

**IN THE COURT OF  
APPEAL AT NAIROBI  
(CORAM: ACHODE, JA (IN  
CHAMBERS) CIVIL APPLICATION NO.  
E383 OF 2025 BETWEEN**

**JOHN MIRITI MBARIRE.....APPLICANT**

**AND**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

*(Being an application seeking extension of time to file and serve a  
Memorandum of Appeal out of time against the judgment of the  
Employment and Labour Relations Court at Nairobi (Nzioki wa Makau J)  
dated 4<sup>th</sup> March, 2024*

**in**

**ELRC Cause No. 2399 of 2017**

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**RULING**

1. By Notice of Motion application dated 27<sup>th</sup> June, 2025, the applicant John Miriti Mbarire seeks the leave of Court to file a Memorandum of Appeal, against the judgment of the Employment and Labour Relations Court (ELRC), delivered on 4<sup>th</sup> March, 2024 by Nzioki Wa Makau J. The application is expressed to be brought under **rule 4** and **47** of the **Court of Appeal Rules 2010** (these should be **Court of Appeal Rules 2022**) and **Section 3A** and **3B** of the **Appellate Jurisdiction Act**.
2. The grounds of the application are on the face thereof and supported by his affidavit dated 27<sup>th</sup> June 2025. The applicant avers that he was aggrieved by the aforementioned judgment and he lodged a Notice of Appeal

within 14 days in

compliance with the statutory requirement. He avers that the intended appeal raises arguable issues that the learned Judge disregarded the evidence adduced, the law and regulations as to the compensation the appellant was entitled to; and, misapprehended the facts and the law. He avers that he did not file the Memorandum of Appeal in time due to the court's failure to supply the certified copy of proceedings in good time.

3. The applicant filed submissions dated 1<sup>st</sup> September, 2025 through the firm of J.A. Guserwa & Company Advocates and reiterated all the grounds and averments made in the affidavit. He has placed reliance on the case of **Paul Mulwa Langui vs Kanini Kitili Mwengi (Sued as the legal Administrator of the Estate of Kitili Mwengi Mwai (deceased)) - Civil appeal No. 144 of 2019**, and the case of **Vishva Stone Suppliers Company Limited vs RSR Stone - Civil Application No. 55 of 2020** where the court held that the applicants were unable to beat the deadline to file their appeal due to mistake and/or omission of their counsel and allowed the application. That it would be unfair and unjust to pin responsibility of non-compliance on the applicants.
4. In the submissions dated 23<sup>rd</sup> January, 2026 filed on behalf of the respondent by the firm of Mohammed Muigai LLP, counsel urges that time in the administration of justice is a fundamental safeguard against erosion of finality and the prejudice that attends indefinite delay. He relies on the case of **Aviation Cargo Support Limited vs St Mark**

**Freight Services Limited [2014] eKLR**, where delay of  
far lesser

duration was deemed inexcusable absent extraordinary cause. Counsel submits that the applicant's plea rests on unsubstantiated claims of illness, contradicted by his vigorous pursuit of parallel remedies in the superior court below. Thus the court should decline to exercise its discretion lest it reward indolence and subvert the same principles of timely adjudication that **rule 4** exists to uphold.

5. In reliance of the Supreme Court decision in **Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, counsel posits that discretionary power is a powerful tool that should be exercised with abundant caution, care, fairness and on a case to case basis. That extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. Further that in **Fakir Mohamed vs Moses Mugwanja & 4 others, [2005] eKLR**, the court underscored that vague pleas fail to engage the court's favour, for equity aids the vigilant not the indolent and the burden rests on the applicant to persuade, and not presume the benevolence of the court.
6. On whether there is reasonable reason for delay, counsel relies on the case of **Utalii Transport Company Limited & 3 others vs NIC Bank Limited & another [2014] eKLR**, to state that there is no precise measure of what amounts to inordinate delay, as it depends on the circumstances of the case. That the litmus test is that it be an amount of delay that leads the court to an inescapable

conclusion that it is inordinate, and therefore inexcusable.

