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

**Civil Case 534 of 2008**

**DEPOSIT PROTECTION FUND BOARD(suing as Liquidator of EURO BANK**

**LIMITED (IN LIQUIDATION) ……...……. PLAINTIFF**

**VERSUS**

**WETHE LIMITED ……..…….. DEFENDANT**

**RULING**

This is an application by the defendant brought under the provisions of **Order IXA rule 10** and **11** of the **Civil Procedure Rules** seeking to set aside the exparte judgment that was entered against it in default of filing a defence. The defendant further sought orders setting aside all the consequential proceedings thereto. The defendant further sought to be granted unconditional leave to defend the plaintiff's claim. The grounds in support of the chamber summons are on the face of the application. In essence, the defendant pleads that it did not file defence within the requisite period on account of inadvertent and excusable mistake by its counsel. It was the defendant's case that although it entered appearance within the required period, the advocate who was seized with instructions failed to file defence within the required period. The defendant pleaded with the court not to punish it on account of mistake of its counsel. The defendant averred that it had a *bona fide* defence which should be heard and determined on merits. The application is supported by the annexed affidavit of Katwa Kipchumba Kigen, the advocate for the defendant.

The application is opposed. Muhamud Ahmed Muhamud, the Liquidation Agent of Euro Bank Ltd (in liquidation) swore a replying affidavit in opposition to the application. In the said affidavit, he took issue with the fact that the advocate of the defendant had sworn the affidavit in support of the application instead of the directors of the defendant. He deponed that the exparte judgment entered by the court was obtained regularly after the defendant had failed to file defence within the statutory period. He deponed that the defendant did not have any defence to the plaintiff's claim. He annexed several correspondences written by a director of the defendant admitting to owing the amount demanded by the plaintiff, the only reservation by the defendant being that it had requested the plaintiff to grant it waiver of interest that had accrued on the loan facility. He deponed that the defendant's director had issued cheques in part payment of the debt, which cheques when deposited, were returned unpaid. He reiterated that the defendant did not therefore have a defence to the plaintiff's claim. He was of the view that the defendant was just buying time and seeking to avoid being held liable by seeking to set aside the exparte judgment. He swore that the defendant was indolent and had slept on its rights and should therefore, not be rewarded by having the court set aside a regular judgment. He urged the court to dismiss the defendant's application with costs.

At the hearing of the application, I heard the submissions made by Mr. Sigei on behalf of the defendant and Mr. Odhiambo Ochieng on behalf of the plaintiff. The issue for determination by this court is whether the defendant had established a case to entitle the court exercise discretion in its favour and set aside the exparte judgment. The principles to be considered by this court in determining whether or not to set aside a default judgment are well settled. Where it is established that there was no proper service, this

court has no alternative but to set aside such judgment *ex debito justiticiae* (see **Kanji Naran vs. Velji Ramji (1954) 21 EACA 20**). The court has no discretion other than to set aside the ex-parte judgment. Where it is established that the defendant was served, this court has unfettered discretion to set aside the default judgment, provided that in so doing, no injustice is occasioned to the opposing party. The discretion to set aside ex-parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice (see **Shah vs. Mbogo [1967] EA 116**). Finally, the court must be satisfied that the defendant has a good defence on merits (see **Maina –vs – Mugoria [1983] KLR 78**).

In the present application, certain facts are not in dispute. It is not disputed that the defendant was served with summons to enter appearance. The defendant instructed counsel who entered appearance on its behalf. The defendant did not file a defence within the requisite period. Judgment in default of defence was entered against the defendant on 4th February, 2009. Thereafter, the plaintiff extracted the decree and sought to execute against the defendant. It was when the defendant was served with notice of the plaintiff's intention to execute the decree of the court that the defendant rushed to court and made the present application seeking to set aside the ex-parte judgment. It was therefore clear that the default judgment entered against the defendant was regular. According to the defendant, its failure to file a defence within the requisite period was occasioned by mistake of its counsel who failed to follow its instruction by failing to file defence in time. The defendant urged the court not to punish it for the mistake of its counsel. The defendant argued that it had a defence which should be allowed to be ventilated on merits. On the other hand, the plaintiff was of the view that the defendant had failed to put forward sufficient grounds to enable this court exercise its discretion to set aside the exparte judgment. The plaintiff was of the view that the defendant had been indolent and casual in its conduct of the case. The plaintiff argued that the defendant did not have a defence worth of credit as the defendant had unequivocally admitted owing the amount due to the plaintiff. The plaintiff urged the court to dismiss the defendant's application with costs.

As stated earlier in this ruling, the default judgment entered against the defendant was regular. However, this court has discretion to set aside any exparte order issued if it is satisfied that the interest of the justice will be served. In the present case, I am persuaded by the explanation given by counsel of the defendant for the delay in filing defence. It appears that the counsel who was instructed to file defence on behalf of the defendant did not give effect to the instructions. The said counsel left employment of the firm that is on record for the defendant. It was only after judgment had been entered, that the principal partner of the firm became aware that a defence had not been filed. When the advocate became aware of the mistake, he immediately took action to remedy the situation.

I accept that, unless it is otherwise established, that mistake by counsel should not always result to a litigant being punished. This court is aware that an advocate acts as the agent of the litigant. In many instances, the acts of an agent bind the principal. In the present case, I am persuaded that this is one of the cases where mistake by counsel should not be visited upon the litigant. The Court of Appeal recognized this legal position in **Kenya Industries Ltd. vs. Samuel Sang & Anor [2008] eKLR** at page 7 where it quoted with approval that the orbiter remarks made by Madan, JA in **Murai vs. Wainaina (No. 4) [1982] KLR 33** in which he stated that:

"*A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but is ought to certainly do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Court of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is also done in the interests of justice.*"

I am also of the opinion that the defence proposed to be filed by the defendant raises at least one triable issue; which is that the manner which the plaintiff has applied interest on the principal amount, especially in the decree, is an issue which can only be resolved when the case is heard and determined on its merits.

I would therefore allow the application filed by the defendant to set aside the exparte judgment entered by this court on 4th February 2009. The said exparte judgment is set aside. The defendant is granted leave to file defence to the plaintiff's suit. The defendant shall file and serve the said defence within fifteen (15) of today's date. The defendant shall pay to the plaintiff thrown away costs which I assess at Kshs.20,000/=. The said amount shall be paid within fifteen (15) days of today's date or in default thereof, the orders issued herein in favour of the defendant shall stand automatically vacated.

It is so ordered.

DATED at NAIROBI this 27th day of MAY, 2009

**L. KIMARU**

**JUDGE**