PIUS KAWINZI KITHOKA……..…….APPLICANT

VERSUS

JACINTA KAVINDU MAKAU…….....RESPONDENT

RULING

1. The applicant herein, **Pius Kawinzi Kithoka** ("*Applicant*"), has moved the Court by way of **Notice of Motion** dated **27/03/2009** ("*Application*"). In the main, the Application seeks two reliefs:

a. That the Court enlarges time for filing an Appeal from Kangundo CRMCC No. 60 of 2005;

b. That there be a stay of execution of the decree in Kangundo CRMCC No. 60 of 2005 pending the hearing and determination of the appeal.

2. The Application also sought an order of temporary stay of execution pending the hearing of this Application. The same was granted by *Justice Lenaola* on *31/03/2009* when he also certified the Application as urgent. The Application is supported by the Supporting Affidavit of the Applicant.

3. The Application is opposed. The Respondent, **Jacinta Kavindu Makau** ("*Respondent*") filed a Replying Affidavit sworn on **08/06/2009** and filed in Court on the same day.

4. The Application was canvassed by way of written submissions which were filed and confirmed by *Justice Kihara Kariuki* on **18/05/2011**. *Justice Kihara Kariuki*, however, left the station before he could deliver the ruling. It fell on me to do so. At a mention duly scheduled and notified on **25/11/2011,** the Respondent's counsel requested for a ruling based on the face of the record. I obliged.

5. I will begin with the Applicant's request for extension of time to file an appeal because if that prayer fails, the relief sought for stay of execution is dependent on it. The law, in **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. It is not clear when the decree was extracted in the lower Court. Indeed, it is not even clear when the judgment was delivered in the case. It was incumbent upon the Applicant to place these matters before the Court so that it can reach proper determination.

6. Instead, the Applicant tells the Court the following:

a. That judgment in the lower court was initially scheduled for 09/11/2008 but the Learned Magistrate failed to deliver it on that day and advised that judgment would be delivered on notice;

b. That neither the Applicant nor his advocates received any notice regarding the judgment;

c. That the Applicant only got to learn that a judgment had been given when he received a call from his father on 09/03/2009 who complained that some auctioneers had proclaimed the father's property on account of a decree from the suit.

7. We only get to learn of the date the judgment was delivered from an annexture to the Respondent's Replying Affidavit (Annexture Marked as *"JKM 1"* which is a letter purportedly written to the Applicant's advocates dated **23/01/2009).** From this letter, we learn that the judgment was delivered on **19/12/08.**

8. The Applicant says he did not know about the judgment and the Learned Magistrate failed to issue a notice as required by law (**Order XX, Rule 1** of **(Old) Civil Procedure Rules).** He therefore prays that the Court exercises its discretion and allow him to file an appeal out of time.

9. The Respondent requests that the motion be denied and gives the following reasons:

a. First, the Respondent says that the Application has been brought after inordinate delay. The Respondent says that the Applicant's advocates knew about the judgment at least since shortly after 23/01/2009 when her advocates wrote to Applicant's advocates.

b. Second, the Respondent argues that the Application was only brought after the Respondent tried to execute the decree of the lower court. This, she says, shows it has been brought in bad faith.

c. Third, the judgment/order being appealed against has not been attached to the Application.

10.In deciding whether to exercise the Court's discretion, the court is guided by two competing interests. On the one hand, there is the obligation of a court of law to do justice by the parties and not to use technical legal rules to defeat substantive justice. The legal principle implicated by this judicial objective is now enshrined in the now popularly known Oxygen Principles encapsulate in **sections 1A** and **1B** of the **Civil Procedure Act.**

11.On the other hand, however, we must never lose sight of the fact that though procedure is the handmaiden of justice; and that rules of procedure serve an important function of preserving the orderly conduct of legal proceedings. In addition, courts must recall the need to bring proceedings to an end.

12.The judicial test which has developed to balance these competing interests is stated succinctly in the case of *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi* (Civil Application No. NAI 251 of 1997). There the court stated the test in these terms:

It is now 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 matter which this Court takes into account in deciding whether to grant an extension of time are first the length of delay. Secondly the reason for the delay, thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.

This case was cited with approval by the Court of Appeal in *Grindlays Bank International (K) Ltd v. George Barboor* (Civil Application No. NAI 251 of 1995) and *Trade Bank Ltd (In Liquidation) v LZ Engineering Construction Ltd & Another* (Civ. Application No. NAI. 282 OF 1998)

13.I will now consider these four factors our case law has identified as imperative in considering an application for extension of time to file an appeal. I understand that the Court is to consider all of them in their totality with the singular objective of ensuring that the ends of justice are met. I would readily hold that the appeal contemplated herein is arguable. All the Applicant is required to do is to raise one arguable issue i.e. a serious question on appeal. It does not have to be certain to succeed. One of the issues the Applicant plans to argue on appeal is that the Respondent adduced evidence, which was accepted by the Learned Magistrate and relied on in his judgment, which was at variance with the pleadings. There is no doubt that this is an arguable issue.

14. As to the length and reasons for delay, I am, unfortunately, unable to say that the Application is timely. First, I note that the Applicant has not placed before the Court any documents which show when the decree was issued. As I stated above, it is incumbent upon an applicant seeking this relief to do

so. The Court is unable to tell what transpired when the judgment was delivered and whether, it is, in fact, true that neither the Applicant nor his advocates were present. A copy of the judgment would have settled this. But it was not attached. Additionally, the Respondent claims in her Replying Affidavit that the Applicant's lawyers knew about the judgment as early as **23/01/09** vide her advocate's letter. The Applicant did not file any affidavit evidence in response to that credible averment. Instead, his advocates deny the truth of that allegation in his written submissions. An advocate cannot adduce evidence through his written submissions in the same way she cannot proffer evidence from the bar. In the circumstances, the Respondent's claims that the Applicant knew about the judgment date at least two months before filing the Application stands unchallenged.

15.Lastly, on the issue of inordinate delay, even by the Applicant's own narrative, he got to know of the proclamation of his father's property on **09/03/2009**. Yet, he did not bring any application until **31/03/2009.** That is **twenty-two (22) days** later. The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the court's discretion. Equity does not aid the indolent.

16.I should point out that when the Applicant finally filed the present Application, despite all this delay, he still did not attach a copy of the judgment or decree. For avoidance of doubt, this is not merely a failure of a technical nature which could be excused or dismissed as venal inattention. By failing to attach these vital documents, the Applicant denied the Court the evidence it needed to establish with certainty exactly when the judgment was delivered and decree entered. Secondly, he also denied the Court the evidence it needed to assess the veracity of his claim that neither he nor his advocate were in Court when judgment was delivered. Lastly, it is also an indicia of the lack of seriousness in pursuing the appeal that, in my view, has characterized the Applicant's counsel's conduct of the matter.

17.This case was initially filed on **10/05/2005.** About **forty-three (43) months** later, the Respondent got her judgment. **Three months** after entry of judgment she sought to execute and enjoy the fruits of her judgment only to be confronted by the present Application. While the Applicant has a right to pursue an appeal, the Respondent is entitled to an expeditious disposal of the case. She cannot be kept in abeyance indefinitely. In my view, the kind of unexplained delay seen here is tantamount to vexing the Respondent as a judgment-creditor. She is entitled to see an end to this litigation.

18. For the above reasons, I have refused to use the Court's discretion in favor of the Applicant here. I hereby dismiss the Application dated **27/03/2009** *in toto* with costs to the Respondent. It follows that any subsisting interim orders are hereby lifted.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **27TH** day of **FEBRUARY 2012**.

J.M. NGUGI
JUDGE