Bartik & 3 others v Aduda & 2 others (Civil Case E002 of 2024)
[2025] KEHC 12025 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12025 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL CASE E002 OF 2024

OA SEWE, J

JUNE 26, 2025

BETWEEN

RAY BARTIK ..... 1ST PLAINTIFF

KATHLEEN H DODGE & 2 OTHERS ..... 2ND PLAINTIFF

AND

ISAYA MBOYA ADUDA ..... 1ST DEFENDANT

ALIDADE ADHIAMBO MBOYA & ANOTHER ..... 2ND DEFENDANT

RULING

1. This ruling is in respect of the defendants' Notice of Motion dated 16th October 2014. The said application was filed pursuant Sections 1A and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 10 Rule 11 of the Civil Procedure Rules, 2010, for the following orders:

    a. Spent

    b. That the ruling dated 16th October 2024 be stayed pending the hearing and determination of the instant application.

    c. That the Court be pleased to reinstate the application dated 27th September 2024.

    d. That further and in the alternative, the Court be pleased to grant leave to the defendants/ applicants to file their Statements of Defence, Witness Statements and documents in relation to the Plaint.

    e. Costs be in the cause.

2. The application was opposed by the plaintiffs and was disposed of by way of written submissions. Thus, the defendants relied on their written submissions dated 28th October 2024. They cited Articles 159(2)(d) of *the Constitution* and Section 3A of the *Civil Procedure Act* as the basis for their submission

that no litigant should be condemned unheard and that the Court has unfettered discretion to mete justice without undue regard to procedural technicalities.

3. It was further the submission of the defendants that no prejudice will be suffered by the plaintiffs should the orders sought be granted. Reliance was placed on the following authorities to buttress the defendants' arguments:

    a. Gold Lida Limited v NIC Bank & 2 others [2018] eKLR.

    b. Philip Chemwolo & another v Augustine Kubende [1982-88] KAR 103; and

    c. Belinda Murai & others v Amoi Wainaina [1978] eKLR

4. The plaintiffs further submitted that the mistake of an advocate ought not to be visited upon the litigant and reiterated their assertion that Ms. Adingo, who was handling the matter on the material day delayed in joining the Court's virtual platform because she was also handling a Court of Appeal matter on the same day. They further contended that the delay was not inordinate and therefore ought to be excused in the interest of justice considering that the claim is for some Kshs. 42,686,554/= in respect of which they stand to suffer irreparable loss if not afforded a hearing on the merits.

5. The plaintiffs opposed the application. They urged the Court to consider the background of the matter, namely that, though served with the Plaint and Summons to Enter Appearance, the defendants failed to put in their Defence within the statutory timelines which necessitated the entry of interlocutory judgment. The matter was then fixed for formal proof hearing on 28th October 2024. The plaintiffs further pointed out that, thereafter, the defendants filed an application dated 27th September 2024 which was served for hearing on 16th October 2024, but which they did not attend court to prosecute.

6. It was therefore the submission of the plaintiffs that the defendants have themselves to blame for the dismissal of their application dated 27th September 2024. They urged the Court to disregard the reason given for non-attendance contending that it was implausible.

7. The plaintiffs further submitted that the impugned order, being a negative order, is incapable of being stayed as sought by the defendants. They relied on the following decisions:

    a. Kenya Commercial Bank Ltd v Tamarind Meadows Limited [2008] eKLR;

    b. Raymond M. Omboga v Austine Pyan Maranga

8. It was therefore the submission of the plaintiffs that, although the Court has discretion to grant stay, that discretion must be exercised judiciously and only in the most deserving of cases. It was also their contention that in this case there is nothing to justify the exercise of that discretion.

9. Having carefully considered the application, the response thereto by the Respondents and the written submissions filed herein as well as the record of the proceedings herein, there is no dispute that upon the filing and service of the Plaint dated 8th May 2024, the defendants were duly served therewith along with Summons to Enter Appearance dated 3rd July 2024. The court record further confirms that, although the defendants entered appearance, they failed to file their Defence within the stipulated timelines.

10. Accordingly, the plaintiffs applied for and obtained interlocutory judgment against the defendants on 18th September 2024. Thereafter, on the 24th September 2024, the suit was fixed for formal proof on 28th October 2024. In view of that development, the defendants filed an application dated 27th September 2024 seeking the setting aside of the ex parte judgment.

11. There is no dispute that the defendants failed to attend court on the 16th October 2024 when the said application was fixed for hearing; whereupon the application was dismissed with costs for want of prosecution. The explanation now being offered for that situation is that counsel, Ms. Adingo, who had instructions to handle the matter got late in attending court because she was also handling another matter before the Court of Appeal.

12. Although not specifically cited by the defendants, the Civil Procedure Rules recognize that a dismissal order for want of attendance can be set aside. Order 12 Rule 7 states:

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

13. For purposes of the Civil Procedure Rules a "suit" is defined in Section 2 of the *Civil Procedure Act* to mean all civil proceedings commenced in any manner prescribed. To my mind, that definition is wide enough to encompass the defendants' application; but even assuming that I were wrong in my interpretation, Order 51 Rule 15 is explicit in respect of orders made in connection with applications. It states:

> " The court may set aside an order made ex parte."

14. Thus, there can be no dispute that the ex parte dismissal order made on the 16th October 2024 is amenable to setting aside as sought by the defendants. Therefore, the issue for my determination is whether sufficient cause has been shown for the exercise of the Court's discretionary powers to set aside the dismissal order.

15. As pointed out in the case of Mbogo v Shah [1968] EA 93 the discretion is intended to be exercised "...to avoid injustice or hardship resulting from 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.

16. The defendants have relied on two affidavits by counsel in an attempt to explain their non- attendance on the 16th October 2024. They basically contended that the mistake of counsel ought not to be visited on them as clients. Whereas that is not always a plausible explanation, the defendants explained that the amount claimed in colossal and therefore it would only be fair and just that they be heard in defence.

17. In the premises, it cannot be said that the intention of the defendants is simply to obstruct or delay the course of justice. Indeed, in Philip Chemwolo & Another v Augustine Kubende [1982-88] KAR 103, Apaloo JA took the following view:

> " ...I think the charge that the appellants were negligent is one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.
>
> I think a distinguished equity judge has said:
>
> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The

court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

18. Moreover, in CMC Holdings Limited v Nzioki [2004] 1 KLR 173 it was held that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

19. In the premises, I find merit in the application dated 16th October 2024. The same is hereby allowed and orders granted as follows:

    a. That the dismissal order dated 16th October 2024 be and is hereby set aside;

    b. That the application dated 27th September 2024 be and is hereby reinstated for hearing and determination on the merits;

    c. That in the meantime, the intended formal proof proceedings be stayed pending the hearing and determination of the application dated 27th September 2024.

    d. That the costs of the application be costs be borne by the defendants in any event.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 26TH DAY OF JUNE 2025

SIGNED BY: HON. LADY JUSTICE OLGA A. SEWE