

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 8 of 2006

EDWARD JUMA MALOVIAPPELLANT

V E R S U S

PETER NDIRANGURESPONDENT

R U L I N G

On 22.3.2006, the appellant, *Edward Juma*, made an application seeking, inter alia, orders to set aside the dismissal on 22.3.2006 of the application dated

24-2-2006 which had sought stay of execution of the orders dated 6.1.06 committing the applicant to civil jail. The said application was dismissed because the applicant had failed to attend court to prosecute it.

Mr. Anziya, learned counsel for the Applicant who swore on 22.3.06 the affidavit in support of the application averred that he was under the mistaken belief that the hearing of the application would be at 2.30 p.m. as is the usual practice and that his failure to attend court at 9.50 a.m. when the application was called out and dismissed was not deliberate.

The application was opposed by the Respondent who filed grounds of opposition in which he contended that the application had no merit and was brought in bad faith and was time wasting. Allegations of bad faith and wasting of time require to be proved by evidence. In absence of an affidavit to substantiate them, they remain more rhetoric.

The court has unfettered discretion to set aside the dismissal order. Such discretion ought to be exercised judicially so as to avoid injustice. The appellant did through his advocate candidly aver that the failure to attend court was due to the fact that the appellant's advocate believed, albeit wrongly, that all applications are heard in the afternoon sessions. It is common knowledge that applications are normally heard in the afternoon sessions. It was not unreasonable for Mr. Anziya to so believe as the minute in the court file for fixing of the application for hearing did not specify the time for the hearing of the application. It is the policy of the court not to shut out litigant who has not shown to be undeserving of the right to be heard. It is human to error and make mistakes and lawyers are not exempt from this. Mistakes and accidents will continue to occur as long as people remain human. And there is no error or default that cannot be compensated by way of costs. Excusable errors or mistakes or accidents can be forgiven save where it is shown that they were deliberate and intended to subvert justice.

I have perused the application and given due consideration to the submissions of both counsel. I am satisfied that the mistake by Mr. Anziya was excusable. In exercise of my discretion, I allow the application and set aside the order dated 22.3.06 dismissing the appeal. The respondent shall have the costs of the application.

Delivered, dated and signed at Kakamega this 29th day of June, 2006.

G. B. M. KARIUKI

J U D G E