

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CIVIL MISC APPLICATION NO. E005 OF 2025

MARE OGE.....
APPLICANT

VERSUS

HABIBA AILA KARA..... RESPONDENT

R U L I N G

A. Introduction

1. The application before this court for determination is the Applicants Notice of Motion application dated 8th July 2025 brought pursuant to provisions of **Section 1A, 1B,3, 3A, 63(e), 79G & 95 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010, and Article 159(2),(c) of the Constitution** and all other

enabling provisions of law. The applicant prays for that;

a) ***Spent***

b) ***Spent***

c) ***That this Honourable court be pleased to grant the Applicant leave to file an Appeal out of time against the judgment issued in Marsabit Kadhi's court Succession No 4 of 2019 Habiba Alla Kara Vs Mare Oge delivered on 7th December 2021.***

d) ***That costs of this Application be provided for.***

2. This application is supported by the grounds on the face of the said application and the Supporting affidavit of the applicant, dated 8th July 2025, where she averred that she was the lawful widow of the late ***GINA AILIA DAE***, who passed on 7th July 2017, while the respondent was her stepdaughter. The respondent had upon the death of her father had commence ***Marsabit Succession cause No 4 of 2019***, where eventually judgment was delivered on 14th May 2019.

3. Being dissatisfied with the same, she did file an Appeal being **Marsabit Civil Appeal No 17 of 2019**, which appeal was heard on merit and judgment delivered by Justice Said Chitembwe on 19th February 2020. The respondent then did file an application to review of the said judgment and vide his ruling dated 27th January 2021, the said learned judge did order that the said succession case before the Kadhi be heard afresh.
4. At the subsequent hearing before the Kadhi, she did inform the court that the estate property had been transferred & registered under her name by the deceased during his lifetime and thus did not form part of the deceased estate, but despite providing this evidence, the learned Kadhi in his judgment dated 7th December 2021 proceeded to cancel her title deed (**Marsabit/Mountain/1725**) on grounds that she had obtained the same through forgery.
5. The applicant further contradicted herself by claiming that the proceedings before Kadhi's court were take exparte in her absence and that the said court had failed to adjudicate on her preliminary objection, which her counsel had filed thus occasioned her serious miscarriage of justice since

she was not accorded a fair hearing. Aggrieved by the said ruling she filed **Isiolo Elc Petition No E001 of 2021**, which was dismissed on technicality on 25th September 2023 and again based on her counsel's advice file the second petition, to wit; **Isolo Elc Petition No E006 of 2023**, which again she withdrew on 5th March 2025 based on her new counsel's advice.

6. Further she did depone that during the pendency of **Isiolo Elc Petition E001 of 2021 and E006 of 2023**, there was no stay of the decree issued by the Kadhi's court, and was therefore arrested and charged with the offence of forgery, yet paradoxically the lands registrar who reviewed the said transfer document and authorized change of ownership of title was not arraigned before court. It was thus clear that her's was a persecution as she had not committed any crime and was being maliciously targeted for obvious reasons.

7. Be that as it may, she had eventually sought advice from her current advocate and had been advised that the ELC court had no jurisdiction to deal with appeals from the Kadhi's court. Being desirous of appealing against the Kadhi's court

decision, which had unlawfully deprived her of her property, she had thus filed this Application to ensure that justice is done. Her intended Appeal was not frivolous, had high chances of success and the respondent would not be prejudiced if the said application was allowed. She thus urged the court to allow this application to have this dispute determined fairly and on merit.

8. The respondent opposed this Application through her replying affidavit dated 4th August 2025. She regurgitated the facts concerning **Marsabit High court Appeal No 17 of 2019** and clarified that after judgment had been delivered on 19th February 2020, it was the applicant who moved the said court to review the said judgment vide her application dated 17th March, 2020 and in prayer (2) of the said application urged the court to remove **Plot 50 (Specifically Marsabit/Mountain/1725)** from the deceased list of assets. Vide the court's ruling dated 27th January 2021, the said application was allowed and the Kadhi's court directed to rehear the dispute afresh.
9. She further pointed out that in the said ruling dated 27th January 2021, the high court did make a

specific finding that she was entitled to claim a part of the estate, whether the same was registered as Plot was No 50,1393 or 1725 and given that the appellant did not appeal against the said ruling, she could not be heard to complain at this late stage that she was the absolute owner of **LR Marsabit/Mountain/1725**.

10. It was also to be noted that the applicant had retained the same counsel, Mr John Behailu, who prosecuted her appeal **Marsabit Civil Appeal No 17 of 2019** and was also the same counsel who had withdrawn the second ELC petition filed before Isiolo Elc court. Her contention that she did not get proper legal advice thus fell flat on its face and nor was her contention that she was an illiterate old widow justifiable given that she was aware of the judgment dated 7th December 2021 and consistently put up a spirited fight to have it overturned, though in the wrong forum.

