



**Choudhry t/a Simz Florist v Choudhry t/a Jamillan Khushi Florists (Commercial Case 187 of 2016) [2025] KEHC 11705 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11705 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 187 OF 2016**

**MN MWANGI, J**

**JULY 31, 2025**

**BETWEEN**

**AMIR MAHMOOD CHOUDHRY T/A SIMZ FLORIST ..... PLAINTIFF**

**AND**

**ASIF MAHMOOD CHOUDHRY T/A JAMILLAN KHUSHI  
FLORISTS ..... DEFENDANT**

**RULING**

1. This Ruling is in respect to the plaintiff's Notice of Preliminary Objection dated 19<sup>th</sup> July 2024, filed pursuant to the provisions of Order 17 Rule 2(5) of the *Civil Procedure Amendment Rules, 2020* and Order 7 Rule 11 of the *Civil Procedure Rules, 2010*, seeking orders for the defendant's defence & counterclaim dated 4<sup>th</sup> February 2020 to be struck out with costs. The said Preliminary Objection is brought on the following grounds –
  - i. That this Honourable Court lacks jurisdiction to hear and determine the reply to defence and counterclaim dated 4<sup>th</sup> February 2020 pursuant to Order 17 Rule 5(2) which stipulates that "A suit stands dismissed after two years where no step has been undertaken";
  - ii. That the current counterclaim is fatally and incurably defective and cannot stand in law;
  - iii. That the continued pendency of the counterclaim suit is an abuse of the court process of this Honourable Court; and
  - iv. That the current counterclaim is incompetently before this Court and should be dismissed in limine.
2. The Preliminary Objection was canvassed by way of written submissions which were highlighted on 12<sup>th</sup> & 13<sup>th</sup> November 2024. The plaintiff's submissions were filed by the law firm of Obwogi J &



Company Advocates on 8<sup>th</sup> August 2024, while the defendant's submissions were filed on 31<sup>st</sup> October 2024 by the law firm of Tariq Khan & Associates Advocates.

3. Mr. Obwogi, learned Counsel for the plaintiff submitted that the defendant's defence and counterclaim filed on 11<sup>th</sup> August 2020 should be dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2(5) of the *Civil Procedure (Amendment) Rules, 2020*. He relied on the decisions made in *Macauley v De Beer and another* [2002] 2 KLR 260 and in *Beatrice Mumbi Wamahiu v Mobil Oil Kenya Ltd* [2011] eKLR and emphasized that a counterclaim is an independent cause of action from the main suit.
4. Counsel argued that since the plaintiff failed to respond to the defendant's counterclaim, the defendant ought to have sought for default judgment, but the defendant took no action, thus his counterclaim was effectively dismissed by operation of the law on 12<sup>th</sup> May 2022 for want of prosecution. Mr. Obwogi cited the case of *Anaclet Kalia Musau v Attorney General & 2 others* [2020] eKLR, and contended that this Court lacks jurisdiction to hear the defendant's counterclaim due to a two-year delay. He argued that limitation of time is a jurisdictional matter, thus the defendant's counterclaim ought to be dismissed immediately.
5. Ms Athman, learned Counsel for the defendant cited the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, and submitted that the plaintiff's Preliminary Objection fails to meet the required legal threshold, as it does not raise a pure point of law. She relied on the Court of Appeal case of *Joseph Muthee Kamau & another v David Mwangi Gichure & another* [2013] eKLR, and argued that a Court's jurisdiction is determined at the time of filing suit, not retroactively. She stated that this Court has had jurisdiction to hear and determine the defendant's counterclaim since 2016 when this suit was filed. She asserted that the Court's jurisdiction could not have ceased simply because the plaintiff's suit was dismissed on 11<sup>th</sup> July 2024.
6. Ms Athman referred to the case of *Muna & 5 others v Boscardin & 5 others* (Environment & Land Case 27 of 2020) [2022] KEELC 3133 (KLR) and the Court of Appeal case of *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR, and argued that since the defendant's counterclaim arises from the same cause of action as the plaintiff's suit, it should be heard in the same proceedings to avoid multiple suits. She contended that following the dismissal of the plaintiff's suit on 11<sup>th</sup> July 2024, the defendant's counterclaim is now properly before this Court. Counsel asserted that the defendant has since taken steps to prosecute its counterclaim, including attending Court on 27<sup>th</sup> July 2023 when directions in respect to the counterclaim were issued. Ms Athman maintained that under Order 7 Rule 13 of the *Civil Procedure Rules* the defendant's counterclaim remains valid and within time, as two years have not lapsed since the plaintiff's suit was dismissed.

### **Analysis And Determination.**

7. Upon perusal of the plaintiff's Notice of Preliminary Objection and the written submissions by Counsel for the parties, the issue that arises for determination is whether the Notice of Preliminary Objection herein should be sustained
8. In order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, but it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. What constitutes



a valid Preliminary Objection was considered by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra)* as hereunder –

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

9. In the said case, Sir Charles Newbold P., stated thus-

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

10. The Supreme Court weighed in, on the issue of what constitutes a proper Preliminary Objection in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR, and stated the following -

.... Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

11. The plaintiff’s Preliminary Objection argues that this Court lacks the requisite jurisdiction to hear and determine the defendant’s counterclaim, as it was automatically dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2(5) of the *Civil Procedure Rules*.

12. On the issue of jurisdiction, in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi, JA., held that–

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

13. This Court notes that from the record, the defendant’s defence and counterclaim dated 4<sup>th</sup> February 2020 was filed on the same day and not on 11<sup>th</sup> August 2020 as stated by the plaintiff. This position is supported by the fact that on 6<sup>th</sup> February 2020, the Court granted leave to the plaintiff to respond to the defendant’s defence & counterclaim and corresponding leave was granted to the defendant to file a reply to the plaintiff’s defence to his counterclaim.

14. As was pointed out by this Court in its ruling of 11<sup>th</sup> July 2024, this suit was scheduled for hearing on 25<sup>th</sup> February 2020 but was adjourned to 12<sup>th</sup> May 2020, on which day it was stood over generally due to non-attendance by both parties. This Court further found that no action was taken in this matter by either the plaintiff or the defendant until 31<sup>st</sup> May 2023 when it came up for Notice to Show Cause why it should not be dismissed for want of prosecution.



15. The plaintiff's contention is that the defendant's counterclaim stood dismissed by operation of the law pursuant to the provisions of Order 17 Rule 2 (5) of the *Civil Procedure Rules* which states that –

A suit stands dismissed after two years where no step has been undertaken.

16. This Court's considered view is that the defendant's contention that his counterclaim could only be heard upon discontinuance or dismissal of the plaint is misconstrued because a plaint and a counterclaim ought to be canvassed in one suit as they stem from the same cause of action and to avoid multiplicity of suits. Further, I am of the considered view that just as the plaintiff, the defendant had a duty and/or responsibility to follow up on the suit and set it down for hearing, since both parties herein had a stake in the suit.

17. In view of the foregoing, I am persuaded that just like the plaintiff's suit, the defendant's counterclaim stood dismissed by operation of the law as at 12<sup>th</sup> May 2022.

18. In the end, this Court finds that the plaintiff's Notice of Preliminary Objection dated 19<sup>th</sup> July 2024 is merited. It is hereby upheld with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Mr. Attalo for the plaintiff

Mr. Malik holding brief for Mr. Khan for the defendant

Ms B. Wokabi – Court Assistant.

