



**Njue v Jumbo Nuts Limited & another (Civil Case E002 of 2024)
[2026] KEHC 563 (KLR) (28 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE E002 OF 2024
RM MWONGO, J
JANUARY 28, 2026**

BETWEEN

EUGENIA MUTHANJE NJUE APPLICANT

AND

JUMBO NUTS LIMITED 1ST RESPONDENT

PIONEER GENERAL INSURANCE LIMITED 2ND RESPONDENT

RULING

The Application

1. By a notice of motion dated 29th September 2025, supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof, the applicant seeks orders as follows:
 1. Spent;
 2. That there be stay of execution of orders issued by the Honourable court on 19th March 2025;
 3. That the Honourable court do set aside the orders issued ex-parte on 19th March 2025.
 4. That the Honourable court do make orders that it lacks jurisdiction to hear and determine the counterclaim;
 5. That the default judgment entered against the Applicant on the counterclaim and all consequential orders be set aside;
 6. That in the Alternative to prayer 4 the Applicant be granted leave to file and serve her defence to counterclaim out of time; and
 7. That the costs of this application be provided for.



2. The applicant's case is that before the preliminary objection was determined by the court, default judgment had been entered against her on 19th March 2025. She argued that she was not served with the application or the request or notice of default judgment against her on the counterclaim. She is apprehensive that if that order is not set aside, given that the matter has already been filed before the correct court, she will suffer irreparable loss.

Response

3. The 1st respondent, through its replying affidavit, deposed that it served its statement of defense and counterclaim upon the applicant on 30th August 2024 but she failed to file a defense to counterclaim in good time. That a request for judgment was filed on 05th November 2024 and it was served upon the applicant. Judgement in default was entered in the sum of Kshs.600,000/=, a liquidated amount. It argued that there was indolence on the applicant's part and that equity should not aid her. It stated that the application is an abuse of the court process and it ought to be dismissed.

Parties' Submissions

4. The applicant filed her written submissions relying on the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) and argued that the court's determination of the preliminary objection was a finding that it lacked jurisdiction to determine the issues raised in the plaint. That having been made by the Court, the applicant argues that since the counterclaim arises from the same facts, it should follow that the court also lacks jurisdiction to determine the counterclaim. As such, the default judgment entered ought to be set aside. She relied on the cases of Kenya School of Law v Kitsao; Council of Legal Education (Interested Party) [2024] KEHC 6352 (KLR) and Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] KEHC 6915 (KLR).
5. The respondents did not file any submissions.

Issue for Determination

6. The issue for determination is whether the orders sought should be granted.

Analysis and Determination

7. The plaint was determined through this Court's ruling dated 30th July, 2025 in which the court found that it lacked jurisdiction to adjudicate on the issues therein. By the time the ruling on jurisdiction was being delivered, the counterclaim had already been determined on 19/03/2025 by way of a default judgment.
8. It is trite that Order 7 of the Civil Procedure Rules envisions a counterclaim as a separate claim to be determined independently of the claims made in the plaint. In Wawira v Kyalo [2025] KEHC 7076 (KLR), the court stated as follows on counterclaims:

“In the case of Wachira v Maina & another (Environment and Land Appeal E003 of 2022) [2024] KEELC 3701 (KLR), 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 Judgement 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.” [Emphasis added]

9. The foregoing position was underscored by the Court of Appeal in the case of Kenya Commercial Bank Limited v 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.” [Emphasis added]

10. In this case, the counterclaim was determined through a default judgment after the 1st respondent requested for the same in court. At the time, the question of the Court’s jurisdiction had not been dealt with or determined. Through the present application, the applicant stated that she was not served with the request for interlocutory judgment, a fact that the 1st respondent denies.
11. On perusal of the court’s record, it is noted that the request for judgment which is also annexed to the replying affidavit, was filed on 06th October 2025. There is no proof of service of the same. The request was filed long after the default judgment was entered on 19th March 2025. However, the oral request for judgment made on 19th March 2025 was allowed by the court on the same date.
12. This finding by the court was reached by the court on an assumption that it bore relevant jurisdiction. Therefore, the applicant’s prayer that the court made the order without jurisdiction is flawed. At the time of the finding and even until now, the applicant made no challenge to the jurisdiction of the court to determine the counterclaim.
13. In light of the fact that in law, the counterclaim deserves to be heard in the same fashion as any other civil suit, it is prudent that the opportunity be duly accorded. Regarding the applicant’s prayer that execution be stayed, the court must satisfy itself that the parameters set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 have been met. The provision provide is as follows:

- “(2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

14. The applicant has stated that she will suffer irreparable loss if the stay order is not made. However, she has made the stay application too long after judgment has been entered against her and no security for performance has been offered.

Disposition

15. Taking into account the overall circumstances of this case, I consider the prudent thing to do is to grant an order for status quo pending hearing of the counterclaim. It is, therefore necessary that the order



of the court entering judgment against the applicant be, and is hereby, set aside pending hearing of the counterclaim.

16. In the circumstances, leave is also granted to the applicant to file her defence to the counterclaim out of time. Such defence to be filed within 7 days of the date of this ruling. Similarly, the respondent is at liberty to file a reply to defence to counterclaim within 7 days of being served.
17. Costs are in the cause.
18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 28TH DAY OF JANUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Migwi for 1st Defendant

Mugane holding brief for Muchangi Gichoya for Plaintiff

Francis Munyao - Court Assistant

