



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

ELRC CAUSE NO. 196 OF 2018

ROBERT MUGO CYRUS.....CLAIMANT

VERSUS

MATHEW MUGO GACENE T/A GIBS ESTATE LTD,

GIBS LTD, SUPER GIBS LTD.....RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated 15th October 2019 seeks to have the order of the Court made on 14th October 2019 dismissing the Applicant's suit for non-attendance of the Claimant and his Advocates be set aside. The application was supported by the Claimant's affidavit in which he deponed that the suit was set down for hearing on 14th October 2019 and that the case was set down for hearing at call-over and given 9.30am for hearing. The Claimant deponed that he was himself running late and on arrival sat in Court 106 and did not come to the Employment Court until after the matter had been dismissed. He deponed that his advocate informed him that he had stepped out to visit the washrooms when the matter was called and dismissed for non-attendance. He deponed that the failure to attend court was not deliberate but on account of inadvertent mistake or error. He asserted that the reinstatement of the suit will meet the overriding objectives of doing justice to the parties and that the Respondent would not be prejudiced in any way.

2. The Respondent's grounds of opposition were to the effect that no sufficient grounds had been given as to why the Claimant did not attend court when the order was being given, that the suit sought to be reinstated was bad in law, ambiguous and does not lay any claim known in law, the court's discretion to set aside judgment should not be exercised to cause injustice to the opposite party. It was asserted that litigation must come to an end.

3. The Claimant filed submissions in which it was argued that reasons had been given in the motion for his absence in court as well as the reason for counsel being absent when the matter was called out for hearing. The Claimant submitted that the dismissal was regretted and the court should excuse the absence of the Claimant and his counsel at the material time. The Claimant submitted that a suit ought not be defeated on account of misjoinder of parties as provided for under Order 1 Rule 9 of the Civil Procedure Rules. He argued that under Order 10 Rule 1 a court has unfettered discretion to order a party to be substituted or added to the suit and as such the opposition by the Respondent was not therefore well founded. The Claimant relied on the principles laid out in the case of **Stephen Kipsang Rutto t/a Springwood College v Tanui Kipkirui & 2 Others [2017] eKLR** and urged the grant of the motion. The Respondent did not file any submissions.

4. In the case of **Stephen Kipsang Rutto t/a Springwood College v Tanui Kipkirui & 2 Others** (supra), it was held that the factors to consider when granting or denying an application such as this are:-

- 1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case*
- 2. Whether the delay is inordinate contumelious and therefore inexcusable*
- 3. Whether the delay is an abuse of the process of the court*
- 4. Whether the delay gives rise to substantial risk to a fair trial or causes serious prejudice to the defendant*
- 5. What prejudice will the dismissal occasion to the plaintiff?*
- 6. Even if there has been delay what does the interest of justice dictate: lenient exercise of discretion by the court.*

5. It is not disputed that the Claimant and his advocate were absent when the cause was called out for hearing at the time scheduled for the

hearing. This was despite the advocate being present when the time for the hearing was set by the Court. The Claimant asserts that counsel had gone to the washroom. No affidavit was sworn by the advocate to that effect and this remains a matter of great scepticism. Secondly, the Claimant asserts that he was in Court 106 when the matter was due for hearing and he only came to this Court after the cause had been dismissed. He did not indicate why he chose to go to Court '106' instead of the Court where Employment matters are heard. In his affidavit in support, he stated that he had come to court late due to some transport hitch yet he did not state whether it was an accident or tardiness that caused his delay to attend the hearing of his case. The Claimant and his advocate know when courts start sitting and the fact that his advocate left court just before the matter was called suggests there was no intention to proceed with the hearing on the material date. Having regard to the facts presented and the factors to consider when contemplating to set aside dismissal orders I find no merit in the explanations offered as to why the Claimant was absent. The motion is devoid of merit and is dismissed. As the Respondent had a lackadaisical approach and seemed unmoved by the provenance of a reinstatement and failed to file submissions or participate in the hearing of the motion, each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 6th day of February 2020

Nzioki wa Makau

JUDGE