IN THE COURT OF APPEAL
AT NYERI

(CORAM: KANTAI, MUMBI NGUGI & ALI-ARONI, JJ.A.)

CIVIL APPEAL NO. E031 OF

2021 BETWEEN

ROBERT MUGO CYRUS.....APPELLANT

AN

D MATHEW MUGO

GACENGE t/a
GIBS ESTATE LTD GIVS LTD
SUPER GIBS LTD.....RESPONDENT

(Being an appeal from the ruling of the Employment and Labour Relations Court at Nyeri (Nzioki wa Makau J.) dated 6th February 2020

in

ELRC Cause No. 190 of 2018)

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the trial court delivered on 6th February 2020, dismissing the appellant's Notice of Motion application dated 15th October 2019 that sought to set aside an order dismissing the suit for non-attendance on 14th October 2019. The issue before us is whether the trial court properly exercised its discretion in declining to set aside its order and reinstating the appellant's suit.
2. The brief facts of the case are that the appellant had filed a claim dated 15th May 2018 seeking, among other things, compensation for the unlawful termination of his

employment as a Manager with the respondent. The matter came up for

hearing on 14th October 2019 and was confirmed for hearing at 9.30 a.m. in the presence of the appellant's counsel, Mr. Mbuthia, who indicated that he was ready to proceed with the hearing. There was no representation for the respondent.

3. When the matter was called out for hearing at 9.30 a.m., however, neither the appellant nor his advocate were present, and the court proceeded to dismiss the suit for non- attendance.

4. The following day, 15th October 2019, the appellant filed an application of the same date seeking reinstatement of his suit. In the affidavit sworn on 15th October 2019 in support of the application, the appellant, **Robert Mugo Cyrus**, averred that the failure to be present in court when the matter was called out for hearing was due to inadvertence on his part and that of his advocate. It was his averment that when the matter was called out for hearing at the allocated time of 9.30. a.m., his advocate had stepped out to use the washroom. On his part, he had arrived late in court due to transport problems and had mistakenly gone to courtroom No. 106 instead of the trial court. He averred that he was contacted by his advocate and by the time

they both went to the court room at 9.50 a.m. the same morning, they found that the matter had been

dismissed. The appellant asked the court to set aside the dismissal order and reinstate his suit.

5. The respondent opposed the application through grounds of opposition dated 26th October 2019. Its argument was that the appellant had not given sufficient grounds to explain why he was not present when the matter was called out; that the suit sought to be reinstated is bad in law and ambiguous, and does not lay any claim against any entity known in law; that a court's discretion to set aside its decision should be so exercised as not to cause injustice to the opposite party; and that litigation must come to an end.

6. Upon hearing the application, the trial court found it to be without merit and dismissed it. While the court considered the principles set in ***Stephen Kipsang Rutto t/a Springwood College v Tanui Kipkurui & 2 Others*** [2017]

eKLR with respect to the principles to be considered in a matter such as was before it, it found that the explanation given by the appellant was not satisfactory; that he had not explained why he chose to go to the wrong court or why he was late; and that his advocate had not filed an

affidavit to explain why he left court just before the matter was called out for hearing. It concluded that there was no intention on the

part of the appellant to proceed with the suit and dismissed the application, with each party to bear its own costs.

7. Aggrieved by the ruling, the appellant filed the present appeal in which he raises, in the Memorandum of Appeal dated 22nd March 2021, four grounds of appeal, complaining that the learned judge erred in: dismissing the Notice of Motion dated 15th October 2019; finding that the appellant had no intention of proceeding with the suit; failing to consider that there was no inordinate delay in prosecuting the case, and even if there was, in failing to consider the wider interests of justice lay in not turning the appellant away from the seat of justice despite the fact that the respondent had not suffered any prejudice.

8. At the hearing of the appeal, learned counsel, Mr. Mbuthia, appeared for the appellant. There was no appearance by the respondent, though duly served. Mr. Mbuthia indicated that he would rely on the appellant's submissions dated 21st June 2025.

9. In these submissions, the applicant reiterates the chronology of events leading to the dismissal of his suit and his subsequent application for reinstatement. He

reiterates the reasons for his and his advocate’s failure to appear in court at 9.30 a.m., the time scheduled for the hearing, and that they

appeared in court at 9.50 a.m., twenty minutes later, to find that the suit had been dismissed. He asserts that the reasons for non-attendance were explained on oath and were unchallenged; that the application was filed without delay and the respondent suffered no prejudice and if any prejudice was suffered, it could be compensated by costs; and that the learned Judge failed to properly apply the principles in ***Stephen Kipsang Rutto t/a Springwood College v Tanui Kipkurui & 2 Others*** (supra) and ***Philip Keipto Chemwolo & Another v Augustine Kubende*** [1986] KLR 492, which

emphasise that dismissal of a suit without hearing it on the merits is a draconian step; and that errors or defaults should be corrected to serve the ends of justice. The appellant prayed that we set aside the ruling dated 6th February 2020, allow the application dated 15th October 2019, reinstate the suit for hearing before the trial court, and award costs of both the appeal and the application to him.

10. The respondent did not file submissions in opposition to the appeal.
11. The law with respect to the exercise of discretion to set

aside orders of the court in a matter such as was before the trial court is well settled. The discretion is wide and unfettered, but

must be exercised to do justice to the parties. Further, that an appellate court will interfere with the exercise of discretion only where the lower court misdirected itself in law or fact, or where the decision is plainly wrong, resulting in a miscarriage of justice.

12. In ***Philip Keipto Chemwolo & another v Augustine Kubende*** [1986] KECA 87 (KLR) Platt JA stated that:

> "***I would draw special attention to the principle as stated by Lord Atkin in the last sentence. It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this Court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision, or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice."***

13. Further, in ***Yooshin Engineering Corporation v Aia Architects Limited*** [2023] KECA 872 (KLR), this Court referred to the decision in ***Bouchard International (Services) Ltd v M'mwereria*** [1987] KLR 193 in which the

Court stated that:

> ***"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he has shown to have applied wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion, which may reverse or vary the order. Otherwise in interlocutory matters, the Judge might be regarded as independent of supervision. Yet an interlocutory order of the Judge may often be of decisive importance on the final issue of the case, and may be one, which requires a careful examination by the Court of Appeal."***

14. In this case, the record indicates that the appellant's counsel was present in court when time was allocated, which would suggest 9.00 a.m. when courts ordinarily start morning sittings. The appellant was absent, having come late and gone to the wrong court. Both client and counsel were, however, present,20 minutes after dismissal of the

suit, at 9.50 a.m. They filed the application the subject of the ruling the very

next day.

15. In these circumstances, we take the view that the trial court wrongly exercised its discretion in declining to allow the application for reinstatement of the suit. As Platt JA observed in ***Philip Keipto Chemwolo & another v Augustine Kubende*** (supra):

> ***"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."***

16. In our view, the reasons and explanation given by the appellant and his counsel were reasonable; the delay was brief- 20 minutes; and the application for reinstatement was made the very next day, so there was no delay whatsoever. The conduct of the appellant and his counsel

are not

indicative of a party uninterested in the pursuit of his case,

and the trial court should have exercised discretion in his favour.

17. Accordingly, we find that the appeal is merited, and we hereby allow it.

18. We set aside the ruling dated 6th February 2020 and allow the application dated 15th October 2019 seeking the setting aside of the dismissal of the appellant's suit and reinstatement thereof. We direct that the suit be set down for hearing on its merits.

19. In the circumstances of the case, we make no order as to costs.

Dated and delivered at Nyeri this 5th day of December, 2025

S. ole KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR