



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELC NO.380 OF 2017

BILHA NJERI KABIRU **1ST PLAINTIFF**

LOISE WAMBUI MUTUA **2ND PLAINTIFF**

VS

ONESMUS KARINA **1ST DEFENDANT**

PETER MAINGI MITHEKO **2ND DEFENDANT**

THE HON ATTORNEY GENERAL **3RD DEFENDANT**

THE LAND REGISTRAR,

MURANGA LANDS OFFICE **4TH DEFENDANT**

RULING

1. The Plaintiffs filed an application on the 13/2/17 raising a Preliminary objection to the 2nd Defendants amended defence and counterclaim dated the 8/8/16 on the following grounds; -

- a. The Counterclaim is incurably defective and a sham and the Plaintiffs shall apply to the Court for an Order to exclude the Counterclaim.
- b. They are non- suited
- c. The Claim raised ought not to be disposed by way of counterclaim but in an independent suit.

2. The background of this case is set out hereunder; The Plaintiffs and the 1st Defendant are siblings being children of the late Waimiri Karina the registered owner of LOC 19/Rwathia/1083. Vide Succession Cause No SRMCC No 177 of 2001 Murang'a the 1st Defendant was appointed legal administrator of the estate of their father and the Plaintiffs were beneficiaries of the suit land. Before registration of the Orders granted to them on the suit land they discovered that unknown to the Plaintiffs the suit land had changed hands and was now registered in the name of the 2nd Defendant. They aver that the transfer was unlawful and fraudulent and was aided by the 3rd and 4th Defendants. Particulars of fraud and illegality have been pleaded therein.

3. They state that they filed civil suits to wit; Murang'a SRMCC No 177 of 2011, Murang'a PMCC No 229 of 2002, Murang'a SRM Criminal case No 354 of 2004 and Embu High Court Criminal Case No 37

of 2006. They maintain that they are unable to effect the certificate of confirmation of grant issued as the same has been prevented by the 2nd Defendants illegal actions. That the 2nd Defendant continues to derive profits out of the suit property.

4. The Plaintiffs sought Orders as follows in their plaint;

- a. An Order for cancellation of the registration of Peter Maingi Mitheko as the owner of title of land parcel No Loc 19/Rwathia/1083 and the lifting of the restriction thereon.
- b. As against the 2nd Defendant, Mesne profits accruing from the 18th January 2002 until date of judgment.
- c. A mandatory injunction compelling the 2nd Defendant to vacate land parcel Loc 19/Rwathia/1083.
- d. Costs of the suit.

5. In opposing the Plaintiffs claim the 2nd Defendants filed a defense and counterclaim on 23/5/11. He contended that the suit land was transferred to him on the 4.9.94 while the succession cause No 177 of 2001 was filed on 8.6.01, a fact that was apparently concealed from the probate Court. He denied fraud or illegality and averred that he has been in occupation of the suit land since 1994.

6. The 2nd Defendant further averred and concurred with the Plaintiffs that PMCC No 229/2002 was withdrawn by the Plaintiffs on realizing that the claim was untenable. In response to the Criminal case, he states that he has filed an appeal for which he has been given a serial number HCCCA No 37/06 pursuant to Rule 60 of the Court of Appeal Rules. He averred that he acquired land through purchase from 1st Defendant in a legal and lawful process and has done developments including planting tea raising the value of the land to Kshs 1.44 million as per the valuation attached and dated 23/2/11. He sought Orders in his counterclaim as follows;

- a. That he is in occupation of land parcel No Loc 19/Rwathia/1083 legally and the prayers sought by the Plaintiffs be dismissed as they were obtained through false swearing.
- b. The 1st Defendant be condemned to pay the 2nd Defendant a sum of Kshs 1,440,000/- being compensation of the value of the subject matter as he is the author of the problems the 2nd Defendant is involved in and the restrictions filed herein remain in force as security until payment in full
- c. Costs of the counterclaim be provided for.

7. In reply to the defense and counterclaim the Plaintiffs stated that the occupation of the suit land by the 2nd Defendant was as a result of a short term lease to the 2nd Defendant by the 1st Defendant who possessed no authority to so lease the suit land. That the said leasing of suit land amounted to intermeddling with the property of the deceased property.

8. On the 13/2/17 the Plaintiffs raised a Preliminary objection against the 2nd Defendants statement of defence and counterclaim and hence the gist of this application. As would be expected the 2nd Defendant on 27/2/17 filed grounds of opposition and raised the grounds as follows;

- a. The counterclaim is filed as provided for under Order 7 rule 8 and therefore competent in law.
- b. The points raised in the counterclaim do not require an independent suit as claimed.
- c. The 1st Defendant having failed to enter appearance in the main suit and counterclaim cannot

escape interlocutory judgment and formal proof to settle all issues involved

d. The notice of preliminary objection offends the provisions of section 1A (1) of the Civil Procedure Act 2010

e. The application further offends the provisions of section 19 (1) (2) of the Environment and Land Court Act 2011.

