



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 602 of 2006

MOHAMMED HUSSEIN

T/A GONDAWALLA & SONS.....1ST APPELLANT

ALNASIR SAYANI

SHEMIN SAYANI

T/A SAFARI HARDWARE.....2ND APPELLANT

VERSUS

MAHFUDH JEIZAN.....1ST RESPONDENT

IQBAL HOLDINGS LIMITED.....2ND

RESPONDENT

R U L I N G

The appellant seeks to have the order made on 1st July, 2008, dismissing his application dated 5.11.07 set aside and the application reinstated to hearing.

The appellant's counsel has sworn a supporting affidavit in which he depones that the failure to attend court was due to an inadvertent error on his part, as he relied on the cause list on the Law Report Website according to which the suit was not listed for 1st July, 2008. Counsel therefore did not attend court and only came to learn later that the matter had been dismissed for non-attendance.

The respondent objects to the application maintaining that the hearing date was fixed by consent of both parties and was in fact listed as No.4 on the daily cause list for 1st July, 2008. Counsel for the respondent submitted that the cause list for 1st July 2008 had 23 pages and the counsel for the appellant had not been candid by availing only a few pages. Relying on the case of *Mawji vs Lalji & Others (1990-1994) EA 337*, counsel submitted that where a party is negligent in conducting his affairs, he should not benefit from the discretion of the court.

I have considered the application and the submissions of both counsels. It is clear that the mistake was that of the appellant's counsel who took a date for the hearing of the application but failed to attend court. Although counsel explains that the matter was not listed on the Website Cause List, counsel apparently did not make any efforts to find out why the matter was not listed.

I would not wish to punish a party for the mistake of his counsel, however counsel must bear full responsibility for his mistake.

Accordingly, I do grant the application and issue orders as prayed but order that costs of the application shall be paid to the respondent by the appellant's advocate personally.

Those shall be the orders of this court.

Dated and delivered this 5th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Karungu H/B for Mutiso for the appellant

Chege for the respondent