

REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
HCCMISC APPLICATION NO. E032 OF 2026

BRITAM INSURANCE CO. LTD.....

.....APPLICANT

-VERSUS-

JULIANA KALOKI MAINGI.....

.....RESPONDENT

RULING

Introduction

1. The Application for determination before me is the one dated 08/04/2026 and filed under certificate of urgency. It is brought under Section 79G of the Civil Procedure Act, Order 42 Rule 6, Order 50 rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It seeks the following orders;
 - a) Spent.
 - b) Spent
 - c) **THAT** the execution of the *ex-parte* judgment entered on 10/11/2025 and subsequent decree in Makindu Small Claims Court SCCC No. E309 of 2025; Juliana Kaloko Maingi (Suing as the next friend and mother to James Kyama Mutonye) -vs- Britam Insurance Co. Ltd be stayed pending the hearing and determination of this Application.

- d) **THAT** the Applicant be granted leave to file an Appeal out of time against the ruling delivered on 30/01/2026 in Makindu Small Claims Court SCCC No. E309 of 2025; Juliana Kaloko Maingi (Suing as the next friend and mother to James Kyama Mutonye) -vs- Britam Insurance Co. Ltd.
- e) THAT the draft Memorandum of Appeal annexed hereto be deemed as duly filed and served.
- f) **THAT** the execution of the *ex-parte* judgment entered on 10/11/2025 and subsequent decree in Makindu Small Claims Court SCCC No. E309 of 2025; Juliana Kaloko Maingi (Suing as the next friend and mother to James Kyama Mutonye) -vs- Britam Insurance Co. Ltd be stayed pending the hearing and determination of the Appeal.
- g) THAT the Garnishee orders and all consequential proceedings emanating from Makindu Small Claims Court SCCC No. E309 of 2025; Juliana Kaloko Maingi (Suing as the next friend and mother to James Kyama Mutonye) -vs- Britam Insurance Co. Ltd be set aside.
- h) **THAT** the costs of this Application be provided for.
2. The Application is supported by the grounds on its face and the Affidavit of Rosemary Wanjiru Kimani sworn on the same day. She deposed that she is the Legal Claims Officer at Britam General Insurance Co. Ltd and duly authorized to swear the affidavit. That, execution against the Applicant has since commenced by way of Garnishee proceedings following a default judgment entered into in

respect to a declaratory suit filed by the Respondent before Makindu Small Claims Court SCCC No. E309 of 2025. A copy of the Garnishee Application and Order are exhibited as **RWK-1 & 2** respectively.

3. That, she is aware of **Kenya Orient Insurance Ltd -vs- Otieno (Civil Appeal E166 of 2023) [2024] KEHC 7637 (KLR) (25 June 2024) (Judgment)** where the High Court in Kisumu determined that the small claims court (subordinate court) lacks jurisdiction to determine declaratory suits. She averred that, in total defiance of the binding decision of the high court, the trial court proceeded to enter default judgment in respect to a disclaimer suit. She deposed that the said judgment is irregular, a nullity and therefore void *ab initio*.
4. She deposed that *via* an Application dated 27/11/2025, the Applicant applied to set aside the *ex-parte* judgment but the same was dismissed *via* a ruling delivered on 30/01/2026 where the subordinate court found that it had jurisdiction to determine declaratory suit. That, the Applicant is seriously aggrieved by the said decision and seeks to exercise its undoubted right of Appeal. That, while the Appeal has overwhelming prospects of success, the Applicant is apprehensive that unless the Application herein is heard without delay, the Garnishee Nisi will be made absolute and occasion substantial loss to the Applicant hence render the Appeal nugatory.
5. She deposed that the delay in filing the Application is due to the fact that there were two similar declaratory suits arising from a similar accident. That, on 09/02/2026, Hon. Wamae E.M, in Makindu Small Claims Court SCC No. E309 of 2025-Dominic Mbithi Muatha -vs- Britam Insurance Co. Ltd-upheld the Preliminary Objection and the

declaratory suit was struck out for want of jurisdiction. A copy of the ruling is exhibited as **RWK-6**. That, she had inadvertently mistaken that both suits had been dismissed hence did not instruct their advocates to appeal the decision.

6. The Application is opposed through the Replying Affidavit of Munyoki Muthangya sworn on 22/04/2026. He deposed that he is an advocate of the High Court in personal conduct of the matter on behalf of the Respondent hence competent to swear the affidavit. That, the Application is fatally defective and based on misrepresentation of facts besides being brought after undue delay of over 3 months. That, the trial court ruling was delivered in the presence of counsel for the Applicant and Respondent hence the Applicant was at all material times aware of the decision.
7. It was deposed that the Applicant waited until the commencement of execution in order to file the instant Application yet he was aware of the judgment against them. That, the Application and intended Appeal are a knee jerk reaction to the execution proceedings and not an action in good faith hence not deserving of the equitable rights in form of extension of time to file Appeal.
8. He deposed that the Applicant's reliance on purported grounds of Appeal is a cunning endeavor to unduly influence the court to believe that they deserve the leave while leaving critical explanation on why the Appeal was not filed within the stipulated statutory timelines. That, the undue delay is evidence of indolence and that, the strict timelines provided by statute including the Small Claims Court Act is

not a mere suggestion for the Applicant to elect when to comply with the same.

