



REPUBLIC OF KENYA



MGK v KDH (Family Appeal E001 of 2026) [2026] KEHC 3732 (KLR) (13 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
FAMILY APPEAL E001 OF 2026**

**FR OLEL, J
MARCH 13, 2026**

BETWEEN

MGK APPELLANT

AND

KDH RESPONDENT

RULING

A. Introduction

1. The Application before this court is the Notice of motion application dated on 16.01.2026 brought pursuant to provisions of Rule 5, 86 of the Kadhi's court (Procedure and Practice rules) Section 1A, 1B, 3(A), 78 & 79G of the *Civil Procedure Act*, Order 9 Rule 9, Order 42 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of law. The Applicant's seek the following prayers, that;
 - a. Spent.
 - b. That the Applicant be granted leave to file and serve a notice of appeal out of time against the judgment in Kadhi's court at Marsabit dated 30th June 2025 and with the annexed notice of appeal dated 16th January 2026 be deemed as duly filed.
 - c. Spent.
 - d. That pending the hearing and determination of the Applicants appeal, there be a stay of execution of the judgment dated 30th June, 2025 in Marsabit Kadhi's court KCDC E007 of 2025.
 - e. That costs of this Application be in the cause.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of the Applicant, Mariam Galgallo Katelo, who depones that she had initially filed Marsabit



HCFA/E001/2025 to challenge the judgment dated 30th June 2025 issued by the learned Kadhi in Marsabit Kadhi's Court KCDC E007 of 2025, but the said appeal was struck out by this court due to her failure to institute the said appeal by filing a notice of appeal. Still desirous of challenging the said judgment by this application, she was seeking leave of the court to file her appeal out of time, which appeal raised triable issues with high chances of success.

3. Unless the said application was allowed, the notice of appeal admitted and stay of execution granted, the appeal would be rendered nugatory as she risked being evicted from her matrimonial home, where she had resided from 1988 thereby causing her irreparable harm, loss and damage.
4. The application is opposed by the respondent, through his ground of opposition dated 26th February 2026, where he stated that there has been inordinate/inexcusable delay of about six months in filing this application and the explanation offered did not suffice. Secondly, the appellant had filed this appeal without leave of the court and was seeking to regularize the same retrospectively, which practice was expressly depreciated by the supreme court in *Salat Vs Independent Electoral and Boundaries Commission & 7 others* (2014) KESC 12 (klr).
5. Further the respondent pointed out that the applicant failed to mark and seal her annexures attached to the said application, which act contravened provisions of Rule 9 of the Oaths and Statutory declaration Rules and thus the said annexures were inadmissible as evidence. Finally mistake of counsel was not automatically excusable as the appellants advocate had filed this appeal without leave of the court, proceeded to file an impotent application for stay of execution without marking its annexations which rendered the application to be incurably defective.
6. The respondent thus prayed that this application be struck out/be dismissed with costs.

B. Analysis & Determination

7. I have carefully considered the Application, its supporting affidavit and the response filed thereto. The issue arising for determination is whether leave to appeal should be granted and secondly whether stay of execution of the decree issued in Marsabit Kadhi's Court KCDC E007 of 2025 be granted pending determination of this Appeal.

1. Order 50 rule 6 of the civil procedure Rules does 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.”

9. The basis for applying for extension of time 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”.

10. In *Imperial Bank Ltd (in receivership) & Ano Vs Alnasir Popat and 18 others* the court observed that;

“some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”
11. The applicant initially filed Marsabit HCFA / E001 OF 2025 appealing against the judgment of the Honourable Kadhi dated 30th June 2025, but the said appeal was stuck out by this court vide its ruling dated 15th January 2026, on the basis that she had instituted the appeal by filing her memorandum of appeal and not notice of appeal as provided for under the Rule 86 of the Kadhi’s Court (Procedure and Practise) Rules.
12. The reason and explanation advanced explaining the delay in filing this appeal are plausible and secondly given that every party aggrieved with a decision of the trial Court has a natural and undoubted right to seek the intervention of the High court, the said Court should not put unnecessary place hindrance to the enjoyment and exercise of that right by the applicant.
13. The respondent objected to this application on grounds that appellant has proceed to file this appeal without leave of the court and now seeks to regularize it respectively. An appeal is deemed file either by filing the notice of appeal or memorandum of appeal as the law may deem fit. In this instance none has been filed and that is why leave to file the notice to appeal out of time has been sought in pray (2) of the application under determination.
14. The procedural mistake that the applicant’s advocate has made is to file his application under an appeal category and not as a Miscellaneous application, but that is a procedural irregularity cured by provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010. At this point the court appreciate the sentiments expressed by the High Court in *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief
15. The respondent also opposed this application on grounds that the annexures were not sealed or marked in contravention of Rule 9 of the Oaths and statutory declaration rules. On this score the respond too is right but the court takes judicial notice that these proceedings are anchored of the judgment issued by the Honourable Kadhi dated 30th June, 2025 in Marsabit Kadhi’s Court KCDC E007 of 2025, which



is signed and certified. Thus, even if the attached copy is not sealed and marked it does not negate its certified content.

16. On the second limb of stay of execution, in the earlier appeal struck out; Marsabit High court Family Appeal No E001/2025, between the same parties, the applicant had filed her notice of motion application dated 28th August 2025 seeking for stay of execution of the decree issued by the learned Kadhi dated 30th June 2025, issued In Marsabit Kadhi's Court KCDC E007 of 2025 and vide a ruling dated 3rd November 2025, this court had granted her stay of execution pending hearing and determination of the appeal. There is no need to reconsider the said limb afresh and for reasons stated in the ruling dated 3rd November 2025 the applicant is granted stay of execution pending determination of the Appeal

Disposition

17. The Application dated 16th January 2026, therefore has merit and is allowed in the following terms
- a. The applicant is grant leave to file and serve her notice of appeal dated 16th January 2025, within the next 10 days of issuance of this Order.
 - b. There will be stay of execution of the judgement/decree dated 30th June 2025 issued in Marsabit Kadhi's Court KCDC E007 of 2025 pending hearing and determination of the appeal filed.
 - c. The hearing of this Appeal will be expedited, and it shall be heard and determined within the next six (6) months.
 - d. The Appellant will pay the respondent costs of this Application assessed at Kshs.20,000/= within 30 days of this ruling being delivered.
18. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MARSABIT THIS 13TH DAY OF MARCH, 2026.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 13TH DAY OF MARCH, 2026.

In the presence of;

N/Afor Applicant

N/Afor Respondent

Mr. JarsoCourt Assistant

