

The Hon. Mr. Justice J.W.M. Tsekobko

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. CIVIL APPL. NO. 61 OF 1991

DAVID SEGULANI : : : : : APPLICANT

VERSUS

1. ROSEMARY NATUKUNDA
2. JOHN NYENYEZI t/a)
M/S HATIMI AUTO & TRAVEL SERVICES) : : : : : RESPONDENTS

BEFORE: THE HON. MR. JUSTICE A.N. KAROKORA

RULING:

The applicant before this court is the defendant in Mengo court civil suit No. GK 623 of 1991. In that suit at Mengo court, the plaintiff/Respondent was claiming a declaration that the Motor Vehicle, a Toyota white in colour 1988 Model Chasis No. YH 61V-0065057 Engine No. 3Y - 0647825 was her property and was claiming for an order of recovery of possession of the said motor vehicle.

In his written statement of defence the defendant/applicant counter-claimed against the 1st Respondent and the 2nd Respondent denying 1st Respondent's claim and counter-claiming breach of contract, general and special refund of Shs.7,400,000/- being money he paid for the subject matter of the suit and return of the vehicle which is currently valued at Shs.10,800,000/-.

In his application for the transfer of the suit from Chief Magistrate's court of Mengo to High Court the grounds he gives came about as a result of his counterclaim he made against the Respondents for breach of contract and/or recovery of shs. 7,400,000/= being the amount paid for the subject matter of the suit or return of vehicle currently valued at shs. 10,800,000/= and because this amount is in excess of pecuniary jurisdiction of the Chief Magistrate's court in which the original suit was instituted, he applied to have the case withdrawn from Chief Magistrate's court of Mengo and transferred to the High court, as the original suit and the Counter-claim can not be fairly tried and disposed of when the Lower court lacks the pecuniary Jurisdiction to entertain the counter - claim.

The application is supported by an affidavit sworn by the applicant.

There is an affidavit in reply sworn by Rosemary Nalukundo, the 1st Respondent dated 24th October 1991 in which it is deposed that she was not a party to the circumstances of the counter-claim as she had never indicated to the applicant that the vehicle subject of her civil claim was either seven or ten million shillings as alleged.

On hearing the application Mr. Matovu Lubega counsel for Respondent rehearsed the contents of the Respondent's affidavit in preliminary objection to the application to

withdraw and transfer the suit from Mengo Chief Magistrate's court to the High Court. It was submitted that the application was misconceived and an abuse of the court process and requested to have the application dismissed, because the gist of the application was that the suit should be brought to the High court in order to accommodate the counter-claim made by the defendant/applicant.

It was contended that before the application could be considered, the counter-claim must be lodged in the court which had a competent jurisdiction to try it, but the counter-claim was in excess of pecuniary jurisdiction of Chief Magistrate's court.

I was referred to the case of Paulo Lubega Kayinyi v. Musilama & Kato Misc. Cause No. 39/1967 where it was held that if a suit is filed in a court which had no jurisdiction to try it, then it was competent to have the suit withdrawn and transferred.

Another ground was that transfer of the suit under section 18 of the civil procedure Act (C.P.A.) was an abuse of court process, because in this case the case has already been withdrawn and transferred to the High court whilst it had already proceeded and merely awaiting judgment.

Against the above submission Mr. Mugisha for the applicant submitted that the application was properly before court. He referred me to the case of Matayo Kabowa v. Habib Bin Abdul Misc. cause 4/1942 reported in (1936 - 51) 6 ULR 121 where it was observed that application for transfer of cases from court to another is a difficult matter but balance of convenience, expenses and hardship involved must be considered.

Mr. Mugisha tried to distinguish the instant case from the case the case Paulo Lubega Kagenyi v. Musilama & Kato (supra) because facts there were dissimilar to the instant case as there was no major suit and counter-claim like in this case. There, a balance of convenience was that the case would be heard by Chief Magistrate whereas in the instant case the plaintiff is contented with the chief Magistrate's court, the defendant is saying in the interest of justice and avoidance of multiplicity of suits, if these matters were withdrawn from Mengo court and transferred to High Court and disposed of simultaneously, multiplicity of suits would be avoided.

