



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA AT KERUGOYA**  
**CIVIL APPEAL NO E050 OF 2025**

**TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT**  
**VERSUS**  
**FREDRICK MURIITHI WAMBUI.....RESPONDENT**

**RULING**

[1] The applicant filed a Notice of Motion dated 30<sup>th</sup> June, 2025 seeking the following orders:

1. *Spent.*
2. *Spent.*
3. *The Honourable Appeal Court be pleased to grant the Applicant leave to file the Memorandum of Appeal out of time against the Judgment of the Honourable Senior Resident Magistrate in Gichugu MCCC No. E025 of 2022.*
4. *The Honourable Appeal Court be pleased to grant orders for stay of execution of the Judgment delivered on 31 May, 2024 in Gichugu MCCC No. E025 of 2022 by Honourable Wanjiru. MN - SRM pending hearing and determination of the intended appeal.*
5. *The Honourable Appeal Court be pleased to grant such further orders to secure the ends of justice.*
6. *Costs of this application be provided for.*

[2] The application is based on the grounds set out in the application and the supporting affidavit of applicant's Legal Officer, Cyril Alusa. The applicant's case is based on his defence that the motor vehicle in question was not insured by the Applicant but did not

get the opportunity to attend trial and effectively address its defence. Judgment was subsequently entered against the Applicant in the sum of Kshs 972,152/= together with interests.

- [3] The Applicant avers that he was dismayed and distressed upon being served with a Garnishee Application seeking to execute the decree from the impugned judgment and the same has been fixed for mention for directions on 2<sup>nd</sup> July 2025. Upon perusing the file he came to learn that judgment was entered against the Applicant on 31<sup>st</sup> May, 2024. The Applicant herein was never served with the judgment, notice of entry of judgment decree or any demand that would have prompted the Applicant to take action. They were able to get a copy of the judgment holding the Applicant herein liable.
- [4] Further, the Applicant avers that he has a very good appeal with overwhelming chances of success. Nevertheless, the appeal would be time-barred as the 30 days' period lapsed. The failure in lodging the Memorandum of appeal was attributable to the delay in obtaining the court's Judgment.
- [5] Lastly, the applicant avers that if granted leave, he would undertake to lodge the appeal and prosecute it expeditiously.

#### *Replying Affidavit*

- [6] The Respondent's Replying Affidavit sworn on 8<sup>th</sup> July, 2025 detailed the respondent's response that the application's only agenda and aim is to deny him the fruits of the Judgment delivered way back in 31/05/2024, 13 months prior to filing of this application yet the applicant was acutely aware in itself and its counsel on record then M/s Gichuki Kimere & Company Advocates. The applicants did not initially defend the suit against it until after entry of judgment in April, 2023 did the applicant make an application to set the said judgment aside that was done further delaying the conclusion of the matter which modus operandi the applicant is dragging to this court.
- [7] Further, the applicant only awoke from its slumber when orders of Garnishee Nisi were issued in respect of its Paybill Number 985850 which was found to have sufficient funds to satisfy the decree and only then did the applicant come into the picture to mislead this honourable court that it was unaware of the judgment. It is therefore a falsehood for the applicant to allege that there were "hitches" in obtaining the subordinate court's written

Judgment which was not only published on the Court's Portal way back in May 2024 but also sent to the applicant by my advocates for them to settle the same.

[8] Lastly, the application is only meant to scuttle the realization of the fruits of his judgment obtained even after bouts of delay caused by the applicants in the subordinate court, further a delay of 13 months in filing an appeal is inexcusable and inordinate in the circumstances.

### **Applicant submissions**

[9] *Whether leave to appeal out of time should be granted*

[10] Section 79G of the Civil Procedure Act provides that every appeal from a subordinate court shall be filed within 30 days, but allows admission of an appeal out of time if sufficient cause is shown.

[11] In *Nicholas Kiptoo Korir Arap Salat vs. IEBC & 7 Others* [2014] eKLR, the Supreme Court stated:

*i. “Extension of time is not a right of any party. It is an equitable remedy... a party who seeks for extension of time has the burden of laying a basis... the delay should be explained to the satisfaction of the court...”*

[12] The applicant submits that this Application was filed timeously as the same was immediately filed upon the Applicant being aware of the impugned judgment after service of the Garnishee application. The case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* (1999) 2 EA 231 was also cited for the factors to be considered on application for leave to appeal out of time.

