REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 117 OF 2007

KENYA ANTI CORRUPTION……..……..……..….PLAINTIFF
VESUS
MICHAEL KIBUCHI GITUTO.……..……..…..DEFENDANT

R U L I N G

The Applicant has moved this court under **Order IXA Rules 10 & 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.** Prayers 1 & 2 of the Application have been spent and this Application is in respect of prayers 3 & 4. These prayers are as hereunder

3. "That the ex-parte judgment entered on 25.9.07 be set aside and all the consequential orders to allow the Applicant enter appearance and file defence so that the case can be heard and determined on merit.

4. ***That the memorandum of Appearance and draft defence annexed to the Application be deemed to have been duly filed upon payment of the requisite filing fees".***

The same is premised on 9 grounds on its face and on the applicant's supporting affidavit dated 30.06.08, and the affidavit of his former counsel on record Mr. Munene Muriuki and several annexures.

The gist of the applicant's case is that after he was served with the plaint and summons, he forwarded the same to Mr. Munene Muriuki with instructions that he enters appearance and files a defence thereto. He left the matter in the trusted hands of his advocates waiting for further communication from him. The next thing that he received was a notice to show cause why he should not be committed to civil jail for the payment of a decretal amount of KShs.8,959,906.50 which was by any standards not a mean amount. He went to his advocate to find out what had happened and it was then that he realized that ex-parte judgment had been entered against him in default of filing a defence.

These averments are corroborated by Mr. Munene's affidavit. He says that the documents in respect of this matter were filed in Nyeri, **CMCC No. 285 OF 2007** which is in respect of the same parties.

The grounds the applicant seems to be strongly relying on is that of excusable mistake or error on the part of his counsel.

On the other hand, counsel for the respondent opposed the application. His main ground is that the judgment was regularly entered and so this court should be guided by the Court of Appeal decision in **CHEMWOLO & ANO. VS KEBENDE (1986) KLR 492** and decline to set aside the ex-parte judgment herein.

I have carefully considered the application the rival affidavits and the submissions by both counsel along with the authorities tendered. Having done so, I would start by saying that the principles applicable in setting aside ex-parte judgments though generally accepted must be applied along with the peculiar circumstances surrounding each case. Unless for very compelling reasons, a court of law should always lean towards deciding cases on merits and not on technicalities (see **KARATINA GARMENTS LTD VS NYANARUA – (1976) KLR 94.** In this case, service of the plaint and summons was admitted and is therefore not an issue. Should the court therefore hold this as a regularly entered judgment and dismiss the application? This is at the discretion of the court. The said discretion is wide and unfettered but the same must be exercised fairly and judicially. In considering whether to set aside an ex-parte judgment or not, the court's primary aim would be to avoid injustice on either party. The court should consider whether the applicant's failure to enter appearance and/or file a defence was caused by inadvertence or excusable mistake or error. The court should not use its discretion to "***assist a person who has***

deliberately sought to obstruct or delay the course of justice" **(see MBOGO VS SHAH (1968) EA 93.**

The other important issue the court must consider is whether the applicant's defence prima facie raises any triable issues. In the present case, former counsel has explained why no memorandum of appearance or defence was filed. In my view and without repeating the contents of his affidavit, I am satisfied that failure to file the defence was not intentional on the part of the applicant or his previous counsel. Given the amount of money claimed, it would be highly unlikely that either the defendant/Applicant or his counsel could have treated this matter lightly. I am therefore inclined to believe that the said failure was occasioned by an Inadvertent and thus excusable mistake which cannot at all be laid on the shoulders of the applicant but that of his previous counsel. It would be totally unjust to visit this mistake upon the Applicant.

On whether the defence raises triable issues, I have considered the annexed intended defence. Even the amount involved itself warrants the defendant being given a second chance. I am satisfied that his defence raises triable issues that should be canvassed in court at a full trial. Let the Applicant have his day in court. This would not be prejudicial to the plaintiff in any way. Any loss or prejudice the plaintiff may have been subjected to can be assuaged by way of costs.

For the foregoing reasons, I allow this application and allow prayers 3 & 4 of the same.

The Respondent be paid thrown away costs which will include costs incurred by the plaintiff since the entry of the ex-parte judgment including the costs of defending this application.

Orders accordingly.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 27th day of October 2010

In presence of:- Mr. Radido for Plaintiff/Respondent, Ms. Ndorongo for Ms. Fatuma & Mr. Njage for Applicants.