

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CIVIL SUIT NO. E003 OF 2021

MARSABIT SERVICE STATION LIMITED.....

PLAINTIFF

VERSUS

NEWTON MUTEITHI..... 1st

DEFENDANT

ABDI ISACKO MAMO.....2nd

DEFENDANT

HADIJA YUSUF ABDULLAH.....3rd

DEFENDANT

HAWO HUSSEIN ANNO.....4th

DEFENDANT

EZEKIEL LTAJAWA NAMBERE Alias Ezakiel.....5th

DEFENDANT

TONY HALAKE WARIO.....6th

DEFENDANT

SIMON GITAU.....7th

DEFENDANT/APPLICANT

EDWARD KAMAU MWANGI.....8th
DEFENDANT/APPLICANT

R U L I N G

A. Introduction

1. The application before this court for determination is the Applicants Notice of Motion application dated 25th March 2025 brought pursuant to provisions **of Section 1A, 1B,3, 3A,of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules 2010,** and all other enabling provisions of law. The applicant prays for that;

a) ***Spent***

b) ***Spent***

c) ***That upon leave being granted, this honourable court be pleased to extend time for the 7th and 8th defendants/Applicants to file and serve their Notice of Appeal against the judgment delivered herein on 19th February 2026.***

d) ***That the notice of Appeal filed pursuant to the leave granted herein be deemed as properly filed and served upon payment of the requisite court fees.***

e) ***That costs of the said Application be in the cause.***

f) 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, **Mr Simon Gitau** dated 25th March 2026, where he averred that judgment in this matter was delivered virtually on 19th February 2026 and later uploaded on the court portal on 11th March 2026, which hindered their ability to immediately decipher , the content of the said judgement and to make an informed opinion of its content. Upon receiving the said judgment, and studying the same, they were dissatisfied with the said decision and had instructed the firm of M/S JM & Advocates LLP to file an appeal challenging the same.
3. They had been advised that time to file the said appeal had lapse and there was need to seek leave to lodge the notice of appeal and urged this court to grant the same since the proposed appeal was meritorious and raised substantial points of law and fact. Their failure to file the said appeal on time was not deliberate nor was it inordinate and thus urged the court to grant the prayers

sought in the interest of justice and fairness. Finally, the order sought too, would not prejudice the respondent in any manner.

4. The respondent opposed this Application through the replying affidavit of **Abdulahkim Omar Salim** , a director of the respondent company, who averred that the application filed was devoid of merit and was meant to delay justice and deny the respondent the fruits of successful litigation.

5. Further the applicants had approached the court with unclean hands in equity as they were present when the said judgment was delivered and had sufficient time to appoint counsel to assist them file their appeal on time. No sufficient reason therefore had been advanced to warrant granting of the orders sought and thus prayed that this application be dismissed and the applicants be condemned to pay costs thereof, but in the alternative if the said orders were to be granted, the same ought to be accompanied with strict guidelines to avert further delay

6. **Analysis & Determination**

7. I have carefully considered the Application, and the affidavits filed in support and in opposition thereto. The only issue which arises for determination is whether the appellant's should be granted leave to Appeal out of time against the judgment/decree delivered herein by Hon Justice J.N Njagi dated 19th February 2026.
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 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.”

10. The principles of granting leave to file an appeal out of time were also 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**

11. 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 Respondent if 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.

12. 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 about 30 days

after the said judgment was delivered but later uploaded on the court portal on 11th March 2026.

13. Considering the facts herein, I do find that delay in filing the notice of appeal is not inordinate and the explanation given for failure to do so, too is also plausible. 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, I find that the respondent will not be prejudice if the orders sought are granted as they have already secured the primary judgment and if need be will get security for the same should the issue of stay arise in the future.

C. DISPOSITITON

14. The upshot is that the application dated 25th March 2025 has merit and is allowed in terms of prayer (3) and (4). The applicants are granted leave to file and serve their notice of appeal, within 10 days from the date of this order.

15. The costs of this Application is awarded to the Plaintiff/Respondent.

16. It is so ordered.

READ, SIGNED and DELIVERED virtually at **MARSABIT** on this **14th** day of **MAY 2026**.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the **virtual platform, Teams** this **14th** day of **MAY, 2026**.

In the presence of;

N/Afor Appellant

N/Afor Respondent

JarsoCourt Assistant

ORIGINAL