



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 357 of 2005**

**1. DAVID GEORGE BELL**

**2. ESTHER GLORIA MWIHAKI BELL .....PLAINTIFFS**

**V E R S U S**

**1. ASHUTOSH BHASIN GIRO**

**2. COMMERCIAL BANK LIMITED .....DEFENDANTS**

**R U L I N G**

The main order sought in the chamber summons dated 20<sup>th</sup> December, 2006 is that the *ex parte* judgment obtained herein by Plaintiff against the 1st Defendant be set aside. The application is brought under Order 9A, rule 10 of the Civil Procedure Rules (the Rules). The grounds for the application appearing on the face thereof are:-

1. That the judgment was obtained due to an oversight on the part of the 1<sup>st</sup> Defendant's advocates.
2. That the 1st Defendant's advocates will suffer irreparably unless the judgment is set aside.
3. That the 1st Defendant was never served with notice of judgment.

There is a supporting affidavit sworn by JAMES GITAU SINGH, the 1st Defendant's advocate.

The application is opposed by the Plaintiffs. There are grounds of opposition dated 18<sup>th</sup> January, 2007 filed on the same date and also a replying affidavit sworn by the 2<sup>nd</sup> Plaintiff, also filed on the same date. The grounds of opposition are:-

1. That the application is defective, bad in law, vexatious and an abuse of the court process.
2. That the affidavit sworn by James Gitau Singh in support of the application is incompetent as it contains evidential material that compromises the said advocate's status as counsel for the 1<sup>st</sup> Defendant, and that therefore it should be struck off.
3. That the 1<sup>st</sup> Defendant has come to court with unclean hands as he has previously made every effort to frustrate the Plaintiffs' cause of action.
4. That the application has been brought with the sole purpose of frustrating the "formal proof" hearing

scheduled for 20<sup>th</sup> February 2007.

5. That the 1<sup>st</sup> Defendant having previously failed to obey the orders of the Court in **Civil Appeal No. 195 of 2006**, is in contempt of this court and should not be granted audience in this application until he obeys the said orders.

When the application came up for hearing on 20<sup>th</sup> February 2007 the learned counsels appearing agreed that they should limit their submissions to two issues only:-

1. Whether interlocutory default judgment as entered was available to the Plaintiffs under the rules.
2. If so, whether the court should exercise its discretion to set aside the default judgment.

The first issue is purely a legal one. Interlocutory judgment in default of either appearance or defence is available only as set out in Order 9A, rules 3, 4, 5, 6 and 7 of the Rules. Rule 7 makes provision for default judgment against the Government and does not concern us in this application. Rule 3(1) provides for default judgment where the plaintiff makes a liquidated demand only. Sub-rule (2) of the same rule provides for default judgment where the plaintiff makes a liquidated demand together with some other claim. Rule 4 makes provision for default judgment where the plaintiff makes a liquidated demand with or without any other claim. Rules 5 and 6 provide for interlocutory judgment where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages.

We must now turn to the plaintiff to see if the reliefs sought therein fit any of the above categories set out in Order 9A foresaid. The amended plaintiff dated 24<sup>th</sup> October, 2005 seeks two declarations, an order that some entries in the register of an immoveable property be cancelled, a mandatory injunction, an order for delivery to the Registrar of Titles for cancellation the title document of the same immoveable property, two permanent prohibitory injunctions, unliquidated *mense profits*, general damages and costs.

It is immediately clear that the amended plaintiff does not make a liquidated demand only (rule 3(1)), nor a liquidated demand together with some other claim (rule 3(2)), nor a liquidated demand with or without some other claim (rule 4), nor a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages (rules 5 and 6). There is no liquidated demand at all made in the amended plaintiff; nor is it drawn with a claim for detention of goods with or without a claim for pecuniary damages. Clearly, no interlocutory default judgment was available to the Plaintiffs under the rules, and it so hold. The interlocutory judgment entered on 25<sup>th</sup> August, 2006 was thus illegally entered and must be set aside as a matter of right.

Having so decided, I need not determine the second issue, that is, whether the court should exercise its discretion anyway to set aside the default judgment. The judgment will be set aside as a matter of law, not as a matter of discretion.

In the result, I must allow the application. The default judgment entered on 25<sup>th</sup> August 2006 (and all consequential orders) be and is hereby set aside with costs to the 1st Defendant. Order accordingly.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF APRIL 2007**

**H. P. G. WAWERU**

**JUDGE**