Seed Ltd which changed name to Nguruman Ltd with Herman and Hedda holding 90% of the shares. Mr. Steyn wanted Mr. Bonde to invest in the company and Steyn held shares in trust for Bonde and that it is Bonde who provided the funds to purchase the suit land. The defendant agreed to manage the plaintiff's property and that is why the defendant company was incorporated and in 2008 when a request was made for transfer of shares to the defendant that trouble began. That the defendant having been invited onto the land, cannot be a trespass and the defendant will seek to lift the corporate veil. That is why the defendant has pleaded in the alternative that if there is found to have been no invitation, then there was misrepresentation that made the defendant spend over 14,000,000 US\$ investment in the property. Mr. Singh also urged that the issues are the same, witnesses are the same i.e. Nielsen Steyn and Nguruman and the counter claim will prevent multiplicity of suits. Counsel also urged that the claim is not contractual but they were invited as investors and managers. They do not challenge the title of the plaintiff.

On 27/5/2010 the parties herein filed a consent to the effect that the application dated 19/5/2010 was allowed as prayed. At Order 3 of the application dated 19/5/2010 the defendant was to file and serve the amended defence and counter claim by 3/6/2010 and the plaintiffs were to file and serve the reply to defence and defence to counter claim by 4/6/2010. It is the defendant's contention that the plaintiffs are trying to set aside a consent order through the back door and should have come under **Order 44** of the **Civil Procedure Rules** seeking review. I do not agree with the above argument. The consent recorded before J. Maraga was in respect of the filing of the amended defence and counter claim and did not preclude the plaintiff from challenging the amended defence/counter claim. This is a challenge to the substance of the counter claim but not the right to file pleadings. There was no need for the plaintiff to bring this application under **Order 44** of the **Civil Procedure Rules** for review or establish the grounds for setting aside a consent.

Mr. Singh also raised issue with the bringing of this application as a chamber Summons instead of a Notice of Motion pursuant to **Order 50 Rule 1** of the **Civil Procedure Rules** which he said is couched in mandatory terms. This application is expressed to be brought pursuant to **Order 8 Rule 11** of the **Civil Procedure Rules**. **Order 8 Rule 11** reads:-

“Where a defendant sets up a counterclaim, if the plaintiff or any other person named in manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just.”

Order 8 Rule 20 provides that applications under **Order 8** of the **Civil Procedure Rules** will be by summons in chambers. I find and hold that the application is properly before this court.

Objection was also raised in respect of the affidavit sworn by Mr. Mongeri in support of the two applications under consideration. In **PATTNI’s CASE** (supra) the Court of Appeal said that an advocate should not swear affidavits on behalf of their clients when their clients are readily available as it does not accord well with the spirit of best evidence and in view of **Order 18 Rule 2** of the **Civil Procedure Rules**. The court went on to say:-

“There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts to state them in affidavits on behalf of his client. So too is an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information.”

In that suit the court allowed Mr. Muite’s affidavit which had been disputed. In this case, Mr. Mongeri has conduct of the case and swore the affidavits in regard to matters within his knowledge. They are not matters upon which he may be called upon to give evidence.

The defendant does not seem to dispute the ownership of the suit land as belonging to the plaintiff, Nguruman Ltd. The cause of action in the plaint is pleaded at paragraph 4 and 5, that the defendant (Ol Donyo Laro Estate Ltd) has by its directors, officers, servants or agents without the plaintiffs’ consent entered unlawfully when expansion of the land known as Ol Donyo Laro Ltd and taken possession of it and remained in or moved occupation of it.

In the counter claim, the cause of action is pleaded at paragraphs 33 to 35. The defendant justifies its presence on the suit land pursuant to an agreement between Jan Bonde Nielsen and Steyn whereby it was agreed that Nielsen would incorporate a company, Ol Donyo Laro Estates Ltd which would be responsible for the management of the affairs of Nguruman property and Ol Donyo Laro Ltd therefore denies being a trespasser on the suit property, but is there based on the agreement with Steyn, the plaintiff’s (now defendant) main principal shareholder. In the alternative, it is pleaded that if the defendant is deemed to be a trespasser then it is due to the misrepresentation by Steyn and Nguruman Ltd and the defendant seeks compensation for what it has invested in Nguruman.

The question is, are the issues raised in the counter claim intertwined with those in the plaint that they should be heard in one suit or should they be separated.

Before the defendant filed the counter claim, it had filed a suit in Milimani High Court as pleaded at paragraph 37 of the counter claim. The parties are **Jan Bonde Nielsen V Herman Steyn Hedda Steyn and Nguruman** in which the plaintiff seeks inter alia, a declaration of a constructive trust in favour of Ol Donyo Laro Ltd. Although the proceedings in the said case were not exhibited, the issues therein seem to be similar to those raised in the counter claim arising from the dispute over the property owned by Nguruman Ltd. It was pointed out that whereas the suit was filed on 18/5/2010 the counter claim was filed a month later on 7/6/2010.