9. Parties have filed written submissions which I have carefully considered.

10. In his submissions the Plaintiff stated that the Counterclaim purported herein is not a cross suit and discloses no cause of action or claim against the Plaintiff. That since the alleged claim is against the 1st Defendant the 2nd Defendant should proceed to sue the 1st Defendant in an independent suit. He cited the case of **County Government of Kilifi Vs Mombasa Cement Limited 2017 eKLR** which defined a counterclaim as;

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross- claim of any kind against A which by law is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim”.

In the **County Government of Kilifi** case above, the Defendant sought an injunction against a property which though owned by the Plaintiff had not been included in the plaint as the suit property. The Court of Appeal held that Order 7 rule 3 gives a Defendant in a suit permission or a carte blanche to raise a counterclaim based on any right or claim against the Plaintiff even where the subject matter or cause of action may be different from the original suit. That Order 7 rule 3 gives the Court wide discretion to reject or admit a counterclaim. the Court of Appeal further distinguished the case when it stated that the respondent had pleaded in the plaint the fact that it owned both properties having acquired them in the same sale agreement.

11. Responding to the Preliminary objection the 2nd Defendant reiterated their grounds of opposition stated above. Further it placed reliance on Order 7 rule 8 of the Civil Procedure Rules. That since the Plaintiff has not been sued in the counterclaim, it should focus on its pleadings and not purport to defend the 1st Defendant.

12. I have considered the application, the rival arguments, grounds of opposition and the submissions filed by the parties and the issue before this Court for determination is whether the Preliminary objection raised is merited.

13. What is a Preliminary objection? In the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** the Court stated that a preliminary objection if raised in limine must be in the nature of a demurrer. It must be a pure point of law to be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Law J stated as follows;

“ so far as I am aware, a preliminary objection consists of a point of law which has been pledged or which has arose by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ...”

In **Oraro vs. Mbaja [2005] 1 KLR 141** Ojwang,J (as he then was) expressed himself in greater detail on the subject. The two cases cited here embody the salient rules that must be met before a Preliminary Objection can be held; first it must be purely on a point of law and must be admitted by both sides of the controversy; thirdly it must be not call on the Court to exercise its discretion.

14. Order 7 rule 3 of the Civil Procedure Rules states as follows;

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.

Order 7 rule 8 of the Civil Procedure Rules states as follows; -

“Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence”.

Order 7 rule 12 of the Civil Procedure Rules states as follows;

“Where a Defendant sets up a counterclaim, if the Plaintiff or any other person named in the 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”.

15. It would appear that the 1st Defendant has not filed any defence to the Plaintiff’s claims.

16. Order 7 rule 8 gives the Defendant permission to raise a counterclaim against the Plaintiff together with any other persons. Any other persons give the Defendant a leeway to bring a counterclaim even against a person not already a party to the suit. He too may file a counterclaim against a co – Defendant in the same suit. My interpretation of Order 7 rule 8 is that the 2nd Defendant is within his rights to file a counterclaim against the 1st Defendant in this suit. The rule further provides that the Defendant shall add to the title of his defence a further title similar to that in the plaint. In this case the 2nd Defendant has complied with the provisions of the procedural law and I cannot find any fault in that regard.

17. I note that the 2nd Defendant had issued a notice under Order 1 rule 24(1) against the Defendant claiming the sum of Kshs 1,440,000/- from the 1st Defendant.

18. The rationale of Order 7 rule 8 in my considered view is to avoid multiplicity of proceedings and claims based on the same or different causes of action between the parties to the suit. The 2nd Defendants claims in the counterclaim against the 1st Defendant and the Plaintiff stem from the same cause of action and therefore it is a claim that can be canvassed in one suit to avoid multiplicity of proceedings and suits. I see no difficulty in trying the counterclaim together with the Plaintiffs’ claims.

19. Overall, the procedural provisions quoted above gives the Court wide discretion subject to application of the parties to either admit or reject the counterclaim where it would, in the opinion of the Court not be convenient or where in its opinion, the counterclaim ought not be allowed. The test is to look at the case by case basis of each application. In the instant one as stated above it is one that can be tried together. Borrowing from the definition of the term preliminary objection and seeing that the Court has wide discretion in the matter, it is plainly clear that the preliminary objection fails the test as enunciated in the **Mukhisa Biscuit** case above.

20. In conclusion I find that the Preliminary objection is unmerited and is dismissed with costs to the 2nd

Defendant/Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF DECEMBER 2017.

J G KEMEI

JUDGE