



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 25 OF 1999

PAULINE WANJA MUORIA.....1ST PLAINTIFF
EPAPHRAS WAWERU MUTHOKO.....2ND PLAINTIFF

VERSUS

EDINA CHERONO BORE.....DEFENDANT

RULING

When on 1.9.2000 the application came for hearing Mrs. Mbugua, the Learned Counsel for the Respondent raised a preliminary objection based on the grounds that the application is made under Order 35 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. She submitted that it is wrong to rely on Section 3A of the Civil Procedure Act when there are specific provisions of the law dealing with that aspect of the application. The 2nd point was that there is no provisions in our Civil Procedure enabling a Defendant who files a Counter Claim to apply for Summary Judgement based on counter claim.

The 3rd point was that there is no prayer in the counter claim for rent but vacant possession.

The 4th point was that the supporting affidavit was bad in law. In support of these points the Learned Counsel cited Order 14 Rule 5 of the Supreme Court of England and the HCCC No. 2352 of 1999 Charles Maina Muchunu vs. Cooperative Merchants Bank and 3 others.

In reply the applicants' counsels submitted that a counter claim is a plaint for all practical purposes.

The application before the court is made under order 35 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Accepting as the Learned Counsel for the Respondent submitted that our Civil Procedure Rules have no provision to enable a defendant to apply for a summary judgment on a counter claim then the applicants are within their rights to resort to Section 3A of the Civil Procedure Act invoking the inherent jurisdiction of the court. The argument that there are specific rules and therefore section 3A is not applicable, cannot stand. The specific rules referred to are for summary judgment on a plaint and not for the counter claim. The application for summary judgment on the counter claim based on Section 3A of the Act would be in order as this is the only provision of the law the applicant could rely on. Regarding the issue that the applicant has

not asked for the striking of the defence first. I should observe that Order 35 does not exigit that there should be no defence before it applies and rule 4 supposes that there may be cases where defence has been filed.

See Donge v. Kenya Caners (1982 –88) 1 KAR page 765 The judgement of Platt J.A.

There is no dispute that a counter claim can commence an action like a plaintiff. If it can assert a claim and a judgment at the end can be given on the counter claim as in a plaintiff I cannot see any reason why a summary judgment would not be given as in a plaintiff. Simply because the rules do not specifically provide for a Summary Judgment in a counterclaim should not be a reason to hold that a summary judgment cannot be given on a counter claim. I have read the ruling in Charles Maina Muchunu in HCCC No. 2352 of 1999 which decided that our Rules unlike the English rules do not have a specific provision to cater for a summary judgment. This is correct but one has to look at the history of order 14 of the Supreme Court Rule. It was taken from the RSC (Rev.) 1962 Order 14 rule 5 where it was introduced.

The purpose of the rule was to carry forward the policy which already existed of equating a counter claim with an independent action. In *Robberts vs. Booth* (1892) Ch. D 52, it was held that where there is no defence to main claim the defendant may set down the counter claim on a motion for judgment. Likewise in the latter case of *Rogers and Another vs. Wood and Another* (1948) All E.R. it was held that the court had jurisdiction to entertain an application for a judgment upon a counter claim provided that the defendant had not filed a reply and is divisible from the main claim. These decisions confirm the principle that a counter claim is treated as a claim and these decisions are older than the present RSC which came into being through the amendment of the Order in 1975.

Once it is accepted that a counter claim is a plaintiff if it is filed with a defence and it is relevant to the claim, it should be treated as a Plaintiff, Section 3A of the Civil Procedure Act was enacted to meet a situation like the present one. The court has the inherent jurisdiction in the absence of a specific provision in the rules to entertain an application for a summary judgment. To hold otherwise is to go against the obvious.

I therefore find that in this present application the court has jurisdiction to hear the defendants' application for a summary judgment on the counter claim.

With regard to the point raised on the affidavit, I would note that even if the applicant is wrong in referring to the amended affidavit instead of filing a further affidavit this would be a defect which is curable under the Civil Procedure Rules. A preliminary point of objection should be such that if allowed it would dispose. For these reasons, I refuse to uphold the objection.

Dated and delivered at Nairobi this 2nd day of October, 2000.

KASANGA MULWA
JUDGE