

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. E190 OF 2025

KENYA AEROTECH LIMITED,
.....APPLICANT

-VERSUS-
ISAAC THOGA
RESPONDENT

(Before Hon. Justice J. M. Njeng'a)

1. The Applicant filed an application dated 28 June, 2025 brought under Sections 17, 20 and 3A of the Civil procedure Act and Order 22 Rule 2, Order 42, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. The Applicant sought among others that the court grants the Applicant leave to file an appeal out of time against the judgment and decree in Nairobi CMEL No. **E620 of 2021 Isaac Thonga vs Kenya Aerotech Limited** and the draft Memorandum of Appeal to be reviewed and properly filed.
3. The application was supported by the grounds set on the face of this Application herein and the Affidavit of **Njenga**

Muchai the Advocate in conduct of the matter for the Applicant who averred that: -

a. The matter at lower court was slated for judgment on 22nd November, 2024 however on the same date the judgment was not ready and the court directed that the judgment would be delivered on notice.

b. The Applicant neither received any notice for the delivery of the judgment nor did the Respondent serve a notice of entry of judgment as required by the law.

c. That it was only recently after the Applicant's advocates became aware of the e-file on the CTS that they realized that the judgment was delivered way back on 19th December, 2024. The judgment was delivered in favour of the Respondent against the Applicant stating that the termination was lawful and proceeded to award compensation in the sum of Kshs 240,000/=, pension contribution of Kshs 229,540/= and bonus shares at Kshs 183,900/=.

d. That being aggrieved by the judgment the Applicant was to appeal the entire judgment. The appeal ought to have been lodged 30 days from the date of the judgment however the appeal herein was lodged 10 months late for the reason that they were not aware of the delivery of the Judgment.

e. The court is clothed with conferred discretion to extend timelines within which to lodge an appeal. That as illustrated in the draft Memorandum of appeal annexed herein the Appeal is meritorious and raises triable issues that would require the interrogation of this court with high probability of success.

f. That the Applicant had in addition requested for the typed proceedings and to ensure the judgment and any orders of the court emanating from the suit are not rendered nugatory or moot it was necessary to allow this application.

g. That it was in the interest of justice and vindication of the Applicant's rights that the orders sought in the application be granted.

4. In reply the Respondent filed his Reply Affidavit sworn on 20th June, 2025 by Isaac Thiongo the Respondent herein and he opposed the Applicant's Application where he averred that:

a. The application is frivolous, incompetent, defective and bad in law and only viable for striking out. That the same was brought through malice to recover from rightful dues which the Applicant has withheld since his termination due to redundancy on 20th May, 2019.

b. The Applicant admitted in the mitigation letter to owing him one month's salary in lieu of notice, severance pay for 26 years worked, pension money and accrued leave days as at 30th April, 2019.

c. That despite repeated promises the Applicant never paid him those sums necessitating him to file the claim on 30th March, 2021. That the Applicant admitted being indebted to him and consequently a consent judgment was recorded on 3rd May, 2021 and judgment thereon entered for a sum of Kshs 483,509.03/- which was a period of 4 years after his termination.

d. That a partial consent judgment having being entered the only issue left for determination by the court was damages for unlawful termination, pension and interest on pension as well as the Wana Sacco shares.

