

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)**

AT IRINGA

CIVIL CASE NO. 05 OF 2020

REGISTERED TRUSTEES CATHOLIC

DIOCESE OF IRINGA ----- PLAINTIFF

VERSUS

MOHAMED MELISORI EMMANUEL-----1ST DEFENDANT

SANLAM GENERAL INSURANCE -----2ND DEFENDANT

M/S MAMBA AUTO SPARES CO. LTD-----3RD DEFENDANT

Date of Last Order: 15/12/2020

Date of Ruling: 12/02/2021

RULING

MATOGOLO, J.

This ruling emanates from the Notice of Preliminary Objection on point of law raised by the 1st defendant in the raised counter-claim.

The objection is to the effect that the counter-claim preferred by the 3rd defendant to the main suit is frivolous vexatious and it amounts into abuse of court process for offending the mandatory requirement established under Order VIII Rule (1) of the Civil Procedure Code Act, [Cap. 33 R.E. 2019].

The preliminary was argued by written submissions. The 3rd defendant was represented by Mary Mgaya learned advocate while the 2nd defendant was represented by Mr. Mafuru learned advocate.

In her submission in support of the preliminary objection counsel for the 1st defendant Mary Mgaya contended that the preliminary objection is purely based on a point of law. She said reading the counter-claim it appears the defendant is shifting liability to the 3rd defendant seeking for indemnification regarding the claim preferred by the plaintiff.

She said looking at the reliefs (ii) claimed it is obvious that, the essence of the counter-claim is essentially focusing for the 3rd defendant to carry the liability of the plaintiff to the counter claim by virtue of an insurance policy duly executed between the two which formed the basis of Annexure LM collectively to the defence to wit an insurance policy in the event thereof, if at all the plaintiff in the counter claim had intended to enforce the insurance policy and if she wanted the insurance company to shoulder her responsibility by the virtue of their policy one would have reasonably expected for the plaintiff in the counter claim to initiate an application for third party, she ought not to have initiated her claim by way of a counter-claim.

She said a counter-claim presupposes that, a claimant must have a specified amount of money against the rival party to enable the court to ascertain whether the amount which is quantifiable in nature can be recovered from the respective counter party.

Looking upon the plaintiff counter claim there is no any exactly amount which is seeking to recover but for all intent and purpose she is seeking for the 3rd defendant to shoulder the responsibility under the insurance policy which for the purpose of enforcement ought to have been preferred by way of a third part notice. The learned counsel submitted

further that if the plaintiff in counter claim had any potential grievances against the 1st Defendant in a counter-claim, she could have demonstrated so in her written statement of defence by establishing the contractual relationship by virtue of the insurance policy or contract for her to shoulder responsibility by virtue of the insurance policy it is so noted further that, the 1st Defendant and plaintiff in the counter claim were impleaded as co defendants in the main suit. The learned counsel viewed the act by 3rd defendant filing counter –claim against a fellow defendant as strange in law, frivolous, vexatious and an abuse of court process.

She said the said counter-claim being bad in law it should be dismissed with costs.

The counsel for the plaintiff by way of counter - claim in reply to the 1st Defendant's written submission in support of the preliminary objection on point of law to counter-claim contended that the notice of preliminary objection raised was misplaced and a misconception in law.

He said the said offended Order VIII r. (1) of the Civil Procedure Code [Cap. 33 R.E. 2019] provides:-

"where summons to file a defence has been served in accordance with Order V and Defendant wishes to defend the suit he shall within twenty one days from the date of service of the summons file to the court a written statement of defence and order appearance on the date specified in the summons".

Reading through the above quoted order, it is the contention by the learned counsel that the preliminary point objection raised is misplaced and a non starter in law.

He said from the fact on record, the plaintiff herein upon being served with the summons filed her defence within time prescribed by the rules, hence the preliminary point of objection so far raised lacks any ground to stand and should be dismissed with costs.

In the alternative counsel for the plaintiff in counter-claim stated that whilst the preliminary objection is premised under Order VIII r. (1) of the Civil Procedure Code, counsel for the 1st defendant with misguided faculty, has led law to go where it should not require to the extent that Order VIII r. (1) of the Civil Procedure Code does not tally with the written submission in support of or antecedent thereto.

He said the counsel for the 1st defendant in her submission at pages 1, 2 and 3 has lamented inter alia that:-

- The gist of preliminary objection at issue is purely based on point of law.
- That when the counter-claim is scanned leads to an interpretation that the Defendant is shifting liability to the 2nd Defendant by virtue of Insurance policy (Annex LM collectively to the defence).
- That if the plaintiff had any potential grievances against the 1st Defendant in a counter claim has to establish the contractual relationship.

