

**Owor Agree and Another v Centenary
Bank and Another (25 of 2023) [2025]
UGHC 185 (7 February 2025)**
[2025] UGHC 185

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- 1. This ruling is on three preliminary objections, all raised by the 2nd Defendant, two of which are against the suit; and one against the 1st Defendant's counterclaimed. The objections are to this effect;
- a. That the suit abated for failure to take out summons for directions;
- b. That the plaint does not disclose a cause of action against the 2nd Defendant; and
- c. That the 1st Defendant's counterclaim is barred in law/incompetent.

- 2. The brief facts, are that the last pleading on record is a reply to the 2nd Defendant's counterclaim, which was filed on the 20th of September, 2023. Further, the Plaintiffs did not take out summons for directions within 28 days of the last reply, as envisages under **Order 11 rule 1(2) of the Civil Procedure (Amendment) Rules, 2019**.
- 3. It is also a fact that the 1st and 2nd Defendants filed counterclaims in their respective written statements of defence. The counter Defendants to 1st Defendant's counterclaim are, (1) Othieno Eriya/2nd Defendant, and others not party to this suit (Okiror Emmanuel Isaac, and Okimaru Christian). The 2nd

Defendant's being a counter Defendant in the 1st Defendant's counterclaim is the subject of the third preliminary objection.

- 4. **Representation:** The Plaintiffs are represented by Counsel Omaset Geoffrey of M/s Kintu Nteza & Co. Advocates; the 1st Defendant is represented by Counsel Opio Moses of M/s Sekabanja & Co. Advocates; and the 2nd Defendant is represented by Counsel Musinguzi Dennis and Okoth Ronald of M/s Gordon Care Samaritan International. Counsel for the parties filed written submissions, which I have considered in this ruling.
- 5. Issues for Determination, as per the submissions of the Plaintiffs' Counsel are:
 - a. Whether Civil Suit No.25 of 2023 abated for failure to take out summons for directions?
 - b. Whether the Plaintiffs' plaint discloses a cause of action against the 2nd Defendant?
 - c. Whether the 1st Defendant's counterclaim is incompetent?

Resolution of Issues:

6. Issue No.1: Whether Civil Suit No.25 of 2023 abated for failure to take out summons for directions?

- 7. I have read the submissions of Counsel for the 2nd Defendant and the Plaintiffs and appreciated the variances therein. For instance, whereas the 2nd Defendant's Counsel argues that the suit abated, the Plaintiffs' Counsel, albeit admitting to not taking out summons for directions within time, argues that the suit did not abate on ground that the provisions of **Order 11 Rules 1(2) and (6) of the Civil Procedure (Amendment) Rules, 2019**, are not mandatory.
- 8. I note that, in support of their respective submissions, Counsel for the 2nd Defendant cited **Kalimesa Samuel Wilson vs Kaggwa Christopher Chris & Others High Court Misc. Appln. No.776 of 2023, C. C Chandran &**

Associated Ltd vs Uganda Revenue Authority High Court Civil Suit No.0917 of 2019, and Abdul Ddamulira vs Ms Xsabo Power Ltd High Court Misc. Applc. No.046 of 2021; and that Counsel for the Plaintiffs cited Kampala Associated Advocates vs Katamba Ssemakula High Court Misc. Appln. No.0677 of 2021.

- 9. It suffices to state that the decisions noted above are all of the High Court, and therefore persuasive, but not binding on this court.
- 10. Nevertheless, I already express myself on the issue in **Opaye Michael Ibiola & Others vs Opoya John & Others HCCS No.0005 of 2022**, among others, where I held that provisions for taking out summons for directions are mandatory; and that if summons for directions are not taken out within the time provided, a suit automatically abates and the only remedy available is to file a fresh one, subject to the law of limitation as **Order 11A Rule 1(7) of the Civil Procedure (Amendment) Rules, 2019**, dictates.
- 11. I have not found any reason to depart from my previous decision. Therefore, it is my view that it applies to the instant case. Consequently, I do agree with Counsel for the 2nd Defendant that Civil Suit No.25 of 2023 abated.
- 12. The issue is found in the affirmative therefore.
- **13. Issue No.2: Whether the Plaintiffs' plaint discloses a cause of action against the 2nd Defendant?**
- 14. Because the suit already abated, it is not necessary to establish if its plaint discloses a cause of action. Accordingly, this issue is struck out under **Order 15**

R.5(2) of the Civil Procedure Rules.

15. Issue 3: Whether the 1st Defendant's counterclaim is incompetent?

16. As I noted earlier, this issue concerns a counterclaim instituted by the 1st Defendant against the 2nd Defendant and other persons. In other words, the counterclaim is by a Defendant against a co-Defendant, and other persons who are not party to the main suit.
- 17. Counsel for the 2nd Defendant argues that the counterclaim is incompetent because a Defendant cannot counterclaim against a co-Defendant and other persons, not party to the suit. He argued that **Order 8 Rule 8 of the Civil Procedure Rules** only contemplates a counterclaim as a cross action against the Plaintiff and any third party as counter Defendants. In support thereof, Counsel cited **Suuta Proscovia vs Magabane David & Mulekwe Michael HCCA No.123 of 2016** where my learned brother *Elubu J*, held that "a cross action by way of counter claim can only be maintained against the Plaintiff and any other person*..." and that if a Defendant intends "to proceed against her co-Defendant alone, she should have lodged an independent suit.*" He prayed that the subject counterclaim be struck out with costs.