11. Finally, it was the respondent's contention that, ***"Equity does not aid the indolent"***. The applicant had not sufficiently demonstrated what prevented her from filing an appeal over the last

four years, and courts discretion could not be made in her favour due to the time lapse and lack of proper explanation for the lapse. It was also important to have litigation come to an end and therefore urged the court to dismiss the said Application as it was filed as an afterthought to derail, frustrate and deny the other estate beneficiaries their rightful share of the said estate property.

B. Analysis & Determination

12. I have carefully considered the Application, and the affidavits filed in support and in opposition thereto. I have also considered the parties' respective submissions filed and the various authorities relied upon. The only issue which arises for determination is whether the appellant should be granted leave to Appeal out of time against the judgment/decree of the Honorable Kadhi dated 7th December 2021 issued in **Marsabit Kadhi's Court Succession No 4 of 2019 Habiba Alla Kara Vs Mare Oge.**

13. **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.”

14. The said provision is to be read with **Order 50 rule 6 of the Civil procedure Rules** which further provides that;

“ where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the

expiration of the time appointed or allowed.”

15. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of **Omar Shurie v Marian Rashe Yafar (Civil Application No. 107 OF 2020) UR** where it was held:

“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.”(Also see Thuita Mwangi V Kenya Airways Ltd [2003] eKLR

16. Similarly, the Court of Appeal in the case of **Thuita Mwangi V Kenya Airways Ltd [2003] eKLR** discussed some of the factors that aid Courts in

exercising the discretion whether to extend time to file an appeal out of time, They include the following:

i) *The period of delay;*

ii) *The reason for the delay;*

iii) *The arguability of the appeal;*

iv) *The degree of prejudice which could be suffered by the if Respondent the extension is granted;*

v) *The importance of compliance with time limits to the particular litigation or issue; and*

vi) *The effect if any on the administration of justice or public interest if any is involved.*

17. Finally on the importance of giving a sufficient reason for the extension of time to appeal, the same was discussed in the Court of Appeal 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”.

18. Considering the above parameters as eloquently expounded in the above case law, it is common ground that extension of time is not a right of a party but could be granted as an equitable remedy only when a deserving party sufficiently explains the reason for delay. In this instance, this application has been filed four years late, because the applicant boarded the wrong litigation train and alighted too late in the day, when time to pursue

her appeal against the decree dated 7th December 2021 had long lapsed.

19. The appellants excuse/explanation that she was an old lady and was misadvised by her counsel to file the Elc petition's, rings hollow and is not supported by the tenacity she has consistently exhibited in her persistent legal battle with her stepchildren from 2017 when her husband died.
20. She and her counsel on record have all along been aware of this judgment but opted for reasons best known to them not to challenge the same in the right forum. It is therefore too late in the day to claim ignorance of the law and/or mistake of counsel, which excuse is not supported by her litigation history and the facts pleaded. I do therefore find and hold that the reasons proffered by the applicant for seeking leave to file her appeal out of time are not convincing and/or reasonable and reject the same. See **Base Titanium Limited Vs County Government of Mombasa & Ano SC Petition (App) No 22 of 2018 (2019) Eklr & Geo Chem Middle East Vs Kneya Bureau of Standards (2020) eKLR**

21. On the chances of the Appeal succeeding, I do find and hold that in the review ruling issued by the Honourable Justice S Chitembwe dated 27th January 2021, which ruling the appellant did not appeal against, did make a conclusive finding that the respondent was entitled to claim part of the suit parcel of land (estate property) whether it was from Plot No 50,1393 or 1275 and sent the parties back to the Kadhi's court to have the court determine the parties respective share's as provided for under the Islamic law. The net effect of this finding is that whichever direction the applicant takes she cannot wish away the respondents share in the deceased estate and that will not change even if she is allowed to appeal against Kadhi's ruling. The Appeal to be filed, if any, therefore has no chance of success.

22. Finally on the issue of prejudice, it is my finding that the court has to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie. Considering the same, it is clear that the parties have been in court from 2017 and it has

reached a point where there must be an end to litigation for the respondent to enjoy the fruits of their judgment. Regurgitating the same issues over and over again cannot be in the interest of justice and the parties herein must of necessity, distribute the estate and find closure.

C. DISPOSITITON

23. The upshot is that the application dated 8th July 2025 lacks merit and the same is dismissed with Costs to the respondent, which costs are assessed at kshs.30,000/=.
24. Stay of execution 30 days.
25. It is so ordered.

READ, SIGNED and DELIVERED virtually at **MARSABIT** on this **12th** day of **FEBRUARY 2026**.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the **virtual platform, Teams** this **12th** day of **FEBRUARY , 2026**.

In the presence of;

N/Afor Appellant

N/Afor Respondent

Mr. JarsoCourt Assistant

ORIGINAL