



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 11 OF 2016

BETWEEN

COUNTY GOVERNMENT OF KILIFI.....APPELLANT

AND

MOMBASA CEMENT LIMITED.....RESPONDENT

(Being an appeal from the ruling of the Environment and Land Court of Kenya at Malindi (Angote, J.)

In

Civil Suit No. 239 of 2014.)

JUDGMENT OF THE COURT

The respondent instituted a suit against the appellant vide a plaint dated 18th December, 2014, in the Land and Environmental Court at Malindi. The subject matter of the suit was a parcel of land situate in Kilifi County measuring 173.7 hectares or thereabouts and known as **Plot Number MN/III/291/2 “the suit land”**. The respondent’s main prayer in the plaint was for an order of permanent injunction to restrain the appellant or its agents from demolishing a perimeter wall built around the suit land or interfering with the construction of the said wall or trespassing on or dealing with the suit land in any manner. The respondent also sought a declaratory order to the effect that the appellant’s act of demolishing the perimeter wall was illegal.

The plaint was filed contemporaneously with a notice of motion invoking **order 40 rule 1** and **10** of the Civil Procedure Rules and **Sections 1A, 1B, 3A** and **63 (e)** of the Civil Procedure Act. By that application, the respondent sought a temporary injunction to restrain the appellant from demolishing the perimeter wall or interfering with its construction pending the hearing and determination of the application and the main suit. It is prudent to note that in both the suit and in its application, the respondent’s prayers were only in respect of the suit land. In its plaint however, the respondent also made averments regarding a different parcel of land as follows;

“7. That in addition to the suit parcel of land herein, vide the same agreement dated 17th February 2004, the Plaintiff also acquired all that parcel of land known as plot number MN/III/4391 from M/s Vipingo Estate Limited which parcel of land is next to the parcel of

land herein.”

The respondent further pleaded that after acquisition of the properties, it took possession and started developing both by putting up a cement production factory.

Upon service of the suit and the application, the appellant filed a statement of defence and a counterclaim that now forms the focal point or the crux of the present appeal. In its counterclaim, the appellant averred that the respondent was not only constructing a perimeter wall on the suit land, but also on the adjacent parcel of land, still owned by the respondent and known as MN/III/289/290 but also referred to as LR No. 4391/MN/III “*the adjacent suit land*”. It therefore sought a permanent injunction to restrain the respondent from constructing or proceeding with construction or reconstructing the perimeter wall on the adjacent suit land. This was on the basis that the respondent had not obtained the requisite and mandatory approvals from the appellant in accordance with the Physical Planning Act to put up a wall on the adjacent suit land. Together with its defence, the respondent also filed a notice of motion seeking to preserve the *status quo* in respect of the adjacent suit land’s boundary wall pending the hearing and determination of both the application and the suit.

The background information leading to the dispute is that the respondent claims to have purchased the suit land from its previous owner, Vipingo Estate Limited vide a sale agreement dated 17th February 2004 after which a transfer was duly registered in its favour on 9th March 2005. It is also not contested or disputed that the respondent subsequently sought and obtained from the appellant the necessary approvals or prior consent to construct a perimeter wall around the suit land. The appellant however did not grant the respondent approval to build a perimeter wall on the adjacent suit land. Yet when the respondent embarked on the construction of the perimeter wall, it encompassed both the suit land as well as adjacent suit land, which the appellant alleges ownership is disputed. However and as already alluded to above, both properties were acquired by the respondent vide one sale agreement and both properties are registered in favour of the respondent. The record reflects however that the respondent’s ownership of the adjacent suit land is disputed by a certain group of people who had lodged a complaint with the National Land Commission for it to conduct investigations and ascertain the true ownership of the land.

The Environment and Land Court at Malindi (**Angote, J.**) heard the two applications simultaneously and delivered the now impugned ruling on 30th September 2015. The Judge found as follows:-

“24. The Defendant is praying for orders of injunction in respect of parcel of land number MN/III/4391, which, though owned by the Plaintiff also, is not the suit property.

25. I do not think that the injunction in respect of LR NO. MN/III/4391 can issue until a substantive suit is filed by either the Plaintiff or the Defendant in respect to the property.