7. Counsel asserts that the chronology of events in this case shows that the delay is more than 13 months, a period which in the annals of the appellate practice, borders on egregious. That whereas the inordinate lapse alone suffices to deny the reliefs sought, it gains added force viewed against the respondent's alacrity, having lodged its Notice of Appeal on 6<sup>th</sup> March, 2024, requested for proceedings the same day and lodged the appeal by 12<sup>th</sup> April, 2024.
8. On whether the delay has been explained to the satisfaction of the Court, counsel contends that the applicant attributes the delay on personal illness that commenced on 14<sup>th</sup> March, 2024, without a shred of medical documentation, or contemporaneous record to lend credence. Counsel invokes the findings in **Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR** where the Court held that bare averments of incapacity demand proof, lest they become a convenient veil for dilatoriness. That the absence herein renders the excuse not merely unpersuasive but untenable.
9. That moreover, the applicant's assertion collapses under the weight of contradiction of professing debility on the one hand and a robust campaign in the court below on the other hand, an incongruity reminiscent of **Adana vs Ogara, Civil Appeal No. E006 of 2021) [2025] KEHC 1462 (KLR)**. This congruity exposes the plea as contrived, transforming what might have been a mitigated fault into an inexcusable one. In sum, the reasons advanced fail not only for want of evidence, but for their inherent

implausibility, leaving the delay unexplained.

10. Regarding whether there will be prejudice suffered by the respondent, if the extension is granted, counsel submits that the respondent having filed its Notice of Appeal on 6<sup>th</sup> March, 2024, requested for proceedings promptly and secured a certificate by 20<sup>th</sup> of March, 2024 and lodged an appeal, **Civil Appeal No. E271 of 2024**, on 12<sup>th</sup> April, 2024 it is evident that they pursued the resolution of this matter with unwavering diligence. That revival of the applicants claim now would shutter this trajectory, protracting litigation and costs where closure was reasonably anticipated. Counsel invites the court to dismiss the Notice of Motion.

11. The Court's mandate in the exercise the discretion to extend time otherwise limited by the rules, or decision of this Court, or Superior Court is unfettered. It is donated by **Rule 4 of this Court's Rules 2022** which provides as follows:

***"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."***

12. I have considered the principles that guide this Court in the exercise of that discretion as set out in **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others, Supreme Court of Kenya Application No. 16 of 2014**, which are:

***“1. Extension of time is not a right of a 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 an extension of time has the burden of laying a basis to the satisfaction of the court'***

***3. Whether the court should exercise the 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 respondents if the extension is granted;***

***6. Whether the application has been brought without undue delay; and***

***7. Whether in certain cases, like election petition, public interest should be a consideration for extending time."***

13. As stated in **Nicholas Kiptoo Arap Korir Salat** (supra), extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The party who seeks the extension of time has the burden of laying a basis to the satisfaction of the Court.

14. Regarding whether the appeal has chances of succeeding if the application is granted. It is trite that whether the intended appeal has merits or not is not an issue to be determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon

which

discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”. See- **Athuman Nusura Juma v Afwa Mohamed Ramadhan [2016] eKLR.**

15. The applicant states the arguable issues to be that the learned Judge disregarded the evidence adduced, the law and regulations as to the compensation he was entitled to and that the learned Judge misapprehended the facts and the law. In my view these are not idle grounds. I will however, say no more on this lest I should embarrass the bench that will hear the appeal should it come to that.
16. On the period and reason for the delay, the impugned judgment was delivered on 4<sup>th</sup> March, 2024 and this Notice of motion seeking to extend the time for filing the Memorandum of Appeal is dated 27<sup>th</sup> June, 2025. The delay is therefore, more than thirteen months. The applicant’s sole reason for the delay is attributed to the court’s failure to supply the certified copy of proceedings in good time.
17. First, I must point out that the applicant did not need the certified copy of proceedings to lodge a Memorandum of Appeal. Secondly, I note that the respondent lodged its Notice of Appeal on 6<sup>th</sup> March, 2024, requested for proceedings the same day and lodged the appeal by 12<sup>th</sup> April, 2024. The delay herein cannot therefore, be blamed on failure by the court to supply certified copies of the proceedings. Thirdly, it is also notable that the applicant was vague on when the letter bespeaking the proceedings

was dispatched and there

is no evidence that it was served upon the respondent. I am satisfied that no good reason has been given for the delay.

18. Regarding whether there will be prejudice suffered by the respondent if the extension is granted, I agree with the respondent that revival of the applicants claim at this point would be prejudicial to the respondent by protracting litigation and the costs, where closure was reasonably anticipated.

19. Consequently, it is my considered view that the delay is inordinate and inexcusable and the applicant is not deserving of this Court's discretion to extend time for filing of his appeal. Reasons wherefore, the application dated 27<sup>th</sup> June, 2025 is found to lack merit and is hereby dismissed with costs to the respondent.

It is so ordered.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2026.**

**L. ACHODE**

.....  
**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR.**