A counter claim has been described as a cross suit/claim and the spirit behind the filing of counterclaim is

to prevent multiplicity of suits, minimize costs and save judicial time, to avoid conflicting and embarrassing decisions over the same issues and to enable the parties to settle at once the question in controversy between them. In the case of **BEDDALL V MAITHAND (1881) VOL. XVI CHD 17**, the court said that a claim and counter claim are wholly independent suits which for convenience of procedure, are combined in one action. A counter claim is an assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. In essence, the court was saying that a counter claim need not be an action of the same nature as the original action. The plaintiff's counsel were claiming that a claim in contract cannot be tried with a claim for trespass but the court held otherwise. Justice Ojwang in his decision in **JOHN MUNGAI ITIRU V JAMES NDUNGU (2006) KLR** however, said that if a counter claim is not intrinsically connected to the main claim by the plaintiff, it amounts to an abuse of the trial process and should be a separate claim. In the case of **HEZEKIA GICHOKA** and **GEORGE KIMEU V LEISURE LODGES LTD, HCC 611/07**, J. Kimaru held that the issues in the claim and counter claim arose out of the same transaction and have to be tried together. It seems therefore that for a counter claim to be sustained the issues in both the main suit and counter claim must be connected, or be linked, intertwined or intrinsically connected, however, one would prefer to refer to it.

In the instant case. the plaintiff Nguruman Ltd claims that the defendant is a trespasser on their property. On the other hand the defendant claims to be on the land by invitation from one Steyn, the principal shareholder of the plaintiff company and that the defendant has invested heavily in the property to the tune of US Dollars 14,000,000. The defendant will be requesting that the court lift the corporate veil. Steyn is not a party in the main suit, hereto but a principal shareholder of the plaintiff and the defendant has to demonstrate whether he was transacting on behalf of the Nguruman Ltd.

The defendant alleged that the defendant started investing in the plaintiff property in 1984 and has made extensive investments therein and has entered into an arrangement to have the defendant manage the said property and that is how the defendant came to be on the said property. The question is whether Ol Donyo Ltd has acquired vested rights as a result of the said relationship. Nguruman Ltd must have been aware of it. This is because no owner of property would allow a stranger to enter its property, make massive investments and improvements on it for so long without the owner protesting

The witnesses to be called are the same i.e. Steyn, Nielsen and Nguruman. At the centre of the controversy is Steyn, the principle shareholder of the plaintiff company and Jan Nielsen of the defendant company. It is the plaintiff's contention that Steyn is not a party to these proceedings, either the original suit or counter claim and that a trespasser cannot set up the defence of permission by a 3rd party against the registered proprietor who is entitled to possession. "**Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice**" says at PP 222 that a counter claim must always claim relief against the plaintiff and quotes from the case of **FURNESS V BOOTH (1876)4 CH D p587** where M.R. Jessel said:-

"a pleading which asks no cross-relief against a plaintiff either alone or with some other person is not a counter claim"

The author also says in his book that a defendant can plead a counter claim against the plaintiff alone with some other person not already a party to the action described as a defendant to the counter claim, provided that he alleges that such other person is liable to the defendant along with the plaintiff in respect of the subject matter of the counter claim or relates to or is connected with the subject matter of the plaintiff's claim and the counter claim may seek relief jointly, severally or in the alternative. Steyn and the confirmed plaintiff have been made defendants in the counter claim and I find the objection by the plaintiff that Steyn is not a party to these proceedings to be unsustainable.

For the court to determine whether or not the defendant is a trespasser, of necessity, the court will have to determine how the defendants came onto the property, whether the defendants have vested rights in the suit property and if a constructive trust has been created as a result of the relationship between the plaintiff and Ol Donyo Ltd; whether the defendant can continue management of the plaintiff or in the alternative whether the plaintiff should pay the defendant all the costs incurred in the management of the

plaintiff company and move out. In my view, since the issues in 332/2010 are related to this case, it would save on costs, time and expenditure and avoid embarrassing or conflicting decisions if this suit was heard together with the counter claim. This court will not make any orders in respect of Nakuru HCC No. 332/2010 because this court has no idea what orders have been made therein so far and the proceedings were not availed to this court. The defendant can have the HCC 332/2010 suit withdrawn if the issues herein can be resolved in the counter claim.

For all the foregoing reasons, I find that the issues in the original suit and the counter claim are so intrinsically intertwined/related that they should be heard in one suit. I decline to grant the prayers seeking to separate the counter claim from this suit. However, I allow the plaintiff (defendant in the counter claim) 21 days within which to file defence to the counter claim. Costs to be in the cause.

DATED and DELIVERED this 1st April 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mongeri for the plaintiff.

N/A for the defendant.

Kennedy – Court Clerk.