26. Although the Defendant has filed a counterclaim in which it has introduced the subject land, I find that the said counterclaim cannot amount to a cross-suit in a situation where the plaintiff has not alluded to LR. NO MN/III/4391 in its Pleint.

27. If the Defendant wants to injunct the Plaintiff from putting up a perimeter wall around LR. NO. MN/III/4391, then it ought to file a distinct suit and not to raise the issue in a suit which is dealing with L.R NO. MN/III/291/2. It is only after such a suit is filed that the court can legally determine the legality or otherwise of the construction of a wall around L.R No. MN/III/4391, also known as MN/III/289/290.”

The Judge then struck out the appellant’s application dated 31st December, 2014 but issued an order restraining the appellant from demolishing the perimeter wall constructed on the suit land pending the determination of the suit.

Aggrieved by that ruling, the appellant is now before this Court by way of an appeal on two grounds, which however converge on the singular issue that the Judge erred in finding that the appellant’s

counterclaim could not amount to a cross-suit.

Both parties agreed to canvass the appeal by way of written submissions, which they duly filed and exchanged. At the formal hearing, we allowed them limited oral highlights. In its written submissions dated 4th October, 2016, the appellant was categorical that the respondent was building a perimeter wall on the adjacent suit land without having obtained prior approval and or consent from itself as is required by the Physical Planning Act. As such, it submitted that it was right in seeking the court to restrain the respondent from undertaking any further construction.

The appellant maintained that a counterclaim had the same effect as a cross-suit thereby enabling a court to pronounce a judgment in the same suit both on the original claim and on the counterclaim. The appellant cited **order 7 rule 3 of the** Civil Procedure Rules which provide that a defendant in a suit may set up by way of counterclaim against the claims of the plaintiff any right or claim and that such a counterclaim shall have the same effect as a cross-suit. The appellant also cited the Supreme Court of India case of **Sh. Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors on 7th May, 1996**, in interpreting the equivalent provision to our **order 7 rule 3**, held that the language in which the provision was couched gave a defendant a wide discretion to bring his own independent cause of action in respect of any claim that would be the subject of an independent suit. According to that court, the defendant's claim need not relate or be connected with the original cause or matter pleaded by the plaintiff. It was also submitted on behalf of the appellant that the court has a wide discretion to allow claims to be tried in one suit to expedite the resolution of all controversies between parties so as to eliminate multiple litigation. The appellant therefore urged us to adopt the same approach and reasoning as the Indian Supreme Court and allow this appeal.

On its part, the respondent opposed the appeal, stating that it was filed in respect of the adjacent suit land and not the suit land. As such, an appeal regarding the adjacent suit land could not arise until a substantive suit in respect thereof was filed, heard and determined. According to the respondent, the appellant's counterclaim could not amount to a cross suit under **order 7 rule 3** of the Civil Procedure Rules since it had not alluded to the adjacent suit land in its Plaintiff. The respondent was of the view that the appellant should have filed a distinct suit to seek an injunction against it in regard to the adjacent suit land rather than seek the same in a suit regarding the suit land. Only then, the respondent urged, could the court determine the legality or otherwise of the construction of the perimeter wall on the adjacent suit land. The respondent also contended that the High Court had exercised its discretion judicially and this Court should not interfere with it. Lastly, the respondent submitted that the present appeal was unfounded and was for dismissal. It cited the case of **Mcfoy v United Africa Company Limited [1961] 3 ALLER 1172** for its proposition that this appeal was incurably bad and fit for dismissal.

During the oral highlights, **Mr. Mugambi**, learned counsel for the appellant, contended that the counterclaim could be conveniently tried in the pending suit. On his part, **Mr. Gikandi**, learned counsel for the respondent, submitted that the issues of the adjacent suit land were totally different and the appellant could not file a counterclaim in regard to it as that would make the trial of the claim convoluted. He maintained the Judge was right in holding that the counterclaim was unsustainable.