- 18. In response, Counsel for the 1st Defendant argued that the counterclaim is within the confines of **Order 8 Rules 2, and 8 of the Civil Procedure Rules**, which respectively provide that:

A Defendant in an action may set off, or set up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether the setoff or counterclaim sounds in damages or not, and the setoff or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the crossclaim...

19. And:

Where a Defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the Plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint ...

- 20. Counsel for the 1st Defendant argued that the said Defendant brought a counterclaim against the 2nd Defendant and his co-guarantors and has demonstrated that in the written statement of defence; and that the counterclaim has a heading which described the counter Defendants. That the counterclaim, being a separate suit, the 1st Defendant is **dominus litis** that can decide whom to sue and be added on the counterclaim. He also added that the counterclaim is not an abuse of court process, and cited **Uganda Land Commission vs James Mark Kamoga & Anor SCCA No.08 of 2004 and Chemical Distributors & Others vs Byaruhanga Silver Company Cause No.142 of 2017**, where abuse of court process was defined.
- 21. The 1st Defendant's Counsel also cited Section 33 of the Judicature Act Cap.16, and argued that the 1st Defendant's counterclaim is proper before court so that all issues related to the parties over the suit land are determined to finality and avoid multiplicity of proceedings. That the import of the provisions in the said section is that the High Court has wide powers to administer justice and investigate all disputes between the parties and provide remedies.
- 22. Counsel referred me to **Kaahwa Stephen & Anor vs Kalema Hannington HCCA No.07 of 2011**. He also cited **Erinest Kabyanga vs Sanyi Patrick & Others HCCS No.304 of 2002** where court observed that "...*again, if I were to allow the objection, the counterclaim would be struck off and the Defendant would be compelled to file a fresh claim which may be complicated by limitation and result into multiplicity of suits*..." It was his argument that the 2nd Defendant is not prejudiced by any omission of the counter claimant, which can as well be cured by amending the counterclaim and add the Plaintiff thereon. Lastly, that the 2nd Defendant should not be seen arguing the Plaintiffs' case since they do not dispute their omissions.

23. Court's Decision

- 24. It is obvious that a Defendant cannot counterclaim against a co-Defendant. Anything beyond that is not a counterclaim. As the 2nd Defendant's Counsel argued, **Order 8 Rules 2, and 8 of the Civil Procedure Rules** envisage a counterclaim only where the Plaintiff is a counter Defendant, at least. In that spirit therefore, I agree with the observations of my learned brother *Elubu J*, in **Suuta Proscovia vs Magabane David & Mulekwe Michael HCCA No.123 of 2016** as reproduced above.
- 25. In light of the above, I therefore find that what was filed by the 1st Defendant against the 2nd Defendant and others is not a counterclaim, as its Counsel argues.
- 26. I am mindful that the said Counsel implored court to invoke its inherent powers under **Section 33 of the Judicature Act** to sustain the document at hand to achieve ends of justice. However, do so would sustain a document which does not meet a bare minimum of a name pleading.
- 27. In addition, inherent powers can be invoked only "...*in circumstances in which courts believe that existing law does not adequately address the problem at hand*" (**Good African Foundation Ltd & Anor vs Agricultural Business Initiative Trust HCMA No.1592 of 2021**). However, the circumstances of this case are adequately provided for by the law (**Order 8 Rules 2 and 8 of the Civil Procedure Rules**). Therefore, there is no justification for invoking the inherent powers of court.
- 28. The 1st Defendant's Counsel also tried to persuade this court with the decision of **Erinest Kabyanga vs Sanyi Patrick & Others**, *supra*. However, unlike in this case, there was an action in that case which constituted a counterclaim, save that the Defendants' pleading, where that action was pleaded, did not bear a title hence leaving one to speculate who was the counter claimant or counter

Defendant. In other words, the facts are distinguishable, thus rendering the authority inapplicable.

- 29. In the circumstances, I find that the 1st Defendant's alleged counterclaim is incompetent; and find issue two in the affirmative as well.
- 30. Before taking leave of the matter, I note that the 2nd Defendant also filed a counterclaim against the Plaintiffs, which certainly is an independent suit according to the law and as Counsel argued. Being an independent suit, the implication is that the law on taking out summons for directions was applicable to it, just as it applied to the Plaintiffs in respect of their suit. Having not taken out summons for directions, I find that the said suit abated as well.
- 31. In conclusion, the following orders are hereby issued:

- a. An order dismissing Civil Suit No.025 of 2023 for failure to take out summons for directions.
- b. An order dismissing the 1st Defendant's counterclaim in Civil Suit No.025 of 2023 for being incompetent.
- c. An order dismissing the 2nd Defendant's counterclaim in Civil Suit No.025 of 2023 for failure to take out summons for directions.
- d. Each party shall bear own costs.

I so order.

\\ DR. HENRY I KAWESA JUDGE 7/02/2025

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