



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waita v Kenya Hospital Association t/a The Nairobi Hospital (Civil Case E040 of 2022) [2025] KEHC 8685 (KLR) (Civ) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8685 (KLR)

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

**CIVIL**

**CIVIL CASE E040 OF 2022**

**JN MULWA, J**

**JUNE 19, 2025**

**BETWEEN**

**HERMAN KABUTIA WAITA ..... PLAINTIFF**

**AND**

**THE KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI  
HOSPITAL ..... DEFENDANT**

**RULING**

1. On 30/03/2023 interlocutory judgment was entered against the defendant in default of filing defence within the prescribed period. However, by consent of the parties dated and executed on 29/05/2024 the interlocutory judgment was set aside and the defendant was granted leave to file its amended defence and a counterclaim, which was filed on 13/06/2024.
2. The plaintiff's claim against the defendant by its plaint dated 22/02/2022 is for special damages in the sum of Kshs. 172,035,609.38 as well as general damages. Upon grant of leave by consent to file defence and counterclaim, the defendant by the counterclaim raised a claim of Kshs. 20,0460,529 against the plaintiff and two other persons, Peter Mwangi Waita and Peninah Nyokabi Waita who have been joined in the suit as defendants in the counterclaim.
3. The Plaintiff was aggrieved by the joinder of the two defendants in the suit, following which he filed a Preliminary Objection, (PO) dated 29/07/2024 and amended on 24/02/2025.

**The Amended Preliminary Objection.**

4. The plaintiff objects to the joinder of Peter Mwangi Waita and Peninah Nyokabi Waita (named as 1<sup>st</sup> and 2<sup>nd</sup> defendants in the counterclaim) on the following grounds:-



1. The Defendant's Counterclaim is legally incompetent as it offends Order 7 Rule 3 of the Civil Procedure Rules. The Defendants ought to have filed a separate suit for convenience of the Court with Mr. Peter Mwangi Waita and Peninah Nyokabi Waita as the parties.
2. The Defendant's Counterclaim is legally incompetent as it violates Order 7 Rule 8 of the Civil Procedure Rules. The Defendant's Counterclaim raises questions between themselves and Mr. Peter Waita & Mrs. Peninah Waita as guarantors of a contract that the Plaintiff was not a party/signatory to.
3. The proper procedure in law for the Defendants ought to have been taking out Third Party Proceedings against Mr. Peter Mwangi Waita and Mrs. Peninah Nyokabi Waita according to Order 1 Rule 15 of the Civil Procedure Rules, seeking indemnity or contribution or any other reliefs connected with the original subject matter of the suit.
4. Section 2 of the Advocates Act defines who a client is and neither Mr. Peter Mwangi Waita nor Mrs. Peninah Nyokabi Waita have retained our Firm, Nderitu & Partners Advocates, to represent them.
5. Both parties filed submissions on the preliminary objections.

#### **Plaintiff's Submissions.**

6. The plaintiff submitted that the defendant's counterclaim offends provisions of Order 7 Rule 3 and 8 of the Civil Procedure Rules (CPR) in respect of joinder of the parties as opposed to seeking indemnity and or contribution reliefs in terms of Order 1 Rule 15 Civil Procedure Rules as well as taking third party proceedings against the two defendants as they were not parties to the contract with the plaintiff and therefore submitting that the counterclaim is legally incompetent citing the case of County Government of Kilifi v. Mombasa Cement Limited [2017] eKLR for the proposition that the two being parents of the plaintiff, who is an adult, does not link them to the suit.
7. It is a further submission that in the circumstances, the right procedure was to take out third party proceedings against them as provided under Order 1 Rule 15(1) CPR also citing Kenya Commercial Bank v. Suntra Investment bank Ltd [2015] eKLR arguing that as the two defendants were not plaintiffs in the claim against the defendant they cannot be included in a counterclaim against the plaintiff.

#### **Defendant's Submissions.**

8. The defendant submitted that the preliminary objection is based on a misconception of the law governing counterclaims and joinder of parties, adding that the plaintiff having consented to the defendant filing a defence and counterclaim, the said counterclaim cannot be said to be incompetent and is proper in law as by the said consent, the counterclaim was introduced.
9. Additionally, the defendant invokes Order 7 Rule 3 CPR to say that a defendant may set off, set-up by way of counterclaim against claims of the plaintiff for a liquidated or unliquidated claims for the court to be able to pronounce a final judgment in the suit but the court may on application of the plaintiff, before trial, refuse to have the set-off or counterclaim disposed of in the pending suit, further invoking Order 7 Rule 7 CPR for the procedure it took; and taking guidance from the holding of the Court of Appeal in the case of Kabuito Contractors Ltd vs. David Meneka t/a Mereka & Company Advocates [2004] KECA 109 (KLR) that a defendant through a counterclaim, may join to the counterclaim parties other than the plaintiff who may be at liberty to appoint their advocates of choice.



10. Further, it is the defendant's submissions that its counterclaim satisfies procedural requirements under Order 7 Rule 8 CPR to avoid multiplicity of suits citing the case of Japan Motors Ltd & 2 others v. Fairuz Feisal Yasin & Another [2020] eKLR, and for the above, has urged for dismissal of the Preliminary Objection.

### **Determination.**

11. The court has carefully considered the rival parties submissions on the preliminary objection against the issues raised by both as well as the consent order executed on 29/05/2024 permitting the defendant to file an amended defence and counterclaim.
12. A perusal of the consent adopted as an order of the court did not bar the defendant from joining parties to the suit by dint of Order 7 Rule 3 CPR which provides:-

“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 counter claim sounds 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 to be allowed, refuse permission or defendant to avail himself thereof”

13. Order 7 Rule 7 of the CPR, requires that if a defendant wishes to file a counterclaim, to state so in his defence.

At paragraph 21 of its amended statement of defence, the defendant expressly admits that the plaintiff and his guarantors signed a discharge agreement on 26/04/2019.

### **Who are these Guarantors?**

14. In the defendant's counterclaim, Peter Mwangi Waita and Peninah Nyokabi Waita are named as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are the parents of the first defendant.

At paragraph 27 of the counterclaim, by way of discharge agreement and or undertaking dated 1/04/2019, including subsequent addendums, they undertook to settle the plaintiff's outstanding bills with the defendant, stated as Kshs. 27,627,836.86.

15. The above therefore brings to the center of the suit the counterclaim herein by dint of Order 8 Rule 5 CPR that provides the general power to amend pleadings to bring the real issues for determination before the court for determination as held in the Court of Appeal case of Kabuito Contractors Ltd. Vs. David Mereke (supra).
16. In the court's view, it would not make any legal or economic sense to file a separate suit by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants arising from the plaintiff's case in respect of its claim of Kshs. 27,627,836.86 (subject to proof) which the plaintiff in its reply to defence and defence to counterclaim speaks about at its paragraphs 6 and 7 thereof.
17. To that end therefore, and taking into account the holding in the case of County Government of Kilifi v. Mombasa Cement Ltd (supra) the court is of the considered opinion that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are squarely linked to the plaintiff's claim and would be properly dealt with in this suit pursuant to the counterclaim as opposed to delaying the hearing and determination of the suit by taking out 3<sup>rd</sup>



party proceedings against them, a position well taken by the court in the Kibuitu Constructors ltd case (supra).

18. The court takes note of Provisions of Order 7 Rule 8 CPR wherein it is provided:-

8 “where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaims were to be enforced by cross-action would be defendants to such cross-action and shall deliver to the court his defence...”

19. The above procedure is expressly demonstrated by the defendant in its counterclaim, so that when the plaintiff faults the defendant for failure to follow the correct procedure, and fails to provide what it deems to be the correct procedure, the court is at a loss.

20. Clearly, the procedure is clearly provided under Order 7 Rule 3 CPR and not Order 1 Rule 15-22 as proposed by the plaintiff. For avoidance of doubt Order 1 Rules 15-22 provides for procedure for enjoining third parties to a suit which is not the case in the instant application.

21. The court is therefore satisfied that the defendants counterclaim relates to the same subject matter and dispute in the primary suit and the defendant’s suit by the counter claim and that both can be conveniently determined in these proceedings without necessitating filing of separate suits as well held in the case of Daikyo Japan Motors Ltd & 2 Others (supra).

22. The rationale of Order 7 Rule 8 Civil Procedure Rules is captured in the said suit and more particularly that separating counterclaims from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of Section 1A(1) of the Civil Procedure Act.

23. For the foregoing, the court finds no merit at all in the preliminary objection raised by the plaintiff. It is dismissed with costs to the defendant.

24. Let parties attend court for Pre-trial Directions under Order II CPR on 2/07/2025.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE, 2025**

.....

**JANET MULWA.**

**JUDGE**