The learned counsel posed a question that does the above sampled fact support the stance of the law under Order VIII r. (1) of the Civil Procedure Code.

He submitted that it has been held in various judicial pronouncements that, preliminary objection on point of law is that which must raise a pure point of law. It cannot be raised if any fact is to be ascertained by inquiry or what entails the exercise of judicial discretion. It must be pure point of law which does not require close examination of documents or evidence. He referred to the famous case of ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696.***

He said by the submission by counsel for the 1st defendant the preliminary objection so far raised invites scrutiny of documents and proof by evidence whether Annex LM collectively to the counter-claim makes proof or reveals a contract of indemnity or not, whether there is established contractual relationship between the parties or not, and further whether there is a shifting of liability or not upon interpretation of the documents.

On the contention by counsel for the 1st defendant that the counter claim is strange in law, frivolous, vexatious and an abuse of court process, counsel for the plaintiff submitted that the counsel for 1st defendant has jumped a gun and her submission brings chill to the legal spine and thus she did not do her work well.

He cited Order VIII r. 10(1) of the Civil Procedure Code which provides as follows:-

"where a Defendant by written statement sets up any counter-claim which raised question between himself and the plaintiff along with

another person whether or not a party to the suits may join that person as a party against whom a counter-claim is made”.

While Order VIII r. II (1) provides:-

“where a defendant sets up a counter-claim the plaintiff and the person if any who is joined as a party against whom the counter claim is made shall each, if he wish to dispute the counter claim present to the court a written reply constraining a statement of his defence in answer to the counter-claim within twenty one days from the date of service upon him of the counter claim”.

He said going through the pleadings in the main suit and counter claim, the counter claim raises issue between the plaintiff, by way of counter claim with the plaintiff in the main suit along with the first defendant herein above who is a party in the suit.

Per Order VIII r. (1) (i) of the Civil Procedure Code the 1st defendant being a party to the suit has been joined in a cross or independence suit by way of counter-claim for determining the read matter in controversy between the parties so far contractual relationship under contract of indemnity is concerned. He submitted further that such kind of a cross suit is not barred and invited this court to invoke the provisions of Section 3 A(1) of the Civil Procedure Code on overriding objective. The learned counsel

submitted further that the first defendant and the plaintiff by way of counter-claim are parties to a suit no need of a third party Notice, because they are seized with the plaint and copy of the written statement of defence or pleadings in the main suit which raises questions between the 1st defendant and plaintiff by way of counter-claim and on another hand the plaintiff in the main suit hence no need of multiplicity of suits.

He therefore said the counter claim is not frivolous, vexatious or abuse of court process.

He cited the case of ***Wangai vs. Mungambi and Another [2013] 2 EALR 474*** to demonstrate what amount to frivolous and vexatious. For frivolous if it has so substance or is fanciful, where a party is trifling with the court or when to set up a defence would be wasting court's time and when it is not capable of a reasoned argument. The matter is vexatious when;

It has no foundation, it has no chance of succeeding or the defence (pleadings) is brought merely for purpose of annoyance is brought so that the party's pleadings should have some fanciful advantage and when it cannot real lead to and possible good.

It is the contention by the learned counsel that the counter claim in question does not fall in those categories. That the allegations raised require inquiry or scrutinizing of the pleadings or documents at large. It is uncertainty findings which is not a pure point of law.

The learned counsel concluded by submitting that the preliminary objection raised has been raised on total absurdity and without merit as is not a pure point of law and Order VIII r. (1) of the Civil Procedure Code is

totally misplaced in support of the preliminary objection. He said there is no any other remedy than dismissing the preliminary objection with costs and the matter be ordered to proceed at the stage it has been reached.

Having carefully read the submissions by the respective learned counsel, Ms. Mary Mgaya learned counsel appears to fault the plaintiff in counter-claim to raise counter claim in his written statement of defence. Reading through her submission, her suggestion is that instead of raising counter-claim against co-defendant, he should have filed an application for third party procedure rather than raising a counter-claim. She said by doing so the 3rd defendant violated Order VIII r. (1) of the Civil Procedure Code. However that stand was not bought by the counsel for the 1st defendant who said the preliminary objection raised is misplaced. As there is no any violation made to the above referred order. Having read the respective submissions, on the first place there are two issues to resolve; where by the 3rd defendant raising counter-claim against the 1st defendant, in the counter claim the former has violated O. VIII r. (1) of the Civil Procedure Code and whether it would be proper for the third defendant to file an application for third party notice.