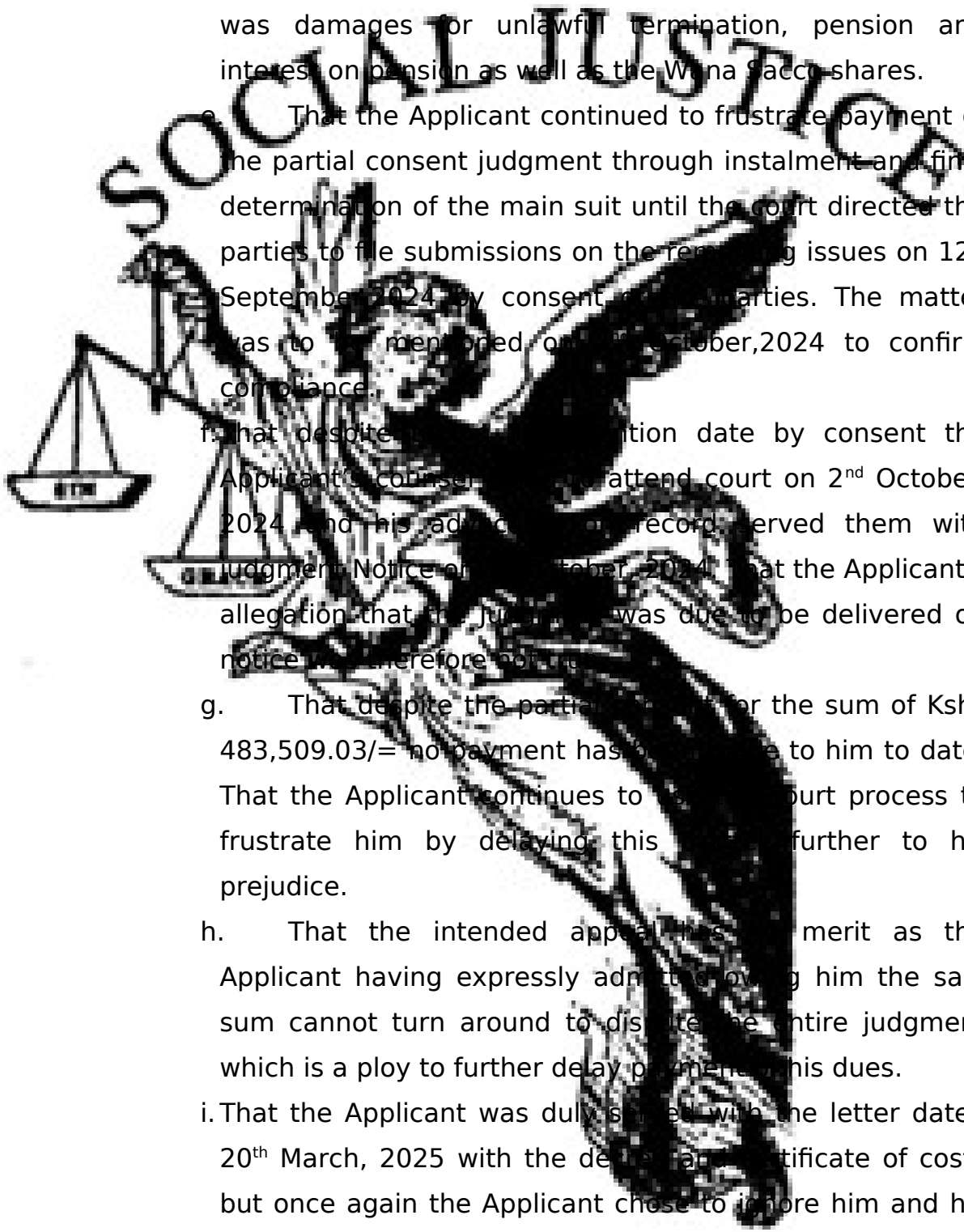
e. That the Applicant continued to frustrate payment of the partial consent judgment through instalment and final determination of the main suit until the court directed the parties to file submissions on the remaining issues on 12th September, 2024 by consent of the parties. The matter was to be mentioned on 2nd October, 2024 to confirm compliance.

f. That despite the stipulated date by consent the Applicant's counsel failed to attend court on 2nd October, 2024 and his address on record served them with Judgment Notice on 1st October, 2024 that the Applicant's allegation that the Judgment was due to be delivered on notice was therefore not tenable.

g. That despite the partial consent for the sum of Kshs 483,509.03/= no payment has been made to him to date. That the Applicant continues to frustrate court process to frustrate him by delaying this further to his prejudice.

h. That the intended appeal has no merit as the Applicant having expressly admitted owing him the said sum cannot turn around to dispute the entire judgment which is a ploy to further delay payment of his dues.

i. That the Applicant was duly served with the letter dated 20th March, 2025 with the debt and certificate of costs but once again the Applicant chose to ignore him and his plight. That the instances where consent judgment can be set aside is where there was fraud or deceit, misrepresentation or other vitiating element of a contract.



j. That the final judgment and decree having been issued and the trial court having confirmed that the termination was unlawful and unfair the Applicant should be compelled to settle the same failing which an order for immediate execution should issue.

k. That he has suffered immense hardship since May, 2019 at the instance of the Applicant and prayed the instant application which is purely a delaying tactic to be dismissed with costs.

5. The court on 24th June, 2025 allowed stay orders on a condition that the Applicant deposit the decretal sum in court within 30 days failure of which execution would ensue and parties were directed to file their respective submissions.

