



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wawira v Kyalo (Civil Appeal E707 of 2023) [2025] KEHC 7076 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7076 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL APPEAL E707 OF 2023**

**TW OUYA, J**

**MAY 26, 2025**

**BETWEEN**

**CONSOLATA WAWIRA ..... APPELLANT**

**AND**

**BETTY KYALO ..... RESPONDENT**

*(Being an Appeal from the Ruling of the Chief Magistrate's Court  
delivered on the 15th day of July 2022 in CMCC No. 3216 of 2020)*

**RULING**

1. Through the Memorandum of Appeal before the Court dated 15<sup>th</sup> August 2022, the Appellant is seeking Judgment as against the Respondent for the following Orders:
  - a. The Appeal be allowed and order be made setting aside the subordinate's court decision/order dismissing the Appellant's Preliminary Objection with costs.
  - b. The costs of the Appeal be paid by the Respondent herein.
  - c. The case be remanded for hearing before any other Court with the jurisdiction to handle the matter.
  - d. Any other reliefs that the Court deems just to grant."
2. The Appellant is challenging the decision of the trial Court, Hon. Principal Magistrate delivered on 15<sup>th</sup> July 2022 in CMCC No. 3216 of 2020 dismissing her Notice of Preliminary Objection dated 8<sup>th</sup> September 2021. The gist of the Appellant's (then Plaintiff) Notice of Preliminary Objection dated 8<sup>th</sup> September 2021 was that the Defendant's (now Respondent) Counterclaim filed on 25<sup>th</sup> June 2021 was time-barred pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act* having been filed some four (4) months beyond the statutory time-period. The Appellant's Notice of Preliminary Objection dated as dispensed by way of written submissions.



3. The trial court determined through the impugned decision dated 15<sup>th</sup> July 2022 that the leave sought by the Respondent to file her Defence out of time was granted vide its Ruling dated 25<sup>th</sup> June 2021 allowing the reliefs set out in the Respondent's Notice of Motion dated 26<sup>th</sup> February 2021. It was the trial Court's holding that the net effect of its Ruling dated 25<sup>th</sup> June 2021 was to enlarge the time for the Defendant (now Respondent) to file her Defence and Counterclaim. Furthermore, the trial Court ruled that the Respondent complied with the directions contained in the Ruling dated 25<sup>th</sup> June 2021 having filed her Defence and Counter-claim within 21 days as directed by the Court.
4. The instant appeal is premised on the following six (6) grounds:
  - (1). The trial Court erred in law and in fact and in law in finding that it had extended leave to the Respondent to file its statute-barred Counterclaim when the same had not been expressly pleaded and granted in its application to file its Defence out of time.
  - (2). The trial Court erred in law and in fact and in law in ignoring the legal maxim that parties are bound by their pleadings. The Respondent, having previously not sought leave to file their statute-barred Counterclaim out of time, no leave could be granted or purported to be granted.
  - (3) The trial Court erred in law and in fact and in law in making a finding that leave had been granted to the Respondent to file its statute-barred Counterclaim out of time when the same did not form the substratum of the Application for leave in doing so occasioned a miscarriage of justice.
  - (4) The trial Court erred in law and in fact and in law in finding that leave had been granted to the Respondent to file its statute-barred Counterclaim out of time merely because it formed part of the defense.
  - (5) The trial Court erred in law and in fact and in law by considering extraneous factors in dismissing the Appellant's preliminary objection.
  - (6) The trial Court erred in law and in fact and in law in failing to consider the evidence on record and submissions of the Appellant which omissions occasioned a miscarriage of justice."
5. The subject Appeal was admitted under the provisions of Section 79B of the [Civil Procedure Act](#) with directions that the same be canvassed by way of written submissions.

### **Appellant's Submissions**

6. The Appellant filed written submissions dated 17<sup>th</sup> February 2024 through its Counsel. After setting out the background to the dispute before the Court, the Appellant identified a single issue for determination in the appeal, namely: Whether the trial Court erred in law and in fact in finding that it had extended leave to the Respondent to file its statute-barred Counterclaim when the same had not been expressly pleaded and granted in its application for leave to file its Defence out of time.
7. The Appellant subscribed to the position that the Respondent's Application dated 26<sup>th</sup> February 2021 did not expressly seek leave to file her Counterclaim out of time as it only sought to file Defence out of time. In the premises, the Appellant argued, the trial Court's misdirected itself in its Ruling dated 25<sup>th</sup> June 2021 by finding that the Respondent was entitled to the grant of leave to file her Counterclaim out of time.
8. It was submitted that parties are bound by their pleadings; as such, the Respondent could only be granted the reliefs sought in her application dated 26<sup>th</sup> February 2021. Reliance was placed in the holding of the court in the cases of Independent Electoral and Boundaries Commissions & Another



V Stephen Mutinda mule & 3 Others [2014] eKLR; and, Malawi Railways Ltd V Nyasulu [1998] MWSC 3, to underpin the preceding proposition.

