

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS, NAIROBI.**

Civil Case 146 of 2005

CYRUS KARIUKI WAITHAKAPLAINTIFF

VERSUS

HEZRON K. WAITHAKADEFENDANT

R U L I N G

The Applicant by his application of the 19.8.2005 seeks an order to set aside the interlocutory judgement entered herein on the 13.7.2005.

The grounds are set out in the Chamber Summons and Supporting Affidavit.

The Applicant relied on O 5 Rule 9 (2) which states;

“A summons may be delivered to an advocate who has instructions to accept service and to enter an appearance to the summons, but judgement in default of appearance may not be entered after such delivery”.

In this case the summons was served upon the Applicant’s advocates (See Affidavit of Service sworn by Eric Osingo herein on the 7.7.2005).

The Applicant also attacked the judgement as having been entered wrongly as it contravened the provisions of Order 9A rule 4 as there is no liquidated demand made in the plaint.

The relief claimed in the plaint includes special damages as specified in paragraph 16 of the Plaint.

From a reading of this Plaint the Plaintiff is seeking orders that the Defendant holds the suit parcels in trust for him. Mr. Wandabwa submitted that the claim was based on quasi contract for money had and received. This is not however what the Plaintiff claims. Had he done so and claimed a specific amount then interlocutory judgement could have been granted. As it is, the Plaintiff is seeking orders, which are not of a pecuniary nature. I agree with Mr. Muriithi that a claim for special damages is not a liquidated one. It requires to be proved.

The provisions of Order 5 rule 9 (2) prohibit interlocutory judgement being given. However the judgement does not fall within the provisions of O 9A rule 4 and as such was wrongly entered.

In the result I set aside the judgement and order the Applicant to file his defence within 14 days. Costs in cause.

Dated and Delivered at Nairobi this 17th day of October,2005

P. J. RANSLEY

JUDGE