O. VIII r. (1)(1) provides that:-

"where a summon to file a defence has been served in accordance with Order V and the defendant wishes to defend the suit, he shall within twenty one days from the date of service of summons, file to the court or written statement of defence and enter

appearance on the date specified in the summons”.

Reading through the above quoted order the same requires the defendant within 21 days from the date of service to file written statement of defence.

The record shows that the third defendant complied with that requirement of the law as after being served on 18th September, 2020 he filed written statement of defence. But he also raised a counter-claim against his co defendant, the 2nd defendant in the main suit and 1st defendant in the counter-claim, perhaps it is important to understand as to what is counter-claim.

Counter-claim is provided under O. VIII r. 9 of the Civil Procedure Code the same provides:-

"9(1) where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence, the defendant may in his written statement of defence, state particulars of the claim made or relief or remedy sought by him.

Provided that, a written statement of defence shall not state:-

(a) Any particulars of claim where the suit is brought for the recovery of taxes, duties or penalties;

(b) Particulars of any claim to repayment in respect of any taxes duties or penalties.

*(2) Where a counter-claim set up in a written statement of defence, the counter-claim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in the cross suit and the provision of Order VIII shall apply **mutatis mutandis** to such written statement as if it were a plaint"*

From the foregoing quoted provisions, it is evidence that a counter-claim can be raised against a plaintiff. But the counter-claim in question was raised against a co-defendant. 3rd defendant did not cite any provision of the law enabling him to raise a counter-claim against his co-defendant.

However this is not one of the point of objection raised by the counsel for the 1st defendant in the counter claim. I therefore leave it there to be considered in the main suit.

However as I pointed out above, O. VIII (1) (1) of the Civil Procedure Code was not violated by the 3rd defendant in the main suit in raising the counter-claim.

As said earlier the counsel for the 1st defendant is of the view that the 3rd defendant should have filed an application for a third party notice. Third party notice is provided under Order 1(b) of the Civil Procedure Code under rule 14 which provides:-

"14(1) where in any suit a defendant claims against any persons not a party to the suit (herein referred to as "the third party)"

- (a) Any contribution or indemnity or*
- (b) Any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, the defendant may apply to the court for leave to present to the court a third party notice".*
(Emphasis supplied).

From the wording of rule 14 of Order I of the Civil Procedure Code a third party notice can be presented in court for a person not a party to the suit. In the present matter 3rd defendant is a party to the suit who is jointly sued with the 1st defendant, the proposed procedure also cannot apply in the circumstances of the present case.

However it was pointed out by the counsel for the 3rd defendant who is right in my view, that preliminary objection on point of law should be confined to a pure point of law. The same cannot be raised on a fact which has not been ascertained, and which if sustained a preliminary objection should be capable of disposing of the case.

See ***COTWU (T) OTTU UNION AND ANOTHER VS. HONOURABLE IDDI SIMBA MINISTER OF INDUSTRIES AND TRADE AND OTHERS (2002) TLR 88.*** The land mark case on preliminary objection on point of law is ***Mukisa Biscuit Manufacturing Co. Ltd vs.***

West End Distributors Ltd (supra), cited by the counsel for the third defendant.

In the case of **Hotel and Lodges (T) Limited vs. The Attorney General (II) Chaporam Hotel Limited** Civil Appeal No. 27 of 2013 CAT (unreported) it was held:-

"Pure point of law must be elicited from what has it been pleaded or must be implied from reading pleadings. The parameters for determination of pure point of law... are restricted within the confines of the pleadings".

Now looking at the preliminary objection raised by the counsel for the 1st defendant, it is obvious that it does not by far qualify to be point of law as defined in **Mukisa Biscuit case** (supra).

I therefore find the preliminary objection raised was raised without any justifiable reasons in law the same is overruled with costs.


F. N. MATOGOLO

JUDGE

12/02/2021

Date: 12/02/2021
Coram: Hon. F. N. Matogolo – Judge
Plaintiff: Absent
Defendants: Absent
C/C: Grace

Mr. Khatibu - Advocate:

My Lord I am holding brief for Mr. Alfred Chapa advocate for the plaintiff. The matter is coming for ruling we are ready.

COURT: Ruling delivered.


F. N. MATOGOLO
JUDGE
12/02/2021