

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
*(Coram: A.C. Mrima, J.)*  
**MISC. CIVIL APPLN. NO. E044 OF 2025**

*-between-*

**ESTHER NYAMBURA WANJIKU &  
EVERLYNE WANJIRU WANJIKU**  
*(Suing as the legal representatives of the  
estate of SEPHANIA ODHIAMBO)* .....  
**APPLICANTS**

*-versus-*

**TRIDENT INSURANCE COMPANY LIMITED....**  
.....**RESPONDENT**

**RULING**

**Background:**

1. On 9<sup>th</sup> November 2023, the trial Court in *Milimani [Nairobi] CMCC No. E5607 of 2022* (hereinafter referred to as '**the suit**'), entered judgment in favour of *Esther Nyambura Wanjiku & Everlyne Wanjiru Wanjiku*, the Applicants herein, against the Respondent, *Trident Insurance Company Limited*, for the sum of Kshs. 6,737,880.82 together with interest and costs.
2. Subsequently, the Applicants moved to execute the judgment through Garnishee proceedings *vide* an application dated 10<sup>th</sup> April 2024. On 7<sup>th</sup> November 2024, the trial Court delivered a ruling capping the Respondent's attachable liability under the garnishee proceedings to the statutory limit of Kshs. 3,000,000/= plus interest, pursuant to the Insurance (Motor Vehicles Third Party Risks) Act.
3. Aggrieved, the Applicants filed an application by way of a Notice of Motion dated 22<sup>nd</sup> May 2025, subject of this ruling, seeking leave to file the appeal out of time.
4. The application was vehemently opposed, hence, this ruling.

### **The Application:**

5. Through the application, the Applicants sought the following orders: -
  1. *Spent.*
  2. *THAT this Honourable court be pleased to grant the applicants leave to appeal out of time against the Ruling delivered by Honourable Isabellah Barasa (Principal Magistrate) on the 7<sup>th</sup> November, 2024 in MILIMANI CMCC NO. E5607 OF 2022.*
  3. *THAT the costs of this application be provided for.*
6. The application was supported by the Affidavit of *Paul Kariba Kibiku*, the Applicants' Counsel, sworn on 22<sup>nd</sup> May 2025. It was his case that judgment was delivered on 9<sup>th</sup> November 2023 in favour of the Applicants for Kshs. 6,737,880 together with interest and costs and proceeded to execute the judgment through Garnishee proceedings on 10<sup>th</sup> April 2024, attaching several bank deposits belonging to the Respondent. He deposed that the trial Court's ruling on 7<sup>th</sup> November 2024 held that the Respondent was only liable to settle Kshs. 3,000,000/= and interest out of the decretal sum a position he claimed was an unlawful review and setting aside of the 9<sup>th</sup> November 2023 judgment by a Court that was *functus officio*, without any formal application for review being filed.
7. It was his further case that the Applicants were granted leave to appeal on 11<sup>th</sup> December 2024, but despite following up *vide* a letter dated 16<sup>th</sup> December 2024, the extraction of the order was delayed by the Court registry. He contended that the intended appeal is arguable with high chances of success, and substantial prejudice amounting to a loss of over Kshs. 3,000,000 would occur if leave is denied. He pleaded that the application be allowed.

### **The Submissions**

8. Through written submissions dated 24<sup>th</sup> October 2025, the Applicants claimed that that the delay in filing the appeal was procedural and excusable. They submitted that under Order 43 Rule 1(3) of the Civil Procedure Rules, they were legally bound to obtain leave before appealing the interlocutory ruling of 7<sup>th</sup> November 2024, which they did on 21<sup>st</sup> November 2024, and were granted on 11<sup>th</sup> December 2024, but the extraction of the order was delayed by administrative inefficiencies at the Court registry despite persistent follow-ups as evidenced by their letter dated 16<sup>th</sup> December 2024.
9. The Applicants further argued that their intended appeal raised serious and arguable legal issues, including the assertion that the trial Court acted *functus officio* by substantively reviewing the judgment of 9<sup>th</sup> November 2023 without a formal application for review under Order 45 of the Civil Procedure Rules. They relied on Section 79G of the Civil Procedure Act and the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, arguing that they possessed good and sufficient cause and that the delay was neither inordinate nor deliberate.

#### **The Respondent's case:**

10. The Respondent challenged the application through a Replying Affidavit sworn by *Wesley Osoro* on 16<sup>th</sup> September 2025. He deposed that the ruling of 7<sup>th</sup> November 2024 was a proper exercise of the Court's jurisdiction at the execution stage and lawfully determined the attachable amount to be Kshs. 3,000,000/= plus interest.
11. The Respondent vehemently denied that the trial Court reviewed or set aside the original judgment, maintaining that the judgment remained intact and the court was not *functus officio*.

#### **The Submissions**

12. In its written submissions dated 16<sup>th</sup> September 2025, the Respondent argued that the Applicants failed to demonstrate good and sufficient cause for the delay. It was its case that the

Applicants' failure to even serve a Notice of Appeal within the statutory 30 days displayed a lack of diligence, and that relying on administrative delays in extracting orders without more did not constitute sufficient cause.

13. Further, the Respondent submitted that Garnishee proceedings under Order 23 of the Civil Procedure Rules serve merely as a mode of execution and do not vary the original judgment. To bolster its case, the Respondent relied on the case of *Thuo & another -vs- Kaghai* (Civil Appeal E013 of 2024) [2025] KEHC 5665 (KLR) for the principle that an applicant must satisfactorily explain the delay and demonstrate promptitude. Further support was drawn from the case of *Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 7 Others* [2014] eKLR and *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, where it was observed that extension of time is a discretionary equitable remedy requiring a reasonable explanation for the delay and consideration of prejudice.
14. Finally, the Respondent referred the Court to the case of *Nelson Kaburu & Co Advocates v Mathews Kenyansa Kimaywa & Another* (2023) KEHC 25387, which reaffirmed that garnishee proceedings involve the attachment of debt and do not set aside a prior judgment.

**Analysis:**

15. From the foregoing discourse, the sole issue that emerges for determination is whether the Applicants have attained the threshold to warrant an extension of time to file an appeal out of time. The power to grant leave to appeal out of time involves the exercise of judicial discretion since the time within which a party must institute an appeal is provided for in Section 79G of the Civil Procedure Act. That period is 30 days from the date of the decree or order appealed against, excluding from such period any time which the Court appealed from may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. There is as well the liberty for extension of said period.

16. In **Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 others** (Application 16 of 2014) [2014] KESC 12 (KLR), the Supreme Court approvingly made reference to the decision of the Supreme Court of California in *Silverbrand -vs- County of Los Angeles* [2009] 46 Cal. 4<sup>th</sup> 106 where jurisdictional significance of timeous filing of an appeal was discussed as under: -

*As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite.*

*.... Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.*

*..... The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.*

17. In the **Nick Salat case** [supra], the Learned Judges of the Apex Court identified the principles applied by a Court in exercising discretion. They observed;

*... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.*

18. Further, the Supreme Court referred to the Court of Appeal decision in **Paul Wanjohi Mathenge -vs- Duncan Gichane Mathenge** [2013] eKLR which laid out the principles to be satisfied in the following terms;

*... I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance*

*For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus: -*

.... 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.** (emphasis added)

19. The Apex Court then crystallized the applicable principles as follows: -

..... 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court **Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time...** [emphasis added].

20. Coming back to the circumstance of the case, the record confirms that a ruling was delivered on 7<sup>th</sup> November 2024. The Applicants were statutorily required to seek leave to appeal, which they applied for on 21<sup>st</sup> November 2024 and obtained it on 11<sup>th</sup> December 2024. The subsequent delay in extracting the formal order was supported by correspondences to the Court registry dated 16<sup>th</sup> December 2024.
21. Taking into consideration the Christmas Recess, a period of about three weeks, the total period of delay was approximately four and a half months. Since the delay was partly occasioned by procedural and administrative lapses attributable to the Court, I find that the Applicants have satisfactorily explained the delay. Accordingly, they meet the threshold of good and sufficient cause.
22. On the arguability of the intended appeal, the core dispute centres on whether a trial Court, during Garnishee

proceedings, possesses the jurisdiction to cap the attachable liability to a statutory limit of Kshs. 3,000,000/= when the primary decree awarded Kshs. 6,737,880.82. The Respondent emphatically asserted that Garnishee proceedings are purely executionary. However, the Applicants' contention that the trial Court's application of the statutory cap at the execution stage essentially reviewed a final judgment while *functus officio*. In this Court's assessment, the issue is a substantial question of law which renders the intended appeal arguable.

23. Finally, the Respondent has not demonstrated that it will suffer prejudice that cannot be remedied by an award of costs.

**Disposition:**

24. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.
25. In light of the foregoing, this Court finds that the Notice of Motion dated 22<sup>nd</sup> May 2025 to be meritorious and hereby issues the following final orders: -

**[a] The Applicants are hereby granted leave to file an appeal out of time against the ruling of the trial Court delivered on 7<sup>th</sup> November 2024.**

**[b] The Applicants shall file and serve a Memorandum of Appeal within 14 days from the date of this Order. The filing shall be in a substantive appeal file.**

**[c] As the delay was attributable to the Court, parties shall bear their respective costs of this application.**

**[d] This file is hereby marked as CLOSED.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 30<sup>th</sup> day of April, 2026.**

**A.C. MRIMA  
JUDGE**

**Ruling virtually delivered in the presence of:**

**Ms Kamau** holding brief for **Mr. Kibiku** for the Appellants/Applicants.

**No appearance** for the Respondent.

**Michael/Amina** - Court Assistants.