



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NYERI  
CIVIL CASE NO.17 OF 2009**

**STEPHEN CHEGE WAWERU**

**(SUING AS THE ADMINISTRATOR OF THE ESTATE OF**

**WAWERU KININI alias**

**WAWERU**

**KANINI .....PLAINTIFF**

**VERSUS**

**EPHANTUS MWANGI & 16**

**OTHERS .....DEFENDANTS**

**RULING**

On 24<sup>th</sup> November 2009, the Deputy Registrar of this court entered judgment in favour of the plaintiff and against Defendants in default of appearance and defence. The Defendants have now taken out the summons dated 23<sup>rd</sup> April 2010 in which they have prayed for the exparte judgment to be set aside pursuant to the provisions of order IXB rule 8 of the Civil Procedure Rules. The summons is supported by the affidavit of Josphat Kirigi sworn on 26<sup>th</sup> April 2010. It is deponed that the Defendant’s advocate was not served with the application or a hearing notice which gave rise to the judgment of 24<sup>th</sup> November 2009 hence he did not attend court. It is also argued that since the Plaintiff’s claim is liquidated the court should not have entered interlocutory judgment as the same is not provided by law. Stephen Chege Waweru, the plaintiff herein, filed a replying affidavit he swore to oppose the summons. It is the plaintiff’s submission that interlocutory judgment was entered when the defendants failed to file a defence despite having been served with relevant pleadings and having entered appearance. It is said that the defendants have not given the reasons why they did not file a defence within the stipulated time.

I have considered the rival submissions plus the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the summons. There is no doubt that judgment was entered on 24<sup>th</sup> November 2009 pursuant to the application dated 17<sup>th</sup> November 2009. In aforesaid application, the plaintiff sought for entry of judgment in default of a defence. When the application was presented before the Deputy Registrar on 24<sup>th</sup> November 2009 he promptly entered judgment in default of appearance and or defence. The record shows that interlocutory judgment was entered in default of appearance and defence. With due respect, I think the learned Deputy Registrar erred when he entered interlocutory judgment in default of appearance. The record shows that the defendants had entered appearance on 17<sup>th</sup> February 2009. In any case the application for entry of judgment dated 17<sup>th</sup>

November 2009 was on the basis that the defendants had not filed a defence. I agree with the submissions of Mr. Mindo, learned advocate for the plaintiff that the presence of learned advocates or parties is not necessary when the Deputy Registrar is dealing with a formal request for entry of interlocutory judgment in default of appearance and or defence. The defendants were required to give reasons why they did not file a defence within time. The defendants actually filed a defence dated 27<sup>th</sup> February 2009 was struck out pursuant to the application dated 28<sup>th</sup> April 2009 on the basis that it was filed in the wrong court i.e Murang'a S.P.M.'s court. The defendants did not file any defence until the plaintiff requested for entry of interlocutory judgment in default of defence. The prayer was granted with a directive that the action be fixed for hearing as a formal proof. No reasons have been given by the defendants as to why they have not filed a competent defence despite the fact that they were aware that their defences were ordered struck out. The main reason advanced by the defendants in support of the application is that there was no provision providing for entry of judgment an unliquidated claim. The plaintiff's claim is not a liquidated claim. It would appear under Order IXA of the Civil Procedure Rules (now order 10) the law only provides for entry of judgment in liquidated claims. The law is silent when it comes to unliquidated claims. Under Order IXA rule 5 of the Civil Procedure Rules, a plaintiff is entitled to request for an interlocutory judgment in default of appearance if the claim is for pecuniary damages or detention of goods with or without a claim for pecuniary damages. The suit before this court is for injunction, general damages for property destroyed and trespass. It is obvious the claim does not fall within the claim envisaged under rule 5. With respect I agree with the submissions of Mr. Ombongi, that the learned Deputy Registrar erroneously exercised his discretion when he entered an interlocutory judgment in default of defence yet the law did not give him discretion to do in such suits. This court is entitled to vacate by setting aside orders given without jurisdiction.

In the end I am satisfied the summons dated 23<sup>rd</sup> April 2010 is well founded. It is allowed as prayed with costs to the Defendants. The defendants are given 10 days to file their defence(s).

Dated and delivered this 18<sup>th</sup> day February 2011.

**J.K. SERGON**

**JUDGE**

In open court in the presence of Mr. Mindo for the Respondent and Kangata for Applicant.

**J.K. SERGON**

**JUDGE**