



**Omulama v Attorney General & another (Civil Appeal E17 of 2020)  
[2022] KEHC 13845 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 13845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E17 OF 2020  
WM MUSYOKA, J  
OCTOBER 7, 2022**

**BETWEEN**

**ALICE AWINJA OMULAMA ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL ASHIENE OMIDO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal arising from the ruling of Hon WT Lopoloiyit, Resident Magistrate (RM), delivered on August 20, 2020, in Kakamega CMCCC no 311 of 2018)*

**JUDGMENT**

1. The suit before the trial court had been initiated of the appellant against the respondents, for compensation. The suit was dismissed on August 8, 2019, when it came up for hearing, for non-attendance and want of prosecution by the appellant and her advocate. An application to reinstate it, dated November 26, 2019, was dismissed, on August 20, 2020. The appeal herein arises from the order of August 20, 2020.
2. In her memorandum of appeal, dated September 19, 2020, the appellant avers that the principles of setting aside of *ex parte* orders were not considered; the refusal by the court to set aside the orders was against the weight of the material placed before the court; the issues were not analysed and the decision was not based on sound principles of law; the trial court relied on speculative evidence; the allegation that the appellant was held up in another court at Bungoma was not controverted by the respondents; and discretion was not exercised judiciously.
3. The suit at the primary court was initiated by the appellant. The date for hearing, August 8, 2019, was fixed by the court on May 23, 2019, in the presence of a Simiyu, Advocate, holding brief for Ms Shimoli, for the appellant. When the matter came up on August 8, 2019, the plaintiff and his advocate were not present to prosecute their case. The 2<sup>nd</sup> respondent was present. Mr Tarus for the 1<sup>st</sup> respondent was



also present. He said that he had been served with a hearing notice for August 8, 2019. He applied for dismissal of the case against the appellant.

4. There is an affidavit of service on record, sworn on August 2, 2019, by Ms Tabitha Shimoli, the advocate acting in the matter of the appellant, returning service of hearing notice for the hearing scheduled for August 8, 2019. The same was effected on June 26, 2019. It is not in dispute that the appellant, through her advocate, was aware of the hearing date.
5. In the motion, dated November 26, 2019, the affidavit in support was sworn by Ms Shimoli, advocate. Her case is that she had another matter at the High Court at Bungoma on August 8, 2019. She decided to rush there first, and instructed her clerical assistant to get another advocate to hold her brief in the instant matter, to have the matter placed aside, as she was ready to proceed. She avers that, when she got back she found that the matter had been called out before the clerical assistant reached the court and had been disposed of. She also established that her client, the appellant, had not attended court that day. From all this material there should be no doubt at all that it was the appellant and her legal advisors who were to blame for what happened on August 8, 2019.
6. Suits belong to the parties, not the court. It is incumbent upon the party who initiates a matter in court to prosecute it. The law is clear, when the matter is called out and the parties or the initiator of the case is not available to prosecute it, the court has the discretion to dismiss the suit. In this case, the date of August 8, 2019 was fixed by consent of both sides before the trial court, and the appellant, through her advocate, served notice on the advocate for the 1<sup>st</sup> respondent. It was the duty of the appellant to prosecute her case on August 8, 2019. The appellant did not attend court on August 8, 2019 and her advocate did not also attend court. The trial court perfectly exercised discretion by dismissing the suit against the 1<sup>st</sup> respondent, on the application of Mr Tarus, the advocate for that party.
7. Did the trial court improperly exercise discretion by declining to set aside the order of August 8, 2019 and to reinstate the suit? I do not think so. Setting aside of orders is discretionary. Discretion is exercised for good cause in favour of the applicant. Was there good cause in this case? I have not found any. The trial court gave the appellant a date for the hearing of her matter, the 8<sup>th</sup> August 2019, but come August 8, 2019 neither the appellant nor her advocate attended court. Instead of attending court, the advocate elected to attend another matter in another court in a different town. No arrangements were made for her advocate to be represented by another advocate. No other advocate was instructed to hold her brief. No courtesy was extended to Mr Tarus, for the 1<sup>st</sup> respondent, in terms of Ms Shimoli alerting him that she was to be busy elsewhere, and she could be coming in late, and asking him to indulge her. Ms Shimoli also had the option of writing to the court to explain her predicament. It was her case, she should have moved heaven and earth to ensure that everything went well. She did not take any serious steps to ensure that the matter was properly attended to, yet she had had all the time, between May 25, 2019 and August 8, 2019, to make alternative arrangements, once she decided to fix another matter for hearing at Bungoma on the same date, thereby creating a clash of dates between the Kakamega matter and the Bungoma matter.
8. Ms Shimoli avers that she was ready to proceed with the matter on August 8 2019, if only the file were placed aside. She cannot possibly have been ready to proceed with the matter in the absence of her client, the appellant. She has not demonstrated that the appellant was aware that the matter was coming up on August 8, 2019. It is telling that the application dated November 26, 2019 was not brought at the instance of the appellant, but that of Ms Shimoli. The trial court, therefore, had no way of verifying what Ms Shuimoli avers in her affidavit, that is to say whether the appellant was aware of the date for August 8, 2019, and was, therefore, ready for the hearing. Clearly, the matter was handled casually, and there was no keenness on the part of the appellant nor her advocate to prosecute it.



9. It is averred that the mistakes of an advocate should not be visited on clients. It is an interesting submission to make, that advocates should be allowed to get away with sloppiness, idleness, casualness and lethargy in the manner that they handle cases. It would mean that suits would stand no chance of being dismissed, even if the parties and their advocates do not attend court, as the courts would not want to appear to be pushing clients too hard for the shortcomings of their advocates. Advocates are under a duty to exercise diligence once instructed in these matters. It is a solemn duty, and they expose themselves to suits for professional negligence where they fall short, as in this case. The client has remedy in damages for professional negligence. In this case, the client has not approached the court to have the suit reinstated, for it is her advocate, who caused the suit to be dismissed in the first place, who has moved the court for reinstatement of the suit.
10. I am not persuaded that the trial court exercised discretion wrongly or improperly, on August 20, 2020, when it dismissed the Motion dated November 26, 2019. The appeal is without merit, and I hereby dismiss it. I would have awarded costs, but I note that the State is the 1<sup>st</sup> respondent in the appeal. Each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 7<sup>th</sup> DAY OF October 2022**

**WM MUSYOKA**

**JUDGE**

**Erick Zalo, Court assistant.**

Ms Ashitsa, instructed by the Shitsama & Company Advocates for the appellant.

Mr Juma, instructed by the Attorney General for the 1<sup>st</sup> respondent.

