



**Utabibu Co-operative Savings and Credit Society Limited v Bank  
of Baroda (K) Limited & 4 others (Commercial Case E005 of 2022)  
[2025] KEHC 12498 (KLR) (Commercial and Tax) (1 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E005 OF 2022  
JWW MONG'ARE, J  
SEPTEMBER 1, 2025**

**BETWEEN**

**UTABIBU CO-OPERATIVE SAVINGS AND CREDIT SOCIETY  
LIMITED ..... APPLICANT**

**AND**

**BANK OF BARODA (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
MONARCH DEVELOPERS LIMITED ..... 2<sup>ND</sup> RESPONDENT  
VRAJBHUSHAN DHAYALAL SHAH ..... 3<sup>RD</sup> RESPONDENT  
SHAH NILESH SHAMJI ..... 4<sup>TH</sup> RESPONDENT  
ARUL SELVARAJMUDALLAR ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The 5<sup>th</sup> Defendant has by a Notice of Motion application filed on 26<sup>th</sup> March 2025 moved this Honourable Court under Section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 12 Rule 7, Order 45 Rule 1 and Order 50 Rule 1 of the Civil procedure Rules and Article 159(2) of the Constitution seeking the following reliefs:-
  - i. Spent
  - ii. That this Honourable Court be pleased to set aside the interlocutory judgment entered on 25<sup>th</sup> February 2025 and allow the Applicant to defend the suit.
  - iii. That the costs of this application be provided for.



2. The application is supported by the grounds set out on its face and the supporting affidavit sworn on 26<sup>th</sup> March 2025 by Nyasani Evanson. The application is opposed and the Plaintiff has filed a replying affidavit sworn on 5<sup>th</sup> June 2025 by Geoffrey Kurgat. Parties filed written submissions on the directions of the Court which I have carefully considered.
3. The Applicant's counsel who is the deponent to the supporting affidavit confirms that they came on record for the 5<sup>th</sup> Defendant on 22<sup>nd</sup> February 2023 and participated in various mentions of the same before Court on various dates including the 5<sup>th</sup> March 2024 when the matter came up for mention and again on 16<sup>th</sup> May 2024. It is their position that upon entering appearance in the matter they asked the Court on the various occasions that they be served with the pleadings but were not served despite the requests. Again, they depone that on 30<sup>th</sup> July 2024 when the matter came up for directions before the Court, they requested to served yet again with the pleadings but the same was not done. They later learned that the Plaintiff had filed a request for judgement on 22<sup>nd</sup> July 2022.
4. Despite not being served, the Court on 25<sup>th</sup> March 2025 proceeded to enter interlocutory judgment and are now apprehensive that execution proceedings shall be commenced against their client without an opportunity for them to offer their defence to the Plaintiff's suit. It is for these reasons that they have brought this application seeking to set aside the said judgment and have attached to these proceedings a draft statement of defence by the 5<sup>th</sup> Defendant.
5. In opposing the application, the Plaintiff confirms that indeed there was substituted done under the directions of the Court and the same was effected through an advertisement in the Nation newspaper of 5<sup>th</sup> October 2023. Indeed, subsequent to the said service the parties proceeded to file their respective pleadings and the 5<sup>th</sup> Defendant instructed counsel to represent them in the suit. It is the position taken by the Plaintiff that the 5<sup>th</sup> Defendant has never shown interest to participate in the present suit and indeed declined to engage in the Court ordered mediation leading to the process to collapse. The Plaintiff argues that this application is brought to frustrate the suit by the Plaintiff and is a mere delaying tactic. The Plaintiff argues that the same application was orally made by the Applicant in open Court and the Court declined to grant the same. The Plaintiff has urged the Court to decline to allow the application and allow the execution process to proceed.
6. I have carefully considered the pleadings by the parties and the arguments put forward in their respective rival submissions. Order 10 of the Civil Procedure Rules grants the Court power to enter interlocutory judgment where a party fails to enter appearance or file a defence. Order 10 Rule 7 provides as follows: -

“7. Interlocutory judgment where several defendants [Order 10, rule 7]- Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the Court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the Court otherwise orders.”

7. Similarly, the said order 10 rule 11 gives the Court power to set aside such an interlocutory judgment if it deems the application to do so justified The said order 10 Rule 11 provides thus; -“11. Setting aside judgment [Order 10, rule 11]-Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”



8. In *Shah v Mbogo & Another* (1967) EA 116, the Court's power to set aside a judgment or consequential order was described as discretionary. The Court stated as hereunder: -

“the discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

9. I have carefully perused the record and the documents filed by the parties. I note from inception that the 5<sup>th</sup> Defendant has been actively engaged in the process herein including the Court mandated annexed mediation. I also note the present counsel came on record in 2023 and has made several appearances before different Courts on various occasions as enumerated in the affidavit filed in support of this application by Evanson Nyasani advocate. I also note that the Plaintiff has demonstrated that service of this process was done through substituted service pursuant to the orders of this Court. Indeed, in the era of digital process, all Court pleadings are deposited on the Courts digital Platform and are available at all times to the parties engaged in the suit. The Applicant has not explained to this Court why no attempt was done to retrieve the pleadings filed by the Plaintiff from the Courts portal and fashion a defence to the same if no service was forthcoming from the Plaintiff.

10. I find that the Applicant has had ample opportunity to ensure all his pleadings were timeously filed and even during the period the matter was before the mediator, nothing stopped the parties from ensuring that all necessary pleadings were duly filed. The Applicant is therefore guilty of laches and has not offered a valid explanation to this Court as to why he failed to put in a defence despite entering appearance and engaging two different counsels.

11. In sum I find no merit in the present application and I dismiss the same. I award costs of this application to the Plaintiff and assess the said costs at Kshs.30,000/=. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2025**

.....

**J.W.W. MONGARE**

**JUDGE**

In the presence of

1. Mr. Moenga holding brief for Mr. Nyasani for the 5<sup>th</sup> Defendant/Applicant.
2. Mr. Kipkorir for the Plaintiff/Respondent.
3. Amos- Court Assistant