APPLICANT'S SUBMISSIONS

6. The Applicant through its Advocate, Sanga Muchai & Associates Advocates filed its written submissions dated 24th July, 2025.
7. On the issue of whether the delay in filing the appeal was inordinate or justified counsel submitted that the Applicant discovered the delivery of judgment only through its own diligence after the lapse of four months. That there was no notice of judgment delivery served by the court or the

Respondent and as such the Applicant was prevented from acting earlier.

8. Counsel relied on the case of **Peter Mathenge t/a Imperial Water Services v Juma (ELRC Appeal E210 of 2023) (2024) KEELRC 1753** where the court accepted lack of knowledge of judgment delivered as a valid reason for delay finding the same reasonable and not inordinate. Counsel further relied on Article 47(1) of the Constitution on the right to fair hearing.

9. On the issue of whether the court should extend time and deem the draft Memorandum of Appeal duly filed counsel relied on section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules on the power to extend time. That the discretion should be exercised judiciously and to advance justice not defeat it. The Applicant attached draft Memorandum of Appeal and applied for certified proceedings demonstrating prompt action after discovery of the Judgment. He submitted further that courts have held that technicalities must not override the need for

substantive justice while relying on Article 159(2) (d) of the Constitution.

- 10.** On the issue of whether the Applicant has demonstrated the merit of the intended appeal counsel submitted that the draft memorandum of appeal discloses serious legal and factual issues including whether the Magistrate erred in finding that the Respondent was unfairly terminated and whether the awards granted were justifiable in law. That the intended appeal was timely, not frivolous and prima facie raises questions suitable for appellate review.

RESPONDENT'S SUBMISSIONS

- 11.** The Respondent through his advocates, Sai Kalande & Co. Advocates filed written submissions dated 18th September, 2025.
- 12.** Counsel submitted that the Applicant came to court with unclean hands stating falsehoods and was undeserving of any equitable remedies from this court. That the Applicant was always aware of the final judgment as per the affidavit of service which had been availed to this court and the

subsequent demand letter forwarding the decree on 20th March, 2025. That the Applicant sat on its heels until 13th June, 2025 upon commencement of execution proceedings to rush to court seeking leniency for orders of stay and extension of time to appeal.

13. Counsel submitted that the delay in bringing the current application for over 6 months was inordinately long and in light of the grave facts and discrepancies highlighted has not been adequately explained. That the application does not meet the criteria for issuance of any stay orders or extension of time. That the Applicant was clearly indolent and has no proper explanation to why it failed to file an appeal on time. Counsel referred to the case of **Rajesh Rughani v Fifty Investments Limited & Another (2016) eKLR** on parties follow their cases even when represented by counsel.

14. Counsel submitted that the Applicant cannot escape blame for inordinate delay in bringing this application. That the Respondent has been greatly prejudiced by the prolonged delay in remittance of his terminal dues and continues to

suffer at the hands of the Applicant who is manipulating and abusing the court process to frustrate the Respondent.

DETERMINATION

- 15.** The court has fully considered the Application, the Reply Affidavit by the Respondent and both parties' submissions together with the authorities relied upon in making the final determination in this matter.
- 16.** Section 79G of the Civil Procedure Act is the guiding law in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides that the appeal ought to be filed within 30 days.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he has a good and sufficient cause for not filing the appeal in time.

