



**TOA v VMN (Civil Suit E044 of 2022)
[2025] KEHC 16271 (KLR) (Family) (11 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16271 (KLR)

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

FAMILY

CIVIL SUIT E044 OF 2022

CJ KENDAGOR, J

NOVEMBER 11, 2025

IN THE MATTER OF MATRIMONIAL PROPERTY ACT,

2013

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA,

2010

BETWEEN

TOA APPLICANT

AND

VMN RESPONDENT

RULING

1. The Applicant filed an Originating Summons dated 24th January, 2022 which the Respondent opposed via a replying affidavit dated 23rd October, 2023.
2. The matter was referred to Court Annexed Mediation at the pre-trial stage, but the same was not successful.
3. The Applicant subsequently filed a notice of withdrawal of suit dated 12th August, 2025. The Respondent opposed the withdrawal on the issue of costs and subsequently filed an application dated 7th February, 2025 which is the subject of this Ruling.
4. The application seeks the following orders;



- i. That this honourable court be pleased to grant leave to the Respondent to file a counter-claim by way of a further affidavit;
 - ii. That the honourable court be pleased to adopt the Draft Further Affidavit annexed hereto as counter-claim duly filed;
 - iii. That costs of this application be provided for.
5. The Applicant opposed the application, and both parties filed submissions, which I have duly considered.

Respondent's case

6. The Respondent has argued in favour of the application and the orders sought and placed reliance on the provisions of the [Matrimonial Property Act](#).
7. The Respondent submitted that she has a right to file a counterclaim in response to the summons and argues that after the pleadings have closed, a further affidavit can only be submitted with the leave of the Court. This is the basis for her current application.
8. The Respondent further argues that she has proprietary and matrimonial interests in the properties listed in the Originating Summons application and asserts that it will be beneficial if the Further Affidavit is adopted as a counterclaim.

The Applicant's case

9. The Applicant contended that the proposed counterclaim is merely an afterthought and claimed that there is no suit to seek leave for, as the main suit has already been withdrawn.
10. The Applicant contended that the proposed counterclaim is an afterthought and argued that there is no suit to seek leave for, as the main suit has already been withdrawn.

Analysis and determination

11. The issue for determination is whether the respondent should be granted the leave sought to file a Counter Claim by way of Further Affidavit.
12. The Matrimonial Property Rules regulate any matter of practice or procedure under the [Matrimonial Property Act](#).
13. It provides as follows on the filing of counterclaims;
Rule 14 Counterclaim or set-off
 - (1) Where the respondent wishes to plead a set-off or counterclaim, they shall set out in a concise manner, in their affidavit in the reply to the summons, the material particulars on which the set-off or counterclaim is made.
 - (2) Where the respondent pleads a counterclaim or set-off in response to the summons, they shall file and serve on the applicant an affidavit—
 - (a) disclosing the nature and material particulars of the counterclaim or set-off;
 - (b) verifying the facts relied upon in support of the counterclaim or set-off, and of which the respondent has personal knowledge;



(c) deposing as to belief in the truth of the other facts relating to the counterclaim or set-off; and

(d) setting out the relief sought in relation to the counterclaim or set-off.

Rule 15. Form of counterclaim as a separate action

- (1) Where the respondent has a counterclaim in respect of which a separate application may be made, they may file a separate claim in accordance with rule 7.
- (2) Where the respondent files a counterclaim pursuant to this rule, they may, in addition to the affidavit in reply to the claim, file an affidavit in support of their counterclaim under this rule.
- (3) The respondent's affidavit in support of their counterclaim shall set out in a concise manner, the material particulars on which the counterclaim is made, including, with necessary modifications, the particulars set out in rule 7(4).
- (4) Where the respondent files a separate claim under this rule, they shall serve the process in that proceeding on the claimant in accordance with Part III, whereupon rules 11, 12 and 13 shall apply with necessary modifications as regards to appearance, reply or admission.

14. A Respondent in a case under the Matrimonial Property Act has the right to file a counterclaim. The Matrimonial Property Rules also specify the timeline for submitting such a counterclaim, which must be done within 14 days of service of the Originating Summons and filed at the time of filing the response to the Originating Summons.
15. The Respondent did not file a counterclaim at the time of filing her response which is dated 12th October, 2023.
16. Rule 17 provides that pleadings close on the filing of the reply to a summons or to a counterclaim, if any, and no subsequent pleading or further affidavits may be filed except with leave of the court on application by a party to the proceeding. Rule 18 provides for the manner how the Court is moved for consideration of leave to file pleadings out of time.
17. The notice of withdrawal is dated 8th August, 2024 and was filed on 12th August, 2024. The Respondent did not seek leave until after the Applicant withdrew the suit. While she may argue that she has interests and rights concerning the subject matter, there is currently no existing suit in which she can file a counterclaim. The Respondent's plea was valid only while the suit was active. If she had filed a counterclaim before the withdrawal of the suit, she could have asked the Court to proceed with the counterclaim, regardless of the withdrawal of the main suit.
18. The authorities relied upon support proceeding with a counterclaim even after a Plaintiff had withdrawn, discontinued, or had their main suit dismissed. A counterclaim is considered an independent action or a cross-suit that can survive on its own merits. The Respondent would have had the opportunity to prosecute the counterclaim if it had been filed earlier and if she had sought leave for filing of the same before the suit was withdrawn. I am convinced that the attempt is an afterthought and lacks justification, given that the matter has been in court for over three years.
19. The Respondent's application dated 7th February, 2025 is not merited and is dismissed.
20. On the issue of costs, given that it is a family dispute, I opine that each party should shoulder their own costs of the suit and the application. As such, the suit is marked as withdrawn, with no order as to costs.
21. It is so ordered.



DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 11TH DAY OF NOVEMBER, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Amondi, Advocate for the Respondent

Ms Martina, Advocate for the applicant