9. The Application was canvassed orally where Mr. Otieno for the Applicant submitted that there was a series of cases arising out of the same accident and some of them were struck out for lack of jurisdiction and therefore assumed that similar orders were applicable but unfortunately, they were not. He submitted that the court should grant an order of stay because they have an arguable Appeal. He contended that the Small Claims Court has no jurisdiction to entertain declaratory suits. He submitted that the Applicant will suffer prejudice if the orders are not granted. He averred that they are ready to deposit the full decretal sum in court as security.
10. Mr. Munywoki for the Respondent submitted that there was no explanation for the delay and that Counsel for the Applicant was present in court when the ruling was delivered but did not take any steps to set aside the interlocutory judgment. He submitted that the trial court relied on section 27 of the Small Claims Court to enter the ex-parte judgment hence the Appeal has no chances of success.
11. In rejoinder, Mr. Otieno submitted that the Small Claims Court has jurisdiction in declaratory suits and denied that they were indolent.
12. Having looked at the Application, Response and rival submissions, the only issue which germinates for determination is whether the Application is merited.

Analysis and determination.

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. My understanding of the above *proviso* is that an intended appeal should be in place or be filed together with the Application seeking leave for extension of time to file it. My view is buttressed by the case of **Mugo & Others -vs- Wanjiru & Anor [1970] EA 482** where the court stated as follows: -

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

15. In our case, the Applicant has filed this miscellaneous Application together with a draft Memorandum of Appeal which, in my view, qualifies as an intended Appeal for purposes of guiding the court on whether to grant the orders sought.

16. It is now well settled that the extension of time or its denial is an exercise of discretion by the court. In **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**; the Court of Appeal stated as follows;

“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”.

17. The impugned judgment was delivered on 10/11/2025 and this Application was filed on 08/04/2026, approximately 120 days later (excluding the Christmas season). The law requires appeals from subordinate Courts to the High Court to be filed within 30 days from the date of the decree or order appealed against. After lapse of the statutory period, the delay in this matter is about 3 months.

18. The Applicant explained that the delay was occasioned by an inadvertent mistake where their counsel thought that the declaratory suit had been struck out for want of jurisdiction because similar matters arising from the same accident had been struck out by Hon. Wamae. I have looked at the exhibited ruling and it is indeed true that Makindu Small Claims Court SCC No. E309 of 2025-Dominic Mbithi Muatha -vs- Britam Insurance Co. Ltd was struck out for want of jurisdiction. However, the explanation has been rebutted by the fact that the Applicant's counsel appeared in court virtually during delivery of the ruling as can be seen from annexures RWK-3 and MM-1. Be that as it may, and being alert of article 50 of the constitution on the right to be heard, I am of the view that this court should indulge the Applicant and find that the delay of 3 months is not inordinate.

19. Having looked at the Memorandum of Appeal, various high court conflicting decisions on the aspect of lack of jurisdiction by SCC on declaratory suits, it is my view that the Appeal is arguable and should be given a chance for parties to exhaust their legal remedy.

20. As regards the prayer for stay, **Order 42 Rule 6** of the **Civil Procedure Rules** is instructive on the conditions which should guide the Court. They are; whether substantial loss will occur if stay is not granted, whether the Application has been filed without unreasonable delay and furnishing security for the due performance of the decree. The question of delay has already been dealt with.

21. As for substantial loss, the Applicant is apprehensive that if this Application is not determined timeously, the Garnishee Nisi will be

made absolute. A Garnishee absolute would mean that the Respondent is able to access the funds held by Safaricom PLC Ltd (Garnishee) and realize the decretal award of Kshs. 325, 464/=. The award may appear not be substantial but the Respondent did not file an Affidavit of Means hence my view that this court is in the dark as to whether she has capacity to refund in the event that the Appeal is successful. In the case of **National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike: Civil Application No. 238 of 2005** the Court of Appeal stated;

“This court has said it before and it would bear repeating that while the legal duty is on the applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

22. As for security, the Applicant’s Counsel stated that they are ready to deposit the whole amount in court. The court has a duty to balance the competing interests between the parties by ensuring that while the Applicant exercises its right to pursue an Appeal, the decretal

award is secured in a way that is easily accessible in the event that the Appeal is unsuccessful. consequently, I am of the view that the Applicant should deposit the whole decretal award in a joint interest earning account in the names of parties' Advocates on record. Accordingly, it is hereby ordered;

- 1) That leave to file the appeal out of time be and is hereby granted and that the said appeal be filed within 30 days from the date of delivery of this ruling.
- 2) That stay of execution be and is hereby granted as prayed subject to the respondents depositing the full decretal sum in an interest earning joint account held in the names of advocates representing the parties herein within 45 days in default execution to proceed.
- 3) That this file is hereby marked as closed as a new file shall be opened for purposes of the intended appeal.

Dated, signed and delivered virtually this **12th** day of **May 2026**

J.N ONYIEGO

JUDGE