



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 694 OF 2012**

**AFRICA TELECOM SOLUTIONS LIMITED.....PLAINTIFF**

**VERSUS**

**KIWAKA GENERAL MERCHANTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING NO.2**

1. The application before me is for the setting aside of the Interlocutory Judgement which was entered against the defendants on 10<sup>th</sup> July 2013.
2. When canvassing the application, Mr. Kago, the learned advocate for the defendants, submitted that the interlocutory judgement was irregular.
3. As far as the defendants were concerned, the Deputy Registrar could only have entered judgement if the plaintiff's claim was for a pecuniary demand or for the recovery of goods.
4. It was the defendants' understanding that this is a case in which the plaintiff was seeking a Permanent Injunction, and that, therefore, the provision of Order 10 Rule 6 did not envisage the grant of an interlocutory judgement in a case of this nature.
5. In response to that submission, Mr. Otachi, the learned advocate for the plaintiff, submitted that the Plaintiff did incorporate a pecuniary claim. Therefore, the plaintiff believes that the Deputy Registrar was entitled to enter interlocutory judgement, and thereafter the other claims could proceed to Formal Proof.
6. The second issue raised by the defendants was that they had already filed and served a Defence before the Deputy Registrar entered the interlocutory judgement.
7. Thirdly, the defendants asserted that the Defence on record raised triable issues, including the plea of Res Judicata.
8. The alleged plea of Res Judicata was said to stem from a decision by the Court in Miscellaneous Application No. 947 of 2007. The defendants told this court that the subject matter of the case had been vested in the 1<sup>st</sup> Defendant, by an order of the Court.
9. According to the defendants, the plaintiff was now seeking to set aside the vesting orders through the

Formal Proof. The said attempt was said to be an attempt to circumvent not just the decision of the High Court, but also a decision by the Court of Appeal, which dismissed the plaintiff's application for stay pending appeal.

10. The appeal had been lodged by the plaintiff herein, to challenge the decision of Waweru J., who had refused to set aside the sale to the 1<sup>st</sup> defendant.

11. When responding to the application, the plaintiff's advocate pointed out that the defendants failed to file their Defence within 14 days of entering appearance.

12. The appearance was entered on 4<sup>th</sup> June 2013, and so the defendants had up to 18<sup>th</sup> June 2013 to file their Defence.

13. The court records show that on 24<sup>th</sup> June 2013, Havelock J. directed the defendants to file and serve their Defence and Counter-claim within 14 days.

14. By the plaintiff's calculations, the 14 days period lapsed on 8<sup>th</sup> July 2013. Therefore, on 11<sup>th</sup> July 2013, the plaintiff filed a Request for Judgement in default of Defence.

15. The court records show that on 12<sup>th</sup> July 2013, the learned Deputy Registrar entered judgement against the defendants.

16. The court records also show that on 12<sup>th</sup> July 2013, the defendants filed a Defence and Counter-claim.

17. The plaintiff does not dispute the fact that the defendants filed and served the Defence on 12<sup>th</sup> July 2013. But the plaintiff emphasizes that the defendants did not comply with the order which required them to file and serve their Defence within 14 days from 24<sup>th</sup> June 2013.

18. The plaintiff submitted that the defendants ought to have sought an extension of the time for the filing of the Defence. Therefore, as the defendants did not seek an enlargement of time, the plaintiff contends that the Defence was irregular.

19. In my considered opinion, the fact that the defendants did not seek an enlargement of time for filing the Defence, did not render the Defence irregular.

20. The fact that the law or the court stipulates the number of days within which a Defence should be filed implies that if there was no compliance within the stipulated time-span, the plaintiff would be at liberty to take further steps in the case. Such steps include the filing of a Request for Judgement in default of Defence.

21. However, provided that the court had not yet entered judgement in default of Defence, the defendant may file his Defence, and it shall be regular.

22. Therefore, provided that the Defence and Counter-claim in this case were filed before the Deputy Registrar had entered judgement, the Defence was properly on record.

23. If the Defence was not on record, the Deputy Registrar would have been right to enter interlocutory judgement, provided that such judgement was limited to the liquidated claim.

24. Pursuant to Order 10 Rule 4 (1) of the Civil Procedure Rules, the Deputy Registrar may enter a final judgement if the plaintiff only makes a liquidated demand.

25. However, pursuant to Order 10 Rule 4 (2);

***“Where the plaintiff makes a liquidated demand together with some other claim, and the defendant***

***fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgement for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgement upon such other claim?.***

26. That is the position when the defendant or defendants do not enter appearance within the stipulated period.

27. Order 10 Rule 6 says that;

***“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the defendant fails to appear, the court shall, on request in Form 13 of Appendix A, enter interlocutory judgement against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be?.***

28. I have only set out the foregoing to illustrate the point that interlocutory judgement may be entered even in cases in which the plaint also has claims other than pecuniary damages.

29. Pursuant to Order 10 Rule 10 of the Civil Procedure Rules, the provisions of rules 4 to 9, inclusive, are applicable, with any necessary modification where the defendant has failed to file a defence.

30. Therefore, when a plaint contains a liquidated demand together with some other claim, the court shall enter judgement for the liquidated demand, if the defendant has failed to file a Defence.

31. In this case I find that there was a Defence on record by the time the Deputy Registrar entered judgement. Therefore, the judgement was irregular, and must be set aside.

32. However, in the event that I were wrong about the Defence preceding the entry of the judgement, I note that the said Defence raises serious issues of law and fact. In other words, the Defence raises triable issues.

33. In the circumstances, I would still have exercised my discretion by setting aside the interlocutory judgement, so that the parties can have an opportunity to canvass their respective cases on merit. My said decision is informed by, *inter alia*, the fact that there were already some decisions of the High Court and also of the Court of Appeal, which have a bearing on the disputes between the parties in this case. Those decisions would have to be given due consideration before the court can come up with a substantive decision on the case.

34. In the result, the interlocutory judgement is set aside.

35. However, the costs of the application shall abide the final judgement. If the plaintiff is ultimately successful, it will also be awarded the costs of the application. But if the defendants are successful, the plaintiff will also pay to them, the costs of the application dated 2<sup>nd</sup> February 2016.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of October 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

*Miss Omesa for Otachi for the Plaintiff*

*No appearance for the 1<sup>st</sup> Defendant*

*No appearance the 2<sup>nd</sup> Defendant*

*Collins Odhiambo – Court clerk.*