



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL SUIT NO. 323 OF 2012**

**CYPRIAN CHIBILE OMUKAMANI ..... PLAINTIFF**

**V E R S U S**

**THE REGISTRAR OF MOTOR VEHICLE ..... 1<sup>ST</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The application for determination is the Notice of Motion dated 29.08.2013 brought pursuant to **Order 51 Rule I** of the Civil Procedure Rules 2010, **section 1A, 1B** and **3A** of the Civil Procedure Act Cap 21 Laws of Kenya and **Article 48** of the Constitution of Kenya 2010. The applicant seeks **ORDERS THAT:-**

1. ....

2. THAT pending the hearing and determination of this application there be stay of execution of the decree on the Chief Magistrate's Court at Kakamega Civil Case No. **33 of 2005**.

3. THAT the Honourable court be pleased to grant a stay of execution in the Chief Magistrate's Court at Kakamega Civil Suit No. 33 of 2005 pending the hearing and determination of the Constitutional Reference filed as Civil Suit No. **323 of 2012** in the High Court of Kenya at Kakamega.

4. THAT a date for inter parties hearing of this application be given.

5. THAT costs of this application be provided for.

2. The application is based on the grounds as set out on the face of it and supported by the affidavit of CYPRIAN CHIBILE OMUKAMANI sworn on the 29.08.2013. He states that judgment was entered against him and a decree issued in Kakamega **CMCC No. 33 of 2005** and on the 29.06.2012 M/S ESHIKHONI AUCTIONEERS went ahead and attached his properties and livestock as shown in the proclamation and notification of sale. He thereafter filed a Constitutional Reference being HCCC. No 323 of 2012 challenging the manner in which the lower court in KAKAMEGA CMCC No. 33/2005 conducted its proceedings. The reference is pending determination. He opines that the said reference has chances of success and if the orders sought herein are granted they will not prejudice the defendant herein as they touch on the subject matter of the Kakamega CMCC No.33 of 2006.

3. The application is unopposed. The applicant made oral submission before this court on 4.11.2014. He emphasised the reference pending before the High Court which is challenging the manner in which his case was handled by the trial court. Specifically he argued that the transfer of the vehicle in dispute was done when the owner of the same was dead and that judgment in the lower court was given before evidence of the Registrar of Motor Vehicle had been obtained. He fears that if the orders herein are not granted he will be executed and the constitutional reference will be rendered useless/nugatory.

4. From the application herein the issue for determination by court therefore is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered by this court on this application are set out under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. In this regard, applicant must satisfy the court that:-

- i. ***substantial loss may result to him unless the order sought is granted;***
- ii. ***the application has been made without undue delay;***
- iii. ***he has provided such security as the court orders for the due performance of such decree or order.***

5. This court has noted that the applicant herein chose to challenge the lower court finding by way of a constitutional reference and not by way of appeal. This court in giving its ruling is aware of **section 159(2)** of the Constitution which states that in exercising judicial authority, the court and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

6. It is not necessary at this stage to consider whether the applicant herein should have appealed against the judgment of the lower court or whether he should have come by way of a constitutional reference.

7. What is true is the fact that the has challenged the decree and judgment of the lower court meaning that he was not satisfied with the same.

8. This court therefore is satisfied that there is a reference before the High Court being HCCC.323 of 2013 and whether the same succeeds or not is not for decision now. There is also the apparent risk of the reference being rendered nugatory if stay of execution is not granted. Such will be substantial loss. Secondly, I am satisfied that the application was brought without undue delay. On the question of security the applicant made no offers but the application is granted on condition that the applicant deposits **KShs.150,000/=** (One hundred and fifty thousand only) into court within the next **seven (7)** days. In default, the stay order shall lapse.

**DATED at KAKAMEGA this 5<sup>th</sup> day of November 2014**

**RUTH N. SITATI**

**J U D G E**