



REPUBLIC OF KENYA



KENYA LAW
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**Kithunzi v Kenya Airways Limited (Civil Appeal 432 of 2019)
[2025] KECA 580 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KECA 580 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 432 OF 2019
K M'INOTI, F TUIYOTT & FA OCHIENG, JJA
MARCH 28, 2025**

BETWEEN

THOMAS MUTUNGA KITHUNZI APPELLANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

(Being an appeal from the Ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (S. Radido, J.) dated 25th October 2018 in ELRC No. 19 of 2018)

JUDGMENT

1. The order made on 25th October 2018, the subject matter of this appeal, is terse:

“Orders of 10/10/2017 were self-exacting and there was breach of condition (ii), there is no suit before court.”
2. As is evident, that order by Hon. Radido, J. was a sequel to a ruling on adjournment by Hon. Serگون, J. made on 10th October 2017 in which he ultimately made the following orders and directions:
 - i. The hearing of this case is stood over to 27/11/17.
 - ii. Today's witness expenses assessed at Kshs.5,000.00 be paid to the Defendant's advocate within 14 days from the date hereof by the Plaintiff.
 - iii. Court adjourned fees be paid before the next hearing date.
 - iv. The Plaintiff to file and serve witness statements together with the documents to be relied upon within 21 days from the date hereof.
 - v. In default to meet the conditions laid in (ii), (iii) and (iv) above the suit shall stand dismissed with no further reference to this Court.



3. On 18th October 2018, learned counsel Mr. Imende then appearing for Kenya Airways Limited, the respondent, told court that the orders of 10th October 2017 had not been complied with in time. To this, Mr. Dome learned counsel for Thomas Mutunga Kithunzi, the appellant, retorted:

“Court adjournment fees as paid but I do not have receipt.” (sic)

4. The trial court gave a chance to the appellant to prove compliance and set the matter for mention on 25th October 2018.
5. On 25th October 2018, Mr. Imende informed court that payment of costs of Kshs.5,000 was made outside the prescribed period and as the conditions of the order of 10th October 2017 were “self-exacting”, there was no suit pending in Court. The learned judge agreed with him hence this appeal.
6. The memorandum of appeal sets out seven 7 grounds but some can be bundled together. It is contended that the trial Judge erred in law and fact in: failing to consider the appellant’s explanation and compliance with the court order; condemning an innocent litigant for the mistake of counsel; infringing on the appellant’s right to fair hearing; and failing to uphold constitutional and statutory dictates that disputes shall be determined on merit without undue regard to technicalities.
7. During the hearing of the appeal, Mr. Dome learned counsel for the appellant submitted that although payment of the court adjournment fees was made just one or so days after the 14-day timeline had lapsed, fees had been paid by the time the matter came up for hearing a year later. He argued that it was a procedural lapse and justice should be administered without regard to technicalities (Article 159 of *the Constitution* and section 20(1) of the Employment and Labour Relations Court). Cited to us for the arguments that mistake of counsel should not penalise a client and that some mistakes should not lock out a litigant from the seat of justice are Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR) and Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 (KLR).
8. Learned counsel Ms. Adan for the respondent, told Court that the appellant had failed to prosecute his matter for over eighteen (18) years in total disregard of pre-trial directions issued by the trial court. To demonstrate the laxity on the part of the respondent, counsel stated that seven years had lapsed since Rawal, J. (as she then was) had directed the appellant to file witness statements within forty-five days of 18th November, 2011; that as of the date when the impugned order was made, the suit had subsisted for fifteen (15) years since the amended plaint had been filed without a written statement.
9. Counsel submitted that the right to be heard is not an absolute right but one that is qualified and dependent on the prosecuting parties’ ability and willingness to prosecute their suit in accordance with established procedures as per the Civil Procedure Rules and directions issued by the trial court from time to time. (Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji (Civil Application No. Nai. 179 of 1998) (unreported) and Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd. & 2 others [2009] eKLR). It was argued that the appellant had been accorded a right to be heard at various times and had not sought to review or set aside the orders of Serگون J. It was contended that the trial judge rightly and judiciously exercised his discretion to dismiss the suit.
10. This is a first appeal and since we are called upon to determine the correctness of an order for dismissal of a suit for non-compliance of a court order, our role is to make that determination on the basis of the material that was before the trial court. We shall re-evaluate that material so as to draw our own conclusion as to whether or not the impugned order was correct and justified.
11. In making the order that the suit had stood dismissed when there was breach of the order of 10th October 2017, the trial judge was exercising a discretion. The judge could either have made the



order he made or overlooked the breach and allowed the suit to survive. For that reason our task is singularly simple: to examine whether the trial court exercised its discretion judiciously, bearing in mind our circumscribed power to only interfere with the exercise of that discretion if the trial court misapprehended the facts, took into account considerations which it should not, failed to take into account considerations which it should have taken into account or that the decision reached is plainly wrong (see *Moses Mwangi Kimari v Shammi Kanjirappambil Thomas & 2 others* [2020] KECA 910 (KLR)).

12. We first observe that the foundational order of Serگون, J. was neither appealed against, reviewed nor set aside. The order was simple and easy to understand and the appellant does not protest that he did not appreciate its implication. As framed, the order meant that the suit would stand automatically dismissed if any of the three conditions were breached.
13. It turns out, and this was conceded by counsel for the appellant, that the court adjournment fees was paid late. Counsel for the appellant argued that the lateness was not inordinate yet we are not told why the appellant did not seek an extension of time if he had difficulty complying within time. For the reason that the order was self-executing, the trial judge cannot be faulted for simply endorsing what had automatically happened upon breach of one of the conditions.
14. Further, it cannot be said that the trial judge did not exercise that discretion judiciously when the suit had been pending unheard for 18 years and there was demonstrable lethargy on the part of the appellant in prosecuting his own suit. For instance, failure to file a witness statement for seven years.
15. We agree with counsel for the appellant that the right to be heard is not absolute. The right is not inflexible. It must be exercised in a responsible manner that is not oppressive to the other side. We recall the words of this Court in *Union Insurance Co. of Kenya Limited* (supra) that:

“The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

16. The appeal is without merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

K. M'INOTI

JUDGE OF APPEAL

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F. TUIYOTT

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

