



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 386 OF 2010**

**YARA EAST AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**THIRIKWA KAMAU t/a MUGUNA GENERAL ENTERPRISES...DEFENDANT**

**RULING**

1. The notice of motion dated *18th May 2017*, is filed by *Thirikwa Kamau t/a Muguna General Enterprises*, the defendant which seeks the entry of judgment in its favour for ksh 2,418,050. With interest at 14% from the date of the debt.

2. That application is premised on the alleged counter claim filed by the defendant. I say the alleged counterclaim because no such counter claim has been filed as envisaged under Order 7 Rule 3 and 5 of the Civil Procedure Rules. In particular, Rule 5 of Order 7 requires a counter claim to be accompanied by an affidavit. The defendant did not file such an affidavit. However, the defendant filed attached to its defence a statement showing various amounts under the heading "*Response to the Plaintiff's Accounts*" which statement is reproduced here under:

**RESPONSES TO THE PLAINTIFF'S ACCOUNTS UNDER ORDER 18r 2, CPR AS PRESENTED BY THE CURRENT MD MR JOHN CRASKE'S EXHIBIT 'JC 1' IN HIS REPLYING AFFIDAVIT DATED 24/06/2015, FILED IN COURT SAME DAY**

	<b>OUTSTANDING INVOICES</b>	<b>PLAINTIFF</b>	<b>DEFENDANT</b>	<b>REMARKS</b>
1.	EAF05031966		-1,848,000.00	Invoice and cheque written for the amount by MD, Mr Lode Vanhoutte and later cancelled upon realisation that the goods had not been supplied to the Defendant – see attached cancelled cheque in his handwriting.
2.	EAF05074764	910,900.00		
3.	EAF05095384		277,100.00	KRA/ETR 22122004/00260A OF 12/09/2005 Fiscal receipt no. 0018
4.	EAF05095385		257,200.00	KRA/ETR 22122004/00260A OF 12/09/2005 Fiscal receipt no. 0017
5.	EAF05095386		284,000.00	KRA/ETR 22122004/00260A OF 16/09/2005 Fiscal receipt no. 0037
6.	EAF05095387		275,200.00	KRA/ETR 22122004/00260A OF 12/09/2005 Fiscal receipt no. 0015
7.	EAF05095388	980,000.00		
8.	EAF05095446		284,000.00	KRA/ETR 22122004/00260A OF 19/10/2005 Fiscal receipt no. 0016
9.	EAF05106049		280,000.00	KRA/ETR 22122004/00260A OF 19/10/2005 Fiscal receipt no. 0075
10.	EAF05106222		302,400.00	KRA/ETR 22122004/00260A OF 12/09/2005 Fiscal receipt no. 0002
	<b>PAYMENTS</b>			
11.			940,050.00	Offset against transport invoices 01/VAT CERT NO. 1480839

12.			554,000.00	Offset against transport invoices 02/VAT CERT NO. 1481056
13.			155,000.00	Cash deposit
14.			XXXXXX	Cheque 102848

3. Such a statement fails to qualify as a counter claim as correctly submitted by the plaintiff’s learned counsel. The Blacks Law Dictionary 8th Edition, defines counter claim as:

***“a claim for relief asserted against an opposing party after an original claim has been made esp., a defendant’s claim in opposition to or a set off against the plaintiff’s claim”.***

4. The defendant’s statement, which is reproduced above, and bearing in mind that definition of counterclaim is a far cry of what can be termed as a counter claim. There is indeed no counter claim on record, filed by the defendant.

5. It is because of the above that I agree with the submissions of the plaintiff’s learned counsel that the application is misconceived, frivolous and devoid of merit.

6. Accordingly the orders of the court are:

- a. *The notice of motion dated 18 May 2017 is dismissed with costs to the plaintiff.*
- b. *The parties are ordered to comply with pre-trial procedure, to that end, the plaintiff and the defendant shall within 14 days from today file and serve each other with witness statements which shall be cross referenced to the bundle of their paginated documents.*
- c. *At the reading of this ruling a hearing date of this suit shall be given.*

**DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.**

**MARY KASANGO**

**JUDGE**

***Ruling read and delivered in open court in the presence of***

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**