



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 21 OF 2020**

**MY CREDIT LIMITED.....APPELLANT**

**VERSUS**

**SINGH PRITHPAL PANDHAL....RESPONDENT**

**RULING**

The Appellant, **MY CREDIT LIMITED**, has asked this court to stay the execution of the Order which the trial court granted on 29<sup>th</sup> May 2020.

1. The court had granted the orders as had been prayed for in the application dated 21<sup>st</sup> May 2020. I find that it is prudent to set out herein the said prayers, which were as follows;

***“1. THAT this application be treated as urgent and be heard exparte in the first instance.***

***2. THAT pending the hearing and determination of this application interpartes, motor vehicle Registration number KCH 666G and motor vehicle Registration KBZ 951N repossessed herein by the Defendant/Respondent through M/S PHILIP MWAURA T/A GILLETE TRADERS AUCTIONEERS be released to the Plaintiff/Applicant on running attachment.***

3.

**“pending the hearing and determination of this application inter partes .....”**

4. Assuming that the order was granted, it would have been effective prior to the hearing and determination of the application.
5. The Respondent herein intended to have only one order granted upon the inter partes hearing of the application; and that order is set out in prayer 5.
6. In the circumstances, I fail to understand why the Respondent herein is alleging that the Appellant was in contempt of court.
7. Similarly, I fail to comprehend wherefrom the Appellant got the notion that the learned trial magistrate had ordered it to release the 2 vehicles, pending the hearing and determination of the suit.
8. Prayer 5, as granted, serves to restrain the Appellant from selling the 2 vehicles, whether by public auction, or by private treaty, or otherwise, until the suit is heard and determined.
9. However, in the event that my understanding of the orders in question is deemed to be flawed, I first remind myself that the appeal before this court arose from an interlocutory Ruling. In the circumstances, I caution myself about the need to refrain from making any definitive findings on a matter which is still pending substantive determination by the learned trial magistrate.
10. Therefore, this court will not make any pronouncements which would place the trial court in a situation wherein its discretion was hampered by what this court would have stated.
11. It is common ground that the Respondent had offered the 2 vehicles as security for financial facilities which the Appellant accorded to him.
12. It is further common ground that the Respondent herein fell into arrears.
13. Notwithstanding the fact that the Respondent had not repaid the facilities, and that he was in arrears, there was an order for the unconditional release of the securities to him.
14. I hold the considered view that the appeal is definitely arguable.
15. I find that if the vehicles were released to the Respondent, unconditionally, the appeal may end up being no more than an academic exercise.
16. On the other hand, if the vehicles are kept by the Appellant pending the hearing and determination of the appeal, the Respondent could suffer irreparable loss, in the event that the suit ultimately succeeded.
17. Justice demands that the court strikes a delicate balance between the 2 parties.
18. But before I do so, I wish to make it clear that when the Appellant moved the court, with an application for stay of execution, that cannot be deemed to constitute contempt of court. When a party who has lodged an appeal files an application for stay of execution pending the hearing and determination of the said appeal, the party was exercising a legitimate legal right.
19. Reverting to the task of balancing the rights of the parties, I am alive to the fact that the Respondent has asserted that the contract was unconscionable.
20. Until and unless the Respondent persuades the court that the express terms and conditions of the contract which he freely executed were unconscionable, the fact remains that the parties should, in the meantime comply with the said terms and conditions.
21. However, as there is the possibility that the trial court may find the said terms and conditions unconscionable, justice will be done to both parties if the court orders, as I hereby do, that;

**a. The Respondent will provide Security *in the nature of either a Fixed Deposit or an unconditional Bank Guarantee, in favour of the Appellant for a sum of Kshs 3,000,000/=.***

**b. Upon the provision of the said Security, *the 2 vehicles will be released to the Respondent.***

**c. The Respondent will continue to make *monthly remittances of a sum of Kshs 250,000/=.* *The said money will be remitted to the Appellant on or before the last date of each month, with effect from 31<sup>st</sup> August 2020.***

**d. The Respondent shall ensure that the *Tracking Devices which the Appellant shall affix to each of the vehicles is not tampered with at all.***

If the said devices shall fail to remit to *the Appellant appropriate signals of the vehicles location, the Appellant shall require the Respondent to restore the devices to proper working condition forthwith.*

e. The trial court will determine whether *or not the money remitted by the Respondent was sufficient, or less or more than that which was payable by the Respondent.*

**Consequential orders shall be made by *the trial court upon its making a determination on this issue.***

22. Finally, I order the costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**