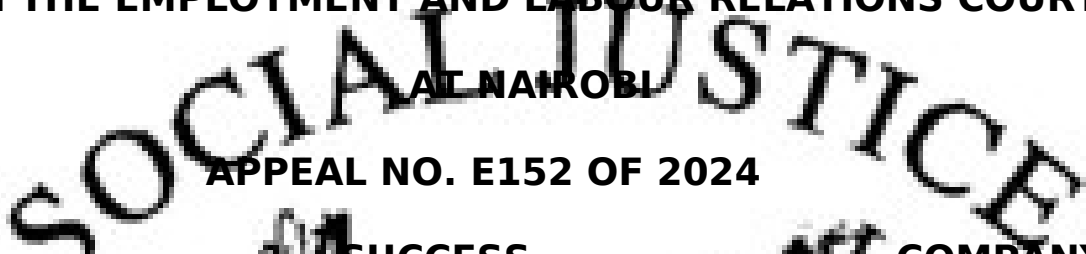


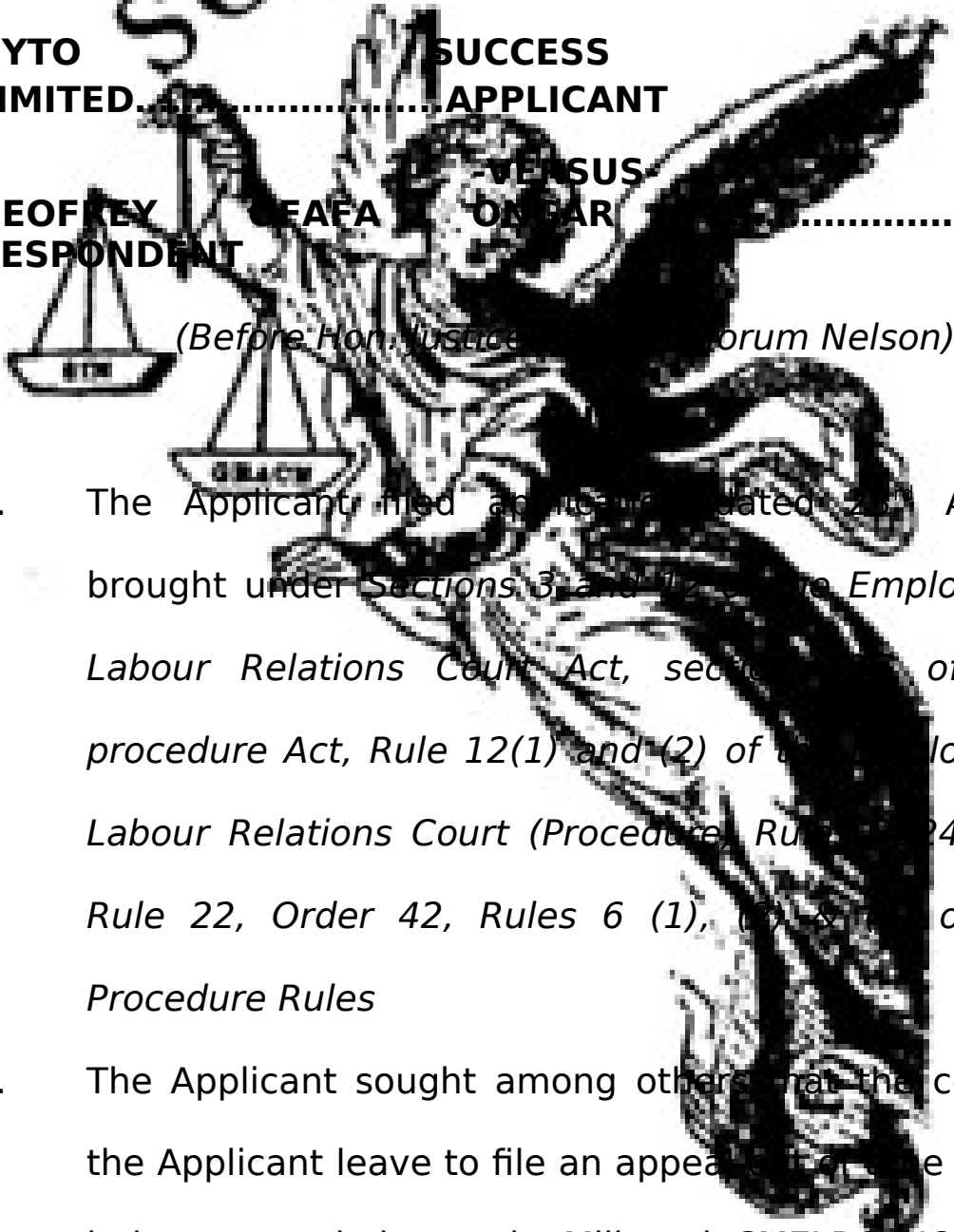
REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI



