



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS AND TAX DIVISION
CIVIL CASE NO. 658 OF 2008

AFRICA HAUL LIMITED PLAINTIFF
VERSUS
CMC AVIATION LIMITEDDEFENDANT

RULING

1. The Notice of Motion dated 30th June 2009 is brought by the Plaintiff under the provisions of Order IXA, rule 10 XLIX, inter alia of the Civil Procedure Rules. The Plaintiff is seeking for an order that a judgment in respect of a counterclaim for Kshs. 2,320,821.80 which was entered in favour of the Defendant on 26th February 2009 be set aside and the Plaintiff be given leave to file a reply to the defence and counterclaim. This application is based on the grounds that on 16th December 2008; a reply to defence and counterclaim was erroneously filed before the Chief Magistrate's court. That was through a mistake which was inadvertent on the part of the counsel for the Plaintiff.

2. This application is supported by the affidavit of **Mr. Njoroge Wachira** counsel for the Plaintiff. He explained how the reply to defence and defence to counterclaim was filed by his Court Clerk to the wrong court. He has also annexed the copy of that pleading which was filed in the wrong court. Counsel also relied on written submissions in which he urged the court to be guided by the overriding objective in the administration of justice and pardon the mistake. Moreover by allowing the reply to defence and counterclaim to be filed, that will not in any way prejudice the Defendant.

3. It was further submitted that the judgment in respect of the counterclaim was not regularly obtained. There is no power by the Deputy Registrar to enter judgment in default of reply to defence and defence to counterclaim. For that proposition counsel relied on the case of; **Kenneth Njagi Njiru v Housing Finance Company of Kenya Limited & another [2005] EKLR** in which **Kasango J** posited the following opinion:

“When one reads Order 9A it is clear that the Deputy Registrar is empowered to enter judgment for the plaintiff in default of appearance and defence. There is no provision under that order for the entry of judgment on a counter claim. I am of the view that the plaintiff is correct in stating that the deputy registrar did not have power to enter judgment on the counter claim. I am, in reaching this conclusion also respectfully persuaded by the ruling of Hon Justice Azangalala in the case HCCC No. 594 of 2004 (Milimani) KENYA SHELL LIMITED VERSUS KILELESHWA SERVICE STATION LTD (unreported). The judge stated that there is no rule, which authorizes the entry of judgment on counter claim, in default. The judge quoted O8 R 13 of the Civil Procedure rules and then sated:-

“My understanding of this rule is that judgment on a counterclaim may only be given upon merits. I have found no other rule that would entitle the defendant to judgment in default of a defence to counterclaim. I am not alone in this view. Harris J was of the same view in KAHURU BUS SERVICE – VERSUS PRAFUL PATEL [1979] KLR 213 and so was Onyango Otieno J, as he then was in BOC KENYA LTD VERSUS CHEMGAS LTD [1999] LLR 1499.”

In the end I therefore find that the deputy registrar had no jurisdiction to enter judgment on

the 1st defendant's counterclaim."

4. This application was opposed by the Defendant; reliance was placed on the replying affidavit of **Adi Dastur** sworn 26th March 201. Counsel for the Defendant also relied on written submissions. It was argued that a counterclaim is an independent suit as such if there is no defence filed, the Defendant is entitled to apply for judgment under **Order IXA rule 3(1)** of the **Civil Procedure Rules**. In this case a regular judgment was entered on 26th January 2009 and there are no justifiable reasons why the default judgment should be set aside. Counsel relied on several decisions especially the case of; **Muthaiga Road Trust Company Ltd vs. Five Continents Stationers Ltd & 2 Others (200) KLR**, in which the Court of Appeal at page 718 quoted from **Patel vs. EA Cargo Handling Services Ltd (1974) EA** where it was held as follows:

"...I agree that where it is a regular judgment as is the case here the Court will not usually set aside judgment unless it is satisfied that there is a defence on merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

4. The Plaintiff was also faulted for being guilty of laches. The default judgment was entered on 26th February 2009 and it was not until 30th June 2009 when they made this application to set it aside. No explanation has been offered for this inordinate delay it can therefore be said that the plaintiff's application is merely meant to obstruct or frustrate the course of justice. Counsel urged the court not to consider the so called mistake of an advocate. The applicant has not acted diligently to secure their rights and the application should be dismissed.

5. This application invokes the jurisdiction under **Order IXA Rule 10** of the **Civil Procedure Rules** which provides as follows:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

The Plaintiff has offered an explanation that the reply to defence and defence to the counterclaim was filed before the Chief Magistrate's court erroneously. They have annexed a copy which bears the court stamp of the Chief magistrate's court of the 16th December 2008. Although the issues of the triable matters is for the trial court, on the face of the reply to defence and counterclaim, the issues raised there cannot be said to be without merit. The other issue to consider in this application is whether by allowing the applications to set aside the exparte judgment of a counterclaim, will that cause injustice to the Defendant? This has to be looked at proportionally with the reply to the defence and counterclaim and assess whether the damage to be caused to the Defendant cannot be compensated with costs.

6. Another element to consider in this application which in my view is an important issue is whether under Order IXA rule 3 the deputy registrar is given power to enter judgment in default of a defence to the counterclaim. According to counsel for the Defendant, a counterclaim is an independent suit and in the absence of a defence and reply, default judgment can be entered much the same way as it is done in a case filed by a plaintiff. I tend to defer with this argument and agree with the opinion of **Kasango J** in the case of **KENNETH NJAGI NJIRU** (supra). This is for the simple reason that in the case of counterclaim, there are two parties and when the notice for entry of default judgment on the counterclaim was heard, or considered before the deputy registrar, that proceedings should have been inter parties.

7. This is in line with the principles of proportionality that both parties should be notified of any proceedings and should be given a chance to participate. I therefore have no hesitation to arrive at the conclusion that the reasons given by the Plaintiff that the reply and defence to the counterclaim were filed in the wrong court and the fact that the Plaintiff was not a party to the notice of entry of default judgment when it appeared before the deputy registrar on 26th February 2009, I allow the notice of motion dated 30th June 2009. The Plaintiff is given fifteen days within which to file the reply to defence and defence to counterclaim. The Defendant will also have fifteen days upon service of the reply to defence and defence to the counterclaim to file their respective reply.

8. The Defendant will also be entitled to the cost of this application.

RULING READ AND SIGNED ON THIS 22ND DAY OF OCTOBER, 2010

M. K. KOOME

JUDGE