[13] Moreover, the Applicant annexed its draft memorandum of appeal wherein it is faulting the trial Magistrate for failing to hold that the Defendant was not the Insurer of the motor cycle registration number KMEE 010T at the time of occurrence of the accident thus not duty bound to satisfy the decretal sum in Gichugu Civil Suit 31B of 2022 and that the learned magistrate erred law and fact in ignoring and disregarding the totality of Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act.

### ***Whether orders of stay of execution should issue***

[14] The applicant submits that there the Applicant shall suffer substantial loss if the orders of stay are not granted. On substantial loss, the court held as follows in **James Wangalwa & Another vs. Agnes Cheseto [2012] eKLR**, the Court held:

***Execution is a lawful process... the applicant must establish other factors which show that the execution will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...”***

[15] On delay, the applicant submits that this Application was filed timeously as the same was immediately filed upon the Applicant being aware of the impugned judgment after service of the Garnishee application herein. The reason for the delay has been explained above and we urge the Court to find that the Application has been filed without undue delay.

[16] On provision of security for due performance of the awarded decretal sum by the trial court, the Applicant is ready and willing to issue an insurance bond in favour of the Respondent or in any other terms as the Court may deem fit.

### **Respondent Submissions**

[17] The respondent did not file submissions.

### **Issues**

[18] Whether leave to appeal out of time should be granted.

[19] Whether orders of stay of execution should issue.

### **Analysis**

#### ***1. Whether leave to appeal out of time should be granted***

[20] Section 79G of the Civil Procedure Act provides:

***“Every appeal from a subordinate court to the High Court shall be filed within thirty days... provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

[21] The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR set out the guiding principles on extension of time, emphasizing that it is not a right of a party, but an equitable remedy available to a deserving litigant who explains the delay satisfactorily.

[22] The Applicant explains that it became aware of the judgment only upon service of Garnishee proceedings and that it was not served with the judgment or notice of entry thereof. It attributes the delay to the time taken to obtain a copy of the judgment from the subordinate court.

[23] The Respondent, on the other hand, contends that the judgment was delivered on 31<sup>st</sup> May, 2024, and that the Applicant, through its advocates on record, was duly aware of it as it was posted on the e-filing portal and served upon them. The Respondent argues that a delay of over thirteen (13) months is inordinate and inexcusable.

[24] From the record, the delay is substantial. The explanation advanced by the Applicant is not entirely convincing since the existence of prior proceedings, including the summons which were served on the applicant where as deponed in the supporting affidavit of the Legal Officer of 30/6/2025 “(a) upon service of the pleadings of eh current and summons in the matter, the applicant instructed one of their advocates in their panel to represent them [and] (b) the then advocates acted upon the instructions of the applicant. However, as the matter proceeded, the advocates ceased acting for the applicant and the applicant was consequently left in the dark on what was transpiring in Court.”

[25] The improbability of the advocate ceasing acting for the Applicant without notice to the Applicant, which would be a breach of the rules, makes it difficult for the Court to accept with cogent evidence that the Applicant was unaware of the entry of judgment, of the taxation of costs, notice whereof were sent to their advocate on record at the time. Paragraph 2 of the Affidavit of the Legal Officer does not given any such cogent evidence.

[26] In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi***, (Civil Application No Nai 255 of 1997) (unreported), cited by the Applicant and considered in ***Thuita Mwangi v Kenya Airways Ltd*** [2003] eKLR the Court expressed itself:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the***

**appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

[27] As held in **Thuita Mwangi** case, the Court need not consider the issue of chances of appeal, as follows:

*“Again, as we have pointed out, we do not think the Court intended that the list of four items it set out in Mutiso’s case, ante, was ever meant or intended to be exhaustive. It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered.”*

[28] The trial court file and proceedings are not before this court and the Court is not therefore equipped to determine the chances of success of the appeal on the principal ground, which is a matter of evidence, whether the defendant/applicant herein was the insurer of the motor cycle at the time of the occurrence of the accident and thus duty bound to pay the decretal sum in the primary suit as the trial court found on the evidence in its Judgment of 31/5/2024, as follows:

*“The insurance certificate produced as PExh 6 indicates that the motor cycle had been insured commencing on 16/04/2019 and it was to expire on 15/04/2020. The accident is said to have happened on 04/08/2019. It is indicated to have been issued by Trident Insurance Company Limited. the defendant The certificate in itself has not been disputed. The policy number is 080/071/1/122040/2019. This is the same policy number indicated in the police abstract. The defendant is their defence claimed that they had not insured the motor cycle but another company had. There is no suit the defendant instituted to avoid or cancel the policy within the timeline provided by the law when the primary suit was instituted or even in this case really, as misplaced that would be. Once this certificate was tendered as prima facie evidence of existence of a policy. the evidentiary proof shifted to the defendant to prove that the policy number indicated did not belong to the plaintiffs motor cycle or it does not exist at all. They failed to do this.*