APPEAL NO. E152 OF 2024

GYTO LIMITED..... SUCCESS COMPANY
LIMITED..... APPLICANT

GEOFFREY OGEFA OMBARI.....
RESPONDENT



(Before Hon. Justice ... Forum Nelson)

1. The Applicant filed an application dated 24 April, 2025 brought under Sections 3 and 12 of the Employment and Labour Relations Court Act, sections 10 and 11 of the Civil procedure Act, Rule 12(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules 2024, Order 22 Rule 22, Order 42, Rules 6 (1), (2) & (3) of the Civil Procedure Rules
2. The Applicant sought among others that the court grants the Applicant leave to file an appeal on time against the judgment and decree in Milimani CMELRC NO. E1575 of 2021 delivered on 24th February, 2025.

3. The application was supported by the grounds set on the face of the Application and the Affidavit of **GLADYS MWIKALI TOWETT** who averred that:

a. Judgment was entered against the Applicant on 24th February, 2025 in the sum of Kshs 78,305/= plus costs and interest.

b. On 16th April, 2025 the Respondent through BETABASE AUCTIONEERS served the Applicant with warrants of attachment and sale and proceeded to proclaim against the Applicant's moveable property for a sum of Kshs 125,000/=.

c. The Applicant was shocked to learn that judgment had been entered against it which came to its knowledge on being served with warrants of attachment and sale by the auctioneer yet it had counsel on record who never updated it of the judgment.

d. The Applicant immediately instructed its current advocates to peruse the court file to obtain a copy of the judgment. The previous advocates M/S Wambua Syokwaa & Co. Advocates fully participated in the matter but failed to inform it of the judgment thereby exposing it to execution proceedings and denying it an opportunity to determine whether the judgment was sound.

e. The Applicant received the judgment on 22nd April, 2025 from its advocates on record and on perusal of the judgment the Applicant was not satisfied with the reasoning therein and therefore instructed their advocates on record to file an appeal against the said award. However, the prescribed time for filing an appeal had since expired.

f. The Applicant did not have the benefit of perusing the judgment in good time so as to appreciate the reasoning of the magistrate and thereby make an informed decision whether or not to lodge an appeal. The delay was therefore due to reasons beyond the Applicant's control. The Applicant being aggrieved by the said judgment intends to file an appeal against the said judgment and decree.

The court is clothed with discretionary powers to grant the orders sought in the interest of justice. The Application is made without unreasonable delay and no prejudice or damage shall be suffered by the Respondent which cannot be compensated by costs if the orders sought are granted.

4. In reply the Respondent filed an opposing Affidavit sworn on 28th July, 2025 by Geoffrey Ofafa, the Respondent herein and he opposed the Applicant's application. He averred among others that: -
- i. The judgment was delivered on 24th April, 2025 in Milimani CMLRC Cause No. E1575 of 2021 in its favor in the sum of Kshs 78,305 plus costs and interests, bringing the total to Kshs 123,746/=. That following the judgment warrants of attachment and proclamation were lawfully issued by Petabase Auctioneers on 16th April, 2025.
 - ii. The Applicant's allegation that its former advocate failed to inform it of the judgment was untrue as the record clearly shows that the Applicant and its counsel were the ones who duly

served the hearing notices, mention notices upon the Respondent and the Respondent duly served them with all pleadings and judgment both physically and via email.

