



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1642 OF 2002

THOMAS MUTUNGA KITHUNZI.....PLAINTIFF/RESPONDENT

- V E R S U S -

KENYA AIRWAYS LIMITEDDEFENDANT/APPLICANT

RULING

1) The subject matter of this ruling is the motion dated 13.8.2015 in which the plaintiff seeks for the following orders:

1. THAT the honourable court be pleased to review and set aside its ex-parte order given on the 18th November 2011 and issued on the 20th July 2012.

2. THAT upon review, the honourable court be pleased to hear the plaintiff's application dated 3rd June 2011 inter-partes.

3. THAT costs of this application be provided for.

2) The motion is supported by the affidavit of Thomas Mutunga Kithunzi.

3) When served with the motion, Kenya Airways Ltd, filed the replying affidavit of John Rono to oppose the motion.

4) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

5) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the submission of the plaintiff/applicant that when the motion dated 3.6.2011 seeking for the production of certain documents came up for interpartes hearing on 18.11.2011 neither the plaintiff nor his former counsel were in court because the same was not listed. The plaintiff further argued that it is only recently and upon filing a notice of change of advocate and upon perusal of the court file that he learnt that the matter proceeded for hearing in his absence and drastic orders given contrary to his prayers. The plaintiff stated that the delay in filing this application was not intentional as his previous advocate had not informed him of the orders given on 18.11.2011.

6) The defendant/respondent has strenuously opposed the motion arguing that the motion has no merit but it is intended to further delay the conclusion of these proceedings. The defendant also accused the plaintiff of material nondisclosure of certain important information relevant to the determination of the application.

7) The matter before this court is an application for review. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 the principles to be considered are clearly spelt out. One of the cardinal points is that the application for review must be brought without unreasonable delay. The decision sought to be impugned was made on 18.11.2011, and this motion was filed after the lapse of 3 years 9 months. The defendant has taken up this issue and has urged this court to find that the motion was filed after an unreasonable delay. The plaintiff admits that he filed the application after a long delay because his erstwhile advocate did not inform him of the making of the decision. I have critically examined the documents attached to the affidavits filed in support and against the motion. The plaintiff depones in his affidavit that he was recently informed by his current advocate that this matter had been heard in his absence and drastic orders given contrary to his prayers.

8) This argument falls on the wayside in that attached to the plaintiff's affidavit is a letter dated 24.11.2011 and addressed to the Honourable the Chief Justice in which the plaintiff admits knowledge of the proceedings and orders made on 18.11.2011. It is clear in my mind that the plaintiff, in the circumstances, cannot be said to have a plausible explanation for the delay to file the motion for review. For this reason, I find no merit in the motion. It is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant