

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CIVIL MISC APPLICATION NO. E001 OF 2026

BARAKO GIRO KATELO.....APPLICANT

VERSUS

GUYATU WAKALA..... RESPONDENT

R U L I N G

1. The application before this court for determination is the Notice of Motion application dated 30th January 2025 brought pursuant to provisions of **Section 1A, 3A, 79G & 95 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules**, and all other enabling provisions of law. The applicant prays for orders that he be granted leave to appeal out of time against the ruling of Honourable Mustafa.G. Shunu delivery on 31ST October 2025 in **Marsabit KCMATC E018 of 2025** and that the court be pleased to stay execution of the said decree pending hearing and determination of the intended Appeal.
2. This application is supported by the grounds on the face of the said application the Supporting affidavit of the

applicant, dated 30th January 2026, where he deposes that the respondent had filed a petition before the Honorable Kadhi, and he did prosecute the said petition unrepresented by counsel, in good faith believing that the said court would render a fair ruling, but unfortunately the ruling delivered on 31st October 2025 was not clear in some aspects regarding custody of the minors and which property constituted matrimonial property, where the said children would be brought up leading to further disagreements between the parties.

3. The impugned ruling was unjust and upon advice of his counsel, he had filed this application seeking leave to appeal out of time to enable the appellate court re-examine the evidence adduced and rectify the injustice that the parties had been subjected to too. The delay in filing the appeal was not deliberate and had been caused by his inability to retain counsel as well as lack of understanding of the legal process. Be that as it may, he urged the court to allow the said application as the proposed appeal was arguable, meritorious in law, and had high chances of success. The respondent too would not suffer any prejudice as the delay in filing the appeal was not inordinate.
4. The Respondent opposed this application through her Replying Affidavit and ground of opposition both dated 6th February 2026. She averred that the applicant had been negligent to have waited for over 90 days before seeking

to appeal, which period was inordinate and further had not proffered any legitimate reason for failing to prefer his appeal on time. His lacking counsel to assist him navigate through the primary matter was an excuse as he had fully participated in the said proceedings and had not expressed any fear or inability to understand the proceedings undertaken.

5. She further also pointed out that the applicant was the Chief Medical Officer in Marsabit county and thus was a knowledgeable person about his rights and could not attribute the delay to file his appeal to ignorance. In the circumstances it would be grave injustice to allow this application as further legal proceedings would destabilize the minors and litigation too, had to come to an end. She also urged the court to note that what the appellant intended to do was to delay enforcement of the maintenance decree issued against him to the detriment of the minors.
6. The respondent thus urged the court to find that the said application lack merit and be pleased to dismiss the same.

(B) Analysis & Determination

7. I have carefully considered the Application, and the affidavits filed in support and in opposition thereto. The two issues, which for determination is whether the appellant should be granted leave to Appeal out of time

against the ruling of the Honorable Kadhi dated 13th December 2024 and if the said ruling should be stayed.

(i) Extension of Time

8. **Section 79G of the Civil Procedure Act** provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

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.”

9. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of **Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR** where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir

Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

10. This application was filed 90 days after the challenged ruling was delivered and I do find that the delay has been sufficiently explained and is not inordinate.
11. On the chances of the Appeal succeeding, that the grounds of appeal raise genuine issues regarding joint and equal responsibility of raising the children of the marriage and require further interrogation, which can only happen if leave to Appeal is granted. Finally, the respondent would not be prejudiced if the order sought is granted as she would be well compensated by way of thrown away costs.

(ii) Stay of Execution

12. Stay of Execution pending appeal is governed by **Order 42 Rule 6 of the Civil Procedure Rules**. It is evident

from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See **Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417.**

13. To the foregoing I would add that an order of stay of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under **sections 1A and 1B of the Civil Procedure Act**, which enables court give effect to its overriding objective, while in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

14. The court, in considering this kind of Application, where the minors are involved, has to observe the cardinal provisions of **Article 53, (1), (c) & (2) of the Constitution of Kenya** and place the best interest of

the child in the forefront of its decision and will not strictly adhere to the provision of **Order 42 Rule 6 of the Civil Procedure Rules** in determining whether or not an order of stay ought to issue

15. The pleadings herein reveal that the parties herein are blessed with four children and it is the applicant's contention that he physically custody of two children, and the respondent had custody the minor two children. It was therefore unfair for the learned Kadhi to direct that he solely bears the burden of maintaining all the children by paying the respondent child maintenance of **Kshs.30,000/=**, without placing corresponding burden on the respondent to carry her parental weight, so to speak. The said amount was also excessive, when considering other factors such as, he had custody of two children and paid school fees and related expenses for all the children, which responsibility remain constant.
16. At this point, the court cannot consider the merits or otherwise of the Kadhi's finding and in exercising its discretion, must opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** The scale of justice tilts in favour of both parents being in their children's life and positively contributing for their wellbeing both emotionally and financially, Considering the circumstances herein, completely staying the primary decree, would be to detrimental to the children's welfare and thus order that

pending the determination of this appeal, the monthly child maintenance due from the applicant will be reduced to **Kshs.20,000/=**.

DISPOSITITON

17. The upshot is that the application dated 30th January 2026 is partially allowed.

a) The Applicant is granted leave to file his Appeal against the ruling of the Honourable Kadhi dated 31st October 2025 delivered in Moyale KCMATC No E018 of 2025 and shall do within 14 days of delivery of this ruling.

b) The Applicants prayer of stay of execution is dismissed, but the monthly child maintenance is reduced to Kshs20,000/= pending hearing and determination of this Appeal.

c) The respondent will have costs of this Application and the same is accessed at Kshs.20,000/= all inclusive.

18. The Appeal be fast-tracked and it be heard within the next 90 days

19. It is so ordered.

READ, SIGNED and DELIVERED virtually at **MARSABIT** on this **13TH** day of **FEBRUARY, 2026**.

**FRANCIS RAYOLA OLEL
JUDGE**

Delivered on the **virtual platform, Teams** this **13TH** day
of **FEBRUARY, 2026.**

In the presence of;

N/Afor Appellant

N/Afor Respondent

Mr. JarsoCourt Assistant

ORIGINAL