As regards the second leg of the submission it was contended that this application was filed well before the hearing of the suit in Mengo commenced. The hearing proceeded

ex-parte when they had indicated they would not be available as they would be involved in a High Court matter. There was therefore no abuse of court process as they never allowed the Mengo court case to proceed.

Now upon hearing both counsels on this preliminary objection and upon addressing my mind to the law regarding withdrawal of suits and transfer of the same to another court and upon considering the law regarding counter claim I must state that it is now settled that where a defendant makes a counter-claim in his defence, the counter-claim is to be treated, for all purposes for which justice requires it to be so treated as an independent action. See Amon v. Robbeth (1889) 22 QBD 543 at page 548 Further, if, after the defendant has pleaded a counterclaim, the plaintiff's action is for any reason stayed, discontinued or dismissed, the counter - claim may nevertheless be proceeded with. Further, the courts, if satisfied that the defendant's claim ought not to be disposed of by way of counterclaim but in an independent action, the counterclaim can be excluded. See order 8 r.2.

Therefore bearing the above in mind, a counter-claim being treated as an independent action, it must, following the principle laid down in Paulo Lubega Kagenyiv. Musilama

& Kato Misc. cause No. 39/1967 reported in Digest High Court cases Volume 3 M.B. 140/1967, be filed in a court which has jurisdiction to try it. If it is filed in a court which has no jurisdiction to try it, then it is incompetent to have the suit (Major suit and counter-claim) withdrawn and transferred from the court which had no jurisdiction to try the action (counter-claim). In my view, if the amount claimed in the counterclaim exceeds pecuniary jurisdiction of the court, in which the main suit had been filed, then the defendant should have considered in which court he should file what he intended to claim in his counter-claim. He could not file a counter-claim in a court which had no pecuniary jurisdiction to entertain it. In my view balance of convenient, avoidance of expense and hardship cannot confer jurisdiction upon any court. The Jurisdiction is conferred upon a court by law.

Accordingly, the case of Matayo Kabowa v. Habib Bin Abdul (1936-51) 6 ULR 121 would be distinguished from the instant case, because in that case, the court was dealing with a case where the withdrawal and transfer of the case was between courts of horizontal jurisdiction unlike in the instant case, where the application sought to withdraw and transfer the case from one court to another court of vertical pecuniary jurisdiction. I think in the instant case, the overriding consideration would be pecuniary jurisdiction of the court in which the suit was filed. Since the counter-claim is over and above shs. 5,000,000/= it could not properly be ^{filed} in Chief Magistrates court which had no jurisdiction and cannot

be withdrawn from a court which had no competence/jurisdiction to hear the case. Therefore, this court can not order withdrawal and transfer of the suit from the court which had no jurisdiction to hear the counter-claim.

On that ground alone the application to withdraw the suit and transfer it to the court would not succeed.


As regards the second ground of objection to the effect that application was an abuse of the court process, I do not see where the application was an abuse of court process, because the allegation that the case is already withdrawn from the lower court and transferred to High Court is not supported by evidence. The allegation that the case is already part-heard and is awaiting judgment would not render the application to be an abuse of court process since under section 18 (1) of Civil Procedure Act, the application can at any stage be withdrawn and transferred from one court to another court.

However, be that as it may, I think the application to withdraw the suit and transfer it to High Court because of the counter-claim is misconceived and is dismissed with costs as the counterclaim ought not to have been filed in a court which had no jurisdiction.

However, before taking leave of this Ruling, I must observe that under order 8 r 2. where the counter-claim could not conveniently be disposed of in the pending suit before the

Chief Magistrate, it ought not to have allowed or defendant should have been refused permission to avail himself of the main suit with the counter-claim appended to it. We have yet to see how the learned Chief Magistrate handled the suit with the counter-claim which was in excess of his pecuniary jurisdiction.

Meanwhile, the preliminary objection to the application to transfer the suit to High court is upheld. The application to withdraw the suit and transfer it to High Court is dismissed with costs to plaintiff.




A.N. KAROKORA
JUDGE.

17/12/91

31/12/91: Mr. Donge holding brief for
Mr. Mugisha for Applicant.

Rosemary Natukunda Respondent
in person Ruling read.



A.N. KAROKORA
JUDGE.

31/12/91.