### **Respondent's Submissions**

9. The Respondent filed written submissions dated 28<sup>th</sup> June 2024 through her counsel and isolated the following three (3) issues for resolution by this Court:
  - a. Whether the trial Court rightfully exercised its discretion to enlarge the time for filing a Defence and Counterclaim.
  - b. Whether the Counterclaim is properly before the trial Court.
  - c. Whether the trial Court rightfully exercised its discretion to enlarge the time for filing a Defence and counterclaim.”
10. It was reiterated that prayer 3 in the Respondent's Application dated 26<sup>th</sup> February 2021 specifically sought the Court's leave to file “defence out of time and or the defence on record [be] deemed duly filed and served, a draft whereof is annexed hereto”, which prayer was allowed by the Court. The Respondent submitted that by granting prayer 3, the trial Court enlarged the time of filing of her Counterclaim. Guidance was placed on the reasoning of the Court in the cases of Nation Media Group Limited & 2 Others V Margaret Kamene Wambua (2021) eKLR; Royal Media Services Ltd V Valentine Mugure Maina & Another (2019) eKLR; and, Spin Knit Dairy Limited V Mwaniki Anderson (2019) eKLR to buttress the foregoing submissions.

### **Analysis**

11. Having carefully considered the grounds of appeal and the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination revolve around one issue as to whether the trial Court orders of 25<sup>th</sup> June 2021 extending the period for the filing of the Respondent's suit automatically granted him time to file Counterclaim.
12. The appeal before the court being a first appeal, the Court is enjoined to re-examine the entirety of the evidence placed before the trial Court and render its own conclusion on the same. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court proclaimed as follows:

“ This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
13. The gravamen of the dispute before this Court concerns whether the trial Court extended the period for the filing of the Respondent's Counterclaim through its Ruling rendered on 25<sup>th</sup> June 2021. The Appellant subscribed to the position that as the Respondent failed to expressly seek for leave to file her Counterclaim out of time, the trial Court could not possibly have granted such leave. Further, the leave allowed vide the Ruling 25<sup>th</sup> June 2021 only concerned the filing of a Defence out of time, hence, the leave allowed by the trial Court does not extend to the Counterclaim.



14. It is trite that a Counterclaim in itself is a separate suit and is not part of the claim mounted by the Plaintiff. Order 7 Rule 13 of the Civil Procedure Rules, 2010 which provides as hereunder:

“If, in any case in which the Defendant sets up a Counter - Claim the suit of the Plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”

15. In the case of *Wachira v Maina & another* (Environment and Land Appeal E003 of 2022) [2024] KEELC 3701 (KLR) (7 May 2024) (Judgment), the Court understood the nature of a Counterclaim as follows:

“In law a counterclaim is filed as part of the Defendant’s answer to a Plaintiff. It is an independent cause of action asserted by the Defendant against the Plaintiff’s claim essentially raising issues that the defense would have raised had he the first chance to go to Court. The Court has to pronounce Judgment on both the Plaintiff and the counterclaim as both contain the claims of the Plaintiff and the Defendant. The rules relating to a defence by a Defendant apply to a defence in answer to a counterclaim so that the Plaintiff must respond likewise to a Defendant just like claim in the Plaintiff.”

16. The foregoing position was underscored by the Court of Appeal in the case of *Kenya Commercial Bank Limited – Versus - James Karanja* [1981] eKLR, where the Court stated that:

“A counterclaim is a fresh suit, and the Defendant instituting it becomes Plaintiff for all intents and purposes. The Counter-Claim is combined in the plaintiff’s proceedings for convenience, to enable the court to pronounce a final Judgment in one set of proceedings, both on the original and on the cross claim. It is a fresh suit, and not an attempt to revive the original matter which was dismissed by the court, as Mr. Salter would have us say.”

17. In the subject appeal, the Appellant argued and submitted that the Respondent never sought the trial Court’s leave to file her Counterclaim out of time. The Appellant further argued that, applying the established principle that parties are bound by their pleadings, there exists no basis for the trial Court’s holding that leave to file Counterclaim was subsumed under the leave which the Court allowed the Respondent to file her Defence out of time.

18. It is trite that parties are bound by their pleadings. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR, cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where the Court declared as follows:

“.....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

19. This Court has carefully inspected the pleadings, totality of the evidence and rival submissions filed by the parties before the trial Court and in respect of the appeal. From a perusal of the prayer numbered 3 in the Respondent’s Notice of Motion Application dated 26<sup>th</sup> February 2021 seeking leave to file Defence out of time, there is no mention of the Respondent’s Counterclaim. In the premises, the



Court is satisfied that leave to file a counterclaim out of time was never sought by the Respondent through her Notice of Motion Application dated 26<sup>th</sup> February 2021. In this event, the Court holds and finds that the question of leave to file the Respondent's counterclaim out of time was not the subject of the trial Court's decision delivered on 25<sup>th</sup> June 2021, which Ruling was relied upon by the trial Court in the impugned decision dismissing the Appellant's Notice of Preliminary Objection dated 8<sup>th</sup> September 2021.

20. For clarity, the Respondent needed to have expressly sought the trial court's leave to file her Counterclaim out of time. It does not follow that where leave is granted to file a Defence out of time, such leave automatically extends to the filing of a Counterclaim, which is a separate suit, as reiterated above.
21. Having regard to the foregoing, the Court proceeds to make the following final Orders:
  - i. /The instant appeal is found merited and Judgment is hereby entered in favour of the Appellant as contained in the prayers number (a), (b) and (c) in the Memorandum of Appeal dated 15<sup>th</sup> August 2022.
  - ii. The Court further directs that the dispute herein be remanded for hearing before a Magistrate other than the Hon. A.N. Makau who made the impugned decision.
  - iii. Pursuant to the provisions of Section 27 of the *Civil Procedure Act*, the Appellant being the successful party in the appeal is awarded the costs of the Appeal and in respect of the Notice of Preliminary Objection dated 8<sup>th</sup> September 2021.

It is so ordered.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY 26<sup>th</sup> MAY, 2025.**

**HON. T. W. OUYA**

**JUDGE**