iii. The Applicant therefore had full knowledge of the proceedings and chose to neglect or ignore them; its current application was therefore an afterthought intended to delay the enjoyment of the fruits of his judgment. The Applicant even paid cost as a condition for setting aside the judgment in the trial court and cannot claim to have not been in communication with his advocate.

iv. That the application for leave to appeal out of time was misconceived. The Applicant has not shown sufficient cause under section 79C of the Civil Procedure Act and the alleged mistake of counsel cannot be a ground for extension. The Applicant has not annexed any communication between him and his counsel seeking information that his counsel may have refused to furnish him with.

v. That the memorandum of appeal filed by the Applicant to the application does not raise any issues. That justice demands that litigation must come to an end and that the Applicant should not be indulged at the expense of the decree-holder.

5. The court directed that it would review the application and give its ruling on 28th July, 2025 but the Respondent proceeded to file its Replying Affidavit sworn on the same day and its submissions on 5th October, 2024.

DETERMINATION

6. The court has fully considered the Application dated 23rd April, 2025, the Replying Affidavit sworn on 28th July, 2025 and the Respondent's submissions dated 28th July, 2025 in making the final determination in this matter.

7. Although the applicant cited section 79C of the Civil Procedure Act, the applicable Rule of Applications of this nature is Rule 18 of E.R. (Procedure) Rules, 2024 which is the guiding law in answering the question whether the prayer to enlarge time to file the appeal is merited. In

Charles N. Ngugi v AS [Société] Limitée [2022] eKLR

the court held as follows:

However, the intended appeal ought to have already been filed before or together with an application seeking leave and time for filing an appeal.

8. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were considered by the Court of Appeal in **THUITA MWANGI V KENYA AIRWAYS LTD [2015] eKLR**. They include the following:

- a. *The period of delay;*
- b. *The reason for the delay;*
- c. *The arguability of the appeal;*
- d. *The degree of prejudice which could be suffered by the respondent if the extension is granted;*

- e. *The importance of compliance with time limits to the particular litigation or issue; and*
- f. *The effect if any on the administration of justice or public interest if any is involved.*

9. In this particular case the application has been filed with a draft Memorandum of Appeal. The Judgment in this matter was delivered on 24th February, 2025 and the Application herein filed on 23rd April 2025. This is around 2 months after delivery of the judgment. The Applicant alleged that its former advocates died soon after it of the delivery of the judgment hence the delay in filing the appeal.

10. The Applicant states that it only became aware of the judgment on 22nd April, 2025 and filed this application the next day. To this court the delay in filing this application was not inordinate since it is only two months between judgment and the application. The appeal could be filed by 22nd March, 2025 but the Applicant only delayed for one month which is not inordinate delay.

11. On the issue of an arguable Appeal the court has looked at the draft memorandum of Appeal attached to the Applicant and notes it has grounds which may need to be addressed

by the court on appeal more so on the fairness or not of the termination.

12. This court is not in the habit of shunning away a litigant unheard when they approach a court within a reasonable time and the party explains the reason for the delay. On the issue of prejudice to be suffered, the court will balance the interests of the parties. It is the right of the Respondent to enjoy a final judgment and the right of the Applicant to be heard on appeal.

13. Since the Applicant deposited the decretal amount in court as security for stay of execution, the court takes the view that the Applicant be granted an opportunity to ventilate its Appeal.

14. **The application is therefore found to be merited and is hereby allowed in the following terms:**

a. The Draft Memorandum of Appeal to be filed within 14 days.

c. Costs shall be in the cause.

d. Matter to be mentioned on 9th February, 2026 to confirm compliance.

15. **It is so ordered.**

Dated at Nairobi this 13th day of November, 2025

Delivered virtually this 13th day of November 2025

Abuodha Nelson Jorum

Presiding Judge-Appellate Division

