

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC No. 404 OF 2014

AMOS KIBURU WAINAINA & OTHERS PLAINTIFF

VERSUS

ROSE MUTHONI t/a MANJING ENTERPRISES.....1ST DEFENDANT

JULIA WAMBUI GICHIA &

JANET WANJIKU MBUGUA

(sued as the Executors of the estate of

ALEXANDER WAINAINA NJOROGE..... 2ND DEFENDANT

VIPRO LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL & OTHERS.....4TH DEFENDANT

THE LAND REGISTRAR NAIROBI.....5TH DEFENDANT

RULING

1. The 2nd Defendant has moved this court vide his application dated 5th August 2025 seeking the following orders:

a. THAT this Honourable Court be pleased to vary, set aside, and vacate the Order issued on 31st July 2025 by Honourable Lady Justice A. Omollo which dismissed the suit for want of prosecution.

b. THAT this Honourable Court be pleased to reinstate the 2nd Defendant's/Plaintiffs Statement of Defence and Counterclaim dated 15th June 2020 and the Amended Statement of Defence and Counterclaim by the 2nd Defendant/Plaintiff dated 19th October 2023 for hearing and determination on merit.

c. THAT this Honourable Court be pleased to set down the Counterclaim for hearing on priority basis.

d. THAT the costs of this application be provided for.

e. THAT the Honourable Court be pleased to issue any such further orders and directions it may deem fit and convenient taking into consideration all the circumstances and interests of justice of this case into account.

2. The application is premised on several grounds inter alia;

a. The 2nd Defendant/Plaintiff has been desirous of prosecuting his Counterclaim.

b. The 2nd Defendant/Plaintiff was the owner of L.R 209/2788/15 RWW1 MB1 ROAD, NYAMAKIMA AREA, NAIROBI, having purchased it from Lakamshi Popat in 1969.

c. The Honourable Court has inherent and unfettered discretion to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of the issues herein.

d. It is in the interest of justice and equity that the orders issued on 31st July 2025 are reviewed and varied.

3. The Applicant also filed supporting and supplementary affidavits in support of the orders sought. The Applicant reiterated the facts stated on the face of the application in their affidavit sworn in August, 2025.
4. In response to the issues raised in the replying affidavit, the Applicants the 2nd Defendant/Plaintiff has been desirous of prosecuting his Counterclaim. That I am informed by my Advocates on record which information I verily believe to be true that, the 2nd Defendant/Plaintiff 's Application does not offend the clear provisions of Order 51 Rule 13(2) of the Civil Procedure Rules 2010.
5. She denied that the counterclaim is premature, incurably defective, or wrongly drafted. She also refutes the deposition that their counterclaim is procedurally flawed, unmerited, and an abuse of the Court Process.
6. Further, the Applicant deposed that a counterclaim is a fresh suit only that the defendant becomes the Plaintiff for all intents and purposes and that a counterclaim is combined in the Plaintiffs' 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.

7. The application is opposed by the 3rd Defendant, Vipro Ltd, by a replying affidavit sworn by Mr John KAGONYE NGURURI, its director. He deposes, inter alia, that the present application contravenes the clear provisions of Order 51, Rule 13(2) of the Civil Procedure Rules 2010, and therefore the application should be struck out with costs.
8. He avers that the Applicant/Defendant in this case can join the company in this matter only as a 3rd Party in accordance with Order 1 Rule 15 of the Civil Procedure Rules 2010. Consequently, the 2nd Defendant's counterclaim is premature, misplaced, incompetent, and an abuse of the court process, and they urged the court to dismiss it with costs.
9. The 3rd Defendant further stated that the 2nd Defendant's counterclaim is incurably defective and wrongly drafted since the 2nd Defendant has described herself as the Plaintiff and consequently the said counterclaim must be struck out with costs. They contend that the counterclaim is unmerited and an abuse of the court process since the 2nd Defendant has not demonstrated that the late Alexander Wainaina Njoroge is the owner of the suit property herein known as LR NO.209/2788/15.
10. THAT the 2nd Defendant has never been in possession of the suit property, as alleged in paragraph 10 of the Supporting Affidavit. I further state that

all the allegations contained in paragraphs 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14 of the Supporting Affidavit are totally untrue.

11. Directions were given that the application be argued by way of written submissions, and both parties complied. The 2nd Defendant/Applicant filed submissions dated 29th October, 2025, and supplementary submissions dated 27th November, 2025. The 3rd Defendant also filed their submissions dated 20th November, 2025.

ANALYSIS & DETERMINATION:

12. I have read and considered the application and the affidavits sworn in support thereof as well as the replying affidavit filed in opposition thereto. I have also considered the submissions rendered. The question raised by the application is whether or not the order dismissing the suit should be set aside to allow the 2nd Defendant prosecute her counter-claim.

13. On 30th July 2025, this court dismissed the Plaintiff's suit for want of prosecution after they failed to show up to explain the delay in prosecuting their case. Earlier, a notice to show cause had been issued as against the Plaintiff and which on the date of its hearing, Mr Konosi learned counsel for the 1st Defendant informed the court that the NTSC had been served on the Plaintiffs' counsel.

14. Order 7 rule 3 of the Civil Procedure Rules of Cap 21 states thus:

“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 counterclaim sound 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 not to be allowed, refuse permission to defendant to avail himself thereof.

15. It is clear from the court record that the order of dismissal was limited to the Plaintiffs' suit, as they were the ones served with the show-cause notice. Including the 2nd Defendant's counter-claim in the order would be unjust, as it would condemn them unheard. If the 3rd Defendant believes the counter-claim on record (which the Applicants state there is) is incompetent or improper, then they must formally move the court for its dismissal and or striking out.

16. Since the counter-claim was not dismissed for want of prosecution, the 2nd Defendant/Applicant is entitled in law to an opportunity to present their case. Consequently, this court ought to remedy the error in the order that marked the file as closed. The said order was made in error, as it was not brought to my attention on the 30th July, 2025, of the existence of the 2nd Defendant's suit via the counter-claim.

17. Once the file is reopened, limited to the counter-claim, the 2nd Defendant shall be able to prosecute its counter-claim, and/or the 3rd Defendant may move the court to strike it out. It is my holding that the reasons raised in the replying affidavit, inter alia, that they are wrongly joined in the counter-claim as defendants instead of as a 3rd Party, are premature, as there is no application before this court challenging the competence or otherwise of the already existing suit by way of counter-claim.

18. It is on this account that I allow the application by issuing an order setting aside the order dated 30th July, 2025, which marked the file closed. The parties are at liberty to set the counter-claim down for directions on hearing. Each party to bear their respective costs of the application.

Dated, signed and delivered at Kisii virtually this 12th of February, 2026.

A. OMOLLO
JUDGE