



Civil Practice and Procedure

- *O 48 R. 2 The deputy registrar has no power to enter judgment on counterclaim in default of defence to counter claim.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 78 of 2005

KENNETH NJAGI NJIRU.....PLAINTIFF

VERSUS

**HOUSING FINANCE COMPANY OF KENYA
LIMITED**

VILA BENEVANTE LIMITE.....DEFENDANT

RULING

The plaintiff by his chamber summons date 15th April 2005 seeks the following orders: -

- That the Honourable court be pleased to set aside the default judgment entered in favour of the 1st defendant against the plaintiff in respect of the counter claim;
- That the plaintiff be granted leave to file a defence to the 1st defendant's counter claim in terms of the draft appended to this application.

The application is brought under section 3A and 63 (e) of the Civil Procedure Act and order IXA Rules 10 and 11, order 111 of the Civil Procedure Rules.

The application is based on two broad grounds; firstly that the plaintiff was not served with the defence and counter claim; secondly that there are no provisions which give the deputy registrar power to enter judgment on a counter claim, in default of a defence to counter claim.

The plaintiff by his affidavits in support of the application and by oral submission by counsel submitted that the 1st defendant did not serve the defence and counter claim and that the affidavit for service was false. That the allegation that the plaintiff's advocates' secretary was served was not true because she was not in employment at the time of alleged service.

In opposition to this ground the 1st defendant's counsel stated that even though the plaintiff alleges non-service in the plaintiff's advocates' file the 1st defendant's defence and counsel counter claim was there. He said that the plaintiff's failure to explain how that document got in his lawyer's file, the court had no

option but to consider that the plaintiff was not being candid on this issue.

The second ground raised by the plaintiff is, I believe, a far more important ground, which I shall consider for this ruling. Plaintiff's counsel stated that the power donated to the deputy registrar to enter judgment in default is O. 9A. Counsel therefore argued that the deputy registrar had no jurisdiction to enter judgment on counter claim. The 1st defendant's counsel responded to this argument and stated that the deputy registrar had power to enter judgment in default, for a liquidated amount.

I have considered counsel's argument and the affidavits evidence hereof order 48 rule 2 provides: -

“Judgment may, on application in writing, be entered by the Registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the chief Justice by writing under his hand in the following cases: -

- (a) under Order IXA**
- (b) in all other cases in which the parties consent to judgment being entered in agreed terms.**
- (c)”**

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 stated: -

“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 1400.”

In the end I therefore find that the deputy registrar had no jurisdiction to enter judgment on the 1st defendants counter claim.

The order of this court as follows: -

- (1) That the default judgment entered in favour of the 1st defendant against the plaintiff on 5th April 2005 is hereby set aside.**
- (2) That the plaintiff is granted leave to file a defence to the counter claim within 14 days from todays date.**
- (3) That the costs of the application dated 15th April 2005 are awarded to the plaintiff**

Dated and delivered this 21st September 2005.

MARY KASANGO

JUDGE