The core issue in this appeal was succinctly put by Mr. Mugambi during the oral highlights as: whether the appellant's counterclaim amounts to a cross-suit. Counterclaims are provided for under **order 7 rule 3 of the Civil Procedure Rules** which is in terms:-

“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 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.” [Emphasis added]

In our view, a plain reading of the above provision allows or gives a defendant in a suit permission or a *carte blanche*, to raise a counterclaim based on any right or claim against a plaintiff. That provision says nothing to the effect that such counterclaim must be related to the original subject matter of the suit and neither does it attract such an implication. That position is supported by **Halsbury's Laws of England, Fourth Edition, vol. 42**, which defines a counterclaim as follows:-

“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 he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”[Emphasis added].

Further that,

“Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.”

The appellant has also cited the case of **Sh. Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors** (*supra*) in which the Indian Supreme Court grappled with the interpretation of the equivalent of our **Order 7 rule 3** of the Civil Procedure Rules couched in similar terms. It rendered itself thus:-

“.....The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.....”

In view of the foregoing, it is safe to conclude that a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counter claim. However, **Order 7 rule 3** of the Civil Procedure Rules gives court a wide discretion such that, on the application of the plaintiff, the court may reject a counterclaim where it would not be convenient or where in the opinion of the court, the counterclaim ought not to be allowed. No doubt, that is a wide discretion and the reasons as to why a court would disallow a counterclaim would be many and varied to be decided on a case-by-case basis.

In the present appeal, in as far as the learned Judge declined to issue an injunction in respect of the adjacent suit land and further in disallowing the counterclaim filed by the appellant, the Judge was exercising discretion in both instances. Injunctions being equitable remedies are discretionary and in disallowing the counterclaim the Judge must have been exercising the discretion granted to court by **order 7 rule 3** of the Civil Procedure Rules. It is trite law that such discretion must be exercised judicially and never capriciously or whimsically. The Court of Appeal's mandate when dealing with the exercise of such discretion was explained in the oft cited case of **Mbogo & Another v Shah [1968] EA 93** in which it was held that a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion misdirected himself in

some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. In the same vein, this Court held in **Matiba v Moi & 2 Others [2008] 1 KLR 670**, that:-

“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges’ discretion with its own discretion. It had to be shown that the Judges’ decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision”.

We must therefore examine the High Court’s ruling to determine whether the exercise of discretion was proper in the circumstances of this case. By the impugned ruling, the main reason why the learned Judge failed or refused to grant the appellant an injunction to stop the respondent from constructing a perimeter wall on the adjacent suit land was because the appellant’s counterclaim could not amount to a cross-suit in a situation where the respondent has not alluded to LR. NO MN/III/4391 (the adjacent suit land) in its plaint. The Judge therefore concluded that an injunction in respect of the adjacent suit land could only issue when a substantive suit was filed in respect of it.

With respect, that holding or finding is faulty. First, we have demonstrated that the appellant was at liberty to raise a counterclaim in respect of any claim or right that it had against the respondent to prevent multiplicity of suits. It was therefore wrong for the Judge to hold that an injunction could not issue to the appellant in respect of the adjacent suit land yet the appellant had raised a counterclaim which amounted to a cross suit. Within the cross suit, the Judge was bound to determine the appellant’s application for injunction on its merits. The two suit lands are owned by the respondent. It would have presented a different case scenario if the adjacent suit land was not owned by the respondent.

Secondly, the Judge finding of fact that the appellant never alluded to the adjacent suit land is incorrect. As stated elsewhere in this judgment, the respondent itself introduced the adjacent suit land in the original suit. The respondent in its plaint averred that it acquired the properties vide the same sale agreement. The respondent further pleaded that after acquiring the properties, it took possession and started developing the same. That fact can only go further to strengthen the appellant’s point that it was indeed justified raising the counterclaim.

Thirdly, it was premature for the learned Judge to have gone extensively in the merits of the counterclaim or to have parties address him on the issue. Further, no party had made an application before him to disallow the counterclaim.

The appeal therefore succeeds to the extent that the finding by the learned Judge that the appellant’s counterclaim cannot amount to a cross -suit is set aside. We were told from the bar that the respondent had since completed the construction or reconstruction of the perimeter wall on the adjacent suit land, Plot Number MN/III/289/290 also known as LR No. 4391/MN/III and therefore granting an injunction will be in vain. Indeed, the appellant abandoned that prayer and rightly so in our view. We make no order as to costs.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE- MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR