



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 1419 OF 1976**

**KAHURU BUS SERVICE.....PLAINTIFF**

**VERSUS**

**PRAFUL PATEL.....DEFENDANT**

**JUDGMENT**

This is an application for judgment under the Civil Procedure Rules, order VI, rule 9, and order IXA, rules 3 and 9, brought by the defendant on his counterclaim to which the plaintiff has failed to file a defence. The plaint, which claimed payment of a liquidated sum of Shs 173,015/25 with interest and costs, was filed on 22nd June 1976, and the defence and counterclaim, traversing the plaint and counterclaiming for a liquidated sum of Shs 44,560 with interest and costs, was filed on 22nd July 1976. No reply to the defence or defence to the counterclaim has been filed.

Order VI, rule 9(1), provides that, subject to rule 9(4) (which is not material), any allegation of fact made by a party in his pleading should be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of the allegation; rule 9(3) declares that an allegation of fact in a counterclaim which the party on whom it is served does not intend to admit should be specifically traversed by him in his defence to that counterclaim; and rule 10(3) and (4) states that there can be no joinder of issue on a plaint or counterclaim.

The question therefore arises as to whether the defendant is entitled under rule 9(3) to apply for judgment in default of a defence to this counterclaim? There is a number of conflicting decisions on this matter, although none was referred to by either counsel.

Order VI deals with pleadings in general, their requirements and effect, how they may be struck out or amended by the Court, and the manner in which they are dealt with at the trial of the suit. Its function is not to deal with applications for judgment based on the absence of pleadings, which is covered in order IXA.

In the corresponding English procedure, order 19, rule 8, of the Rules of the Supreme Court 1965 expressly places a defendant, who has filed a counterclaim to which no defence is filed, in the same position as a plaintiff to whose plaint no defence is filed; and specifically enables such a defendant to apply for judgment on his counterclaim. No such provision is contained in either order VI or order IXA of our rules; and the position of a defendant to whose counterclaim no defence has been filed is not equated to that of a plaintiff to whose plaint no defence has been filed so far as relates to obtaining judgment in default.

For these reasons I am not satisfied that I have jurisdiction to grant judgment on the counterclaim as sought.

The defendant also seeks an order dismissing the suit under order XVI, rule 5, for want of prosecution on the ground that the plaintiff failed to set it down for hearing within three months after the pleadings had closed more than two years ago. There is no doubt that the plaintiff is greatly in default and that I could properly dismiss the suit as requested. The plaintiff's advocate accepts full responsibility for that position in regard to each application and has offered to personally pay the defendant's costs.

In the circumstances I will dismiss both applications with costs to the defendant and direct that they be

borne by the advocate for the plaintiff out of his own resources.

*Applications dismissed.*

**Dated and delivered at Nairobi 11this 27th day of June 1979.**

**L.G.E HARRIS**

**JUDGE**