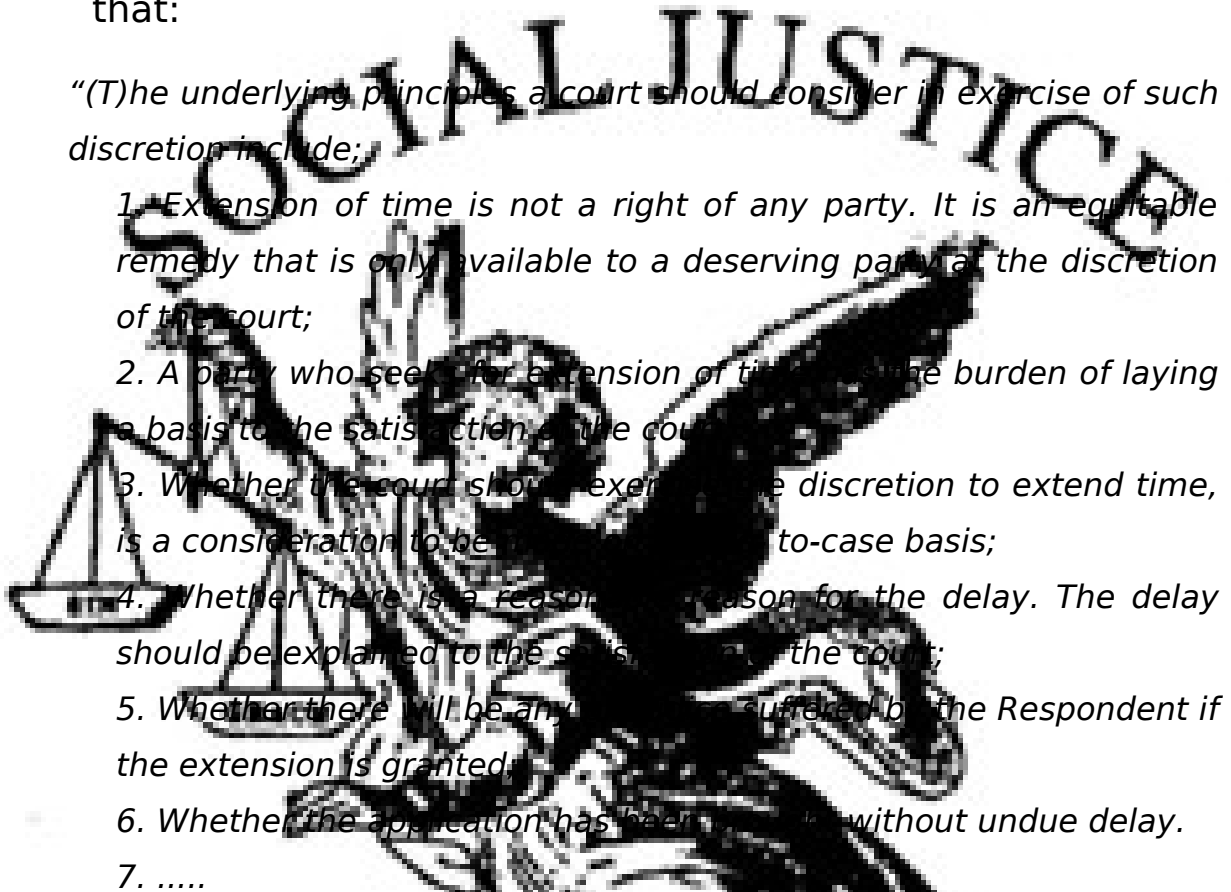
- 17.** In **Charles N. Ngugi v ASL Credit Limited [2022] eKLR** the court held as follows;

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

- 18.** In addition, the Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR** enunciated the principles applicable in an application

for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

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- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
 - 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
 - 3. Whether the court should exercise its discretion to extend time, is a consideration to be made on a case-to-case basis;*
 - 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
 - 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;*
 - 6. Whether the application has been made without undue delay.*
 - 7.*

- 19.** In this particular case the application was then filed with a draft Memorandum of Appeal. The Judgment in this matter was delivered on 26th October, 2024. The Applicant claimed that Judgment was delivered on 19th December, 2024 which is not true as the Judgment is clearly indicated it was delivered on 26th October, 2024. This was clear and it may have been uploaded on the said 19th December, 2024. The Applicant’s counsel was also served by the Respondent’s counsel with judgment notice for 26th October, 2024.

20. The Applicant's assertions that the judgment was to be delivered on 22nd October, 2024 and it was not ready hence to be delivered on notice is also not true as it has been illustrated above the judgment was delivered on 26th October, 2024 and the Applicant's counsel was served.

21. From the records it is clear that the Respondent on 3rd October, 2024 served the Applicant with judgment notice and affidavit of service to that effect. The Respondent again served the Applicant's advocates on 20th March, 2025 with a decree letter with the decree and certificate of costs which elicited no response.

22. The Applicant's counsel was aware of the judgment and the proceeding decree and certificate of costs and only decided to resurface when the Respondent started execution proceedings in May 2025 to seek from the court stay orders and extension of time in June 2025.

23. The Applicant has therefore not approached the court with clean hands since the delay of over 6 months has not been adequately explained.

24. The application is therefore found without merit and is hereby dismissed with costs.

25. It is so ordered.

Dated at Nairobi this 28th day of November, 2025

Delivered virtually this 28th day of November, 2025

Abuodha Nelson Jorum

Presiding Judge, Appellate Division