***Whether the policy covered the risk in tile primary suit***

*The cover was third party. The primary suit was by a pedestrian who was hit by the motor cycle insured under a third party cover. It was not disputed that third-party cover caters for these claims. The accident happened on 04/08/2018 and the cover was still valid at the time.”*

***Degree of prejudice on the respondent***

[29] However, the prejudice of the respondent in this case where the Respondent who lost his son in the accident subject of these proceedings has been waiting for the payment of the damages adjudged by the Court for five years since the Judgment on 9/10/2020 in the personal injury primary suit and over one year since judgment on 31/5/2024 in the declaratory suit against the Applicant.

[30] In this case, the Applicant has not demonstrated a reasonable explanation for the long delay of over one year, in the circumstances of the case where the applicant was represented by Counsel; the chances of the appeal succeeding, although not primary consideration has not been established and the prejudice to the Respondent is great. On the test in *Leo Mutiso* principles, the court in discretion declines the application for extension of time to lodge the appeal.

**Whether stay of execution should issue**

[31] The principles governing stay of execution pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules, namely that:

- i. The applicant must demonstrate substantial loss if stay is not granted;**
- ii. The application must be made without unreasonable delay; and**
- iii. Security for the due performance of the decree must be provided.**

*Substantial loss*

[32] The Applicant contends that it will suffer substantial loss if execution proceeds, arguing that its intended appeal has high chances of success. It has offered to provide an insurance bond as security. The Respondent maintains that the application is an afterthought meant to delay his enjoyment of the fruits of judgment obtained over a year ago.

[33] As held in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, cited by the Applicant itself, substantial loss must be specific and demonstrable; mere apprehension of loss is not enough because execution is a lawful process, and the applicant must show that execution will irreparably affect the core of its appeal. The applicant has urged substantial loss in the prospect of collapse of the applicant which is struggling under threat of insolvency in the even the execution by the respondents proceeds and it leads to an avalanche of similar proceedings.

#### *Delay*

[34] The Applicant delayed for over one year before moving the Court and has not shown special circumstances to warrant stay. The application was not made without unreasonable delay.

#### *Balance of interests*

[35] As frequently held by this court and as stated in *RWW v EKW* [2019] eKLR, the Court must balance the appellant's right to appeal with the successful litigant's right to enjoy the fruits of judgment, and in appropriate cases, this court has ordered the applicant to pay a proportion of the decretal sum to the respondent and give security for the balance pending determination of the appeal.

[36] However, having declined the leave to appeal out of time, the application for stay of execution, which is an interlocutory application pending the hearing and determination of an appeal, must fail.

#### ***Conclusion***

[37] The application cannot succeed.

[38] In the present circumstances, the Applicant has not satisfied the requirements of timeliness of the application for leave to appeal out of time and for stay of execution and even if substantial loss were established, the offer of security cannot cure the inordinate delay and lack of reasonable and acceptable explanation for the delay.

[39] The decretal amount is on its own not substantial amount against the expected portfolio of an Insurance Company in the nature of the applicant, and there is, therefore, no clear substantial loss. Not without sympathy, which must not guide the decision of the

Court in applications of this nature, even though the applicant is taken to have demonstrated substantial loss in likely collapse after payment of the execution for decretal sum opens floodgates of claims against the applicant under the risk of insolvency, the applicant has not given a reasonable explanation as to the delay in filing the application for stay of execution as it was represented by counsel throughout the proceedings and appropriate notices were sent out to the Counsel at all turns of the proceedings from notice of entry of judgment, notice of taxation of costs dated 12/8/2024 and execution proceedings subsequently. The loss of right of appeal by effluxion of time, delay for which has not been satisfactorily explained, takes away the substratum of an application for stay of execution pending appeal.

[40] If the applicant has any recourse, it is to its previous counsel on record of whom it is alleged in the supporting affidavit of Cyril Alusa at paragraph 2 (b) that “*as the matter proceeded, the Advocates ceased acting for the applicant and the applicant was consequently left in the dark on what was transpiring in Court.*”

### **ORDERS**

[41] Accordingly, for the reasons set out above, the Court does not find merit in the application for leave to appeal out of time and stay of execution pending appeal dated 30/6/2025, and it is dismissed.

[42] The applicant shall pay the costs of the application to the Respondent.  
*Order accordingly.*

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

### **APPEARANCES:**

Mr. Kyalo for Mr. Omari for the Applicant.

Mr. Tumu for the Respondent.