



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 177 of 1996

COACH SAFARIS

LIMITED.....APPELLANT

AND

**GUSII DELUXE LIMITED.....
.....RESPONDENT**

**(Appeal from the judgement of the high court of Kenya at Kisumu (Mr. Richard Kuloba) dated
16th May, 1996**

IN

H.C.C.C. NO. 484 OF 1993)

JUDGMENT OF THE COURT

Coach safaris Ltd., the appellant herein, to whom we shall hereafter refer to as “the plaintiff”, filed a suit in the superior court against Gusii Deluxe Ltd., the respondent, (hereinafter called “the defendant”), claiming a liquidated sum of Shs. 1,357,100/- being special damage alleged to have been sustained by the plaintiff when its motor vehicle, a bus, registration No. KAA 410 S collided with another bus registration No. KAA 225C belonging to the defendant at Kericho on 14th October, 1992. It was contended by the plaintiff that the accident was caused by negligence on the part of the defendant’s driver and the particulars of the negligence were set out in paragraph 4 of the plaint. Particulars of special damage were also pleaded.

The defendant entered appearance on 10th April, 1995 but did not file a defence within the time prescribed for that purpose. The plaintiff then applied for judgment in default of defence under order 9A rule 3 as read with rule 9 of the civil procedure Rules. On 5th May 1995, the Deputy Registrar purported to enter “interlocutory” judgment in default of defence but in actual fact it should have been a final judgement in terms of rule 3 above this being a liquidated demand. That being the case there was no necessity for formal proof.

The so called “interlocutory” judgment was by consent set aside on 19th June, 1995 on terms that the defendant pays throw away costs agreed at Shs. 32,000/- within 14 days from the date. In default the said “interlocutory” judgment was to be reinstated without further application. In the event, the defendant

defaulted and the “interlocutory” judgment was thereby automatically reinstated. So whatever followed thereafter by way of formal proof was a nullity and a complete waste of judicial time. In these circumstances we do not have to deal with the propriety or otherwise of what the Judge did thereafter.

By reason of the provisions of order 9A rule 3 of the civil procedure Rules, the plaintiff having made a liquidated demand, it was entitled to final judgement in default defence. In the result, we allowed the appeal and set aside the decree of superior court dated 16th May, 1996. For the avoidance of doubt we wish to state that the judgement which was entered on 5th May, 1995 is still in place. The plaintiff will have the costs of this appeal.

Dated and delivered at Kisumu this 14th day of March, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR