



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC MISCELLANEOUS APPLICATION CASE NO. 08 OF 2018**

**ERASTUS KINYUA KANGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**LUCY KANYUA RUKARIA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**PROGRESSIVE CREDIT LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. This application is dated 3<sup>rd</sup> December, 2018 and seeks the following orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance.
2. That this honourable court be pleased to stay execution pending the hearing and determination of the application.
3. That the honourable court be pleased to stay execution pending hearing and determination of the intended appeal.
4. That the honourable court be pleased to grant the plaintiffs/applicants leave to appeal out of time against the judgment of the honourable Chief Magistrate delivered on 31<sup>st</sup> October, 2018 in Chuka Chief Magistrate's Court Case No. CMCC No. 198 of 2018.
5. That costs of the application be provided for.

2. The application is supported by the affidavit of Erastus Kinyua Kanga, the applicant, and has the following grounds:

1. The plaintiffs/applicants learnt recently, upon perusing the court file, that on the 31<sup>st</sup> October, 2018 the plaintiffs/applicants application for an order of injunction restraining the defendant/respondent from advertising for sale, taking possession of, selling or otherwise dealing in property known as MAGUMONI/THUITA/4857 and motor vehicle registration number KAC 800k, household goods and business chattels was dismissed with costs.
2. The hearing of this matter had been fixed on 10<sup>th</sup> October, but the day was declared a holiday and court did not seat on the material day.
3. The parties in the matter were to take another hearing date but to the utter astonishment of the plaintiff/applicant, he only came to learn that a ruling had been delivered on the matter when auctioneers visited his homestead on 30<sup>th</sup> November, 2018 and served him with a proclamation to sell his properties.
4. The ruling in this matter was delivered on **31<sup>st</sup> October, 2018** and stay of execution period of 30 days was granted to the plaintiff/applicants however the plaintiffs/applicants were not aware of the existence of a ruling and were waiting for a hearing date to be taken by their then advocate Kijaru, Njeru & Co. Advocates only for them to be ambushed by a ruling on the matter.
5. That the advocates on record for the defendant/respondent never served any notice of mention or hearing or ruling of the matter despite taking the dates ex-parte and the applicants/plaintiffs only learnt of the ruling through auctioneers when the stay of execution period expired.
6. That upon being informed of the order of the court, the applicants/plaintiffs instructed the firm of Kaimba, Muthomi & Company Advocates to take over the matter and give a current status of the file.

7. That upon perusal of the file the plaintiffs/applicants herein were dissatisfied with the order and agreed to appeal against the order of the trial court.
8. That the applicant/plaintiffs thereafter instructed the firm of KAIMBA, MUTHOMI & CO ADVOCATES to come on record in place of the firm of KIJARU, NJERU & CO. Advocates and to immediately proceed to file an application to seek orders for stay of execution and enlargement of time to file an appeal out of time and for stay of execution pending hearing of the application for stay of execution and hearing of the appeal itself.
9. The time frame for filing an appeal lapsed a few days ago and there is need for the honourable court to enlarge time to allow the plaintiffs/applicants to file an appeal out of time and also for the court to order for stay of execution pending hearing and determination of this application as well as hearing of the appeal.
10. The plaintiffs/applicants appeal which has very high chances of succeeding will be rendered nugatory unless the honourable court grants the applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.
11. The plaintiffs/applicants stand to suffer substantial and irreparable harm and loss if orders for stay of execution and enlargement of time are not issued urgently, as they may never recover their matrimonial home and farm where they have lived for the last 30 years.
12. The failure to file the Memorandum of Appeal within the prescribed time was not intentional but an inadvertent error the same having been caused by the non-communication of the lower court order to the applicants/plaintiffs.
13. The plaintiffs/applicants have an arguable and meritorious appeal with a good likelihood of success.
14. The plaintiffs/applicants are bound to suffer irreparable prejudice, loss and damage unless this honourable court grants the orders sought herein.
15. The defendant/respondent shall suffer no prejudice if the application is allowed.
16. It is in the interest of justice that the prayers sought herein are granted.

3. On **13<sup>th</sup> December, 2018**, the applicant had been given an interim conditional stay pending hearing of this application and was ordered to deposit with court as security a sum of Kshs. One Million (Kshs.1,000,000/=) within 14 days of the 13<sup>th</sup> day of December, 2018.

4. The application was heard interpartes on **19<sup>th</sup> December, 2018**. Mr. Muthomi, for the applicant, told the court that hearing of the main suit was scheduled to take place on **10<sup>th</sup> October, 2018** but the day was declared a public holiday. Later on, without the participation of the applicant or his advocate the court heard the matter and gave the **31<sup>st</sup> of October, 2018** as the date for delivery of Judgment. He told the court that the applicant only came to know that Judgment had been delivered when auctioneers came knocking at his door. He asked the court to stay execution of the apposite Judgment and to grant the applicant leave to appeal out of time.

5. Miss Kinge, for the respondent, opposed the application. She told the court that the purpose of the application was to waste the court's time and thereby defeat the end of justice. As the applicants did not deny that they owed the defendant/respondent money, their application, the counsel argued, should be struck out. She submitted that the defendant/respondent would suffer irreparable harm and damage if the application was allowed, as it would be unable to realize its security.

6. I have carefully considered the pleadings filed by the parties and their oral submissions. In the interest of justice, I find it necessary to allow the applicants to ventilate their case in an appeal. Therefore, I issue the following orders:

a) The application is allowed in terms of prayer 3 on condition that the applicants deposit with court as security a sum of Kshs. One Million (Kshs.1,000,000/=) within the next 10 days AND should they fail to do so the order of stay granted herein will automatically lapse.

b) Prayer 4 is granted and this order starts operating from 20<sup>th</sup> December, **2018** which means that the intended appeal should be filed **within 30 days of 20<sup>th</sup> December, 2018**.

7. This application is deemed heard and determined.

8. It is so ordered.

**Delivered in open Court at Chuka this 20<sup>th</sup> day of December, 2018 in the presence of:**

**CA: Ndegwa**

**Lucy Kanyua Rukaria – 2<sup>nd</sup> Plaintiff/Applicant**

**Other parties absent**

**P. M. NJORGE**

**JUDGE**