



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Appli 20 of 2004**

**INSURANCE COMPANY OF E.A LIMITED.....PLAINTIFF**

**VERSUS**

**PETER N. NDEGWA.....DEFENDANT**

**R U L I N G**

The application before me seeks the committal of the defendant to civil jail, for a period of six months.

Basically, the application is founded upon the grounds that the defendant, although duly served, had failed or neglected to comply with an order which the lower court had given on 2<sup>nd</sup> October 2003. The said order was made in the case of **INSURANCE COMPANY of E.A. LTD V PAUL KIMANI T/A KING PRIME INTERNATIONAL & ANOTHER, MILIMANI CMCC No. 7863 of 2002.**

By a replying affidavit sworn on 19<sup>th</sup> February 2004, the respondent, Peter Ndegwa, readily concedes having failed to honour the order which the court had given, directing him to release the original log book to the Insurance Company of East Africa. He only explains that the log book was being held by his employer, the Co-operative Bank of Kenya Limited, as security for a car loan which had been advanced to him, for the purposes of purchasing the said vehicle.

Apparently, the respondent's agent, who sold the vehicle on his behalf, then swindled him, by failing to remit the proceeds of sale. For that reason, the respondent says that he has had to institute litigation against the said agent, with a view to recovering the sale proceeds.

It is the respondent's contention that he should be given time and opportunity to finalise the case against his agent, as it is only then that he would be able to pay-off the loan owed to his employer, and thus procure the log book.

The respondent also contends that he did file an appeal to challenge the order which the applicant is seeking to enforce. Therefore, he feels that if the order were to be enforced, in the interim, that would be prejudicial to him.

First, it is the law that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from, except in so far as the court appealed from may order. That is expressly spelt out by Order 41 rule 4 of the Civil Procedure Rules.

Therefore, simply because the respondent may have lodged an appeal is not reason enough to justify his failure to honour the orders made by the learned magistrate.

Secondly, as regards the request that the applicant should give the respondent an opportunity of recovering the sale proceeds from his agent, that cannot constitute a legal justification for not obeying the orders of the court. In my considered view, whilst I sympathise with the respondent for having been swindled by his own agent, it would be wrong to peg the obedience to court orders, to matters which are, at best, only hopes. I say so because there can be no guarantee that the respondent's case against his agent will succeed. But even if the case itself did succeed, there would be no guarantee that the respondent will be able to recover the sale proceeds.

In the circumstances, the respondent must comply with the orders of the court. If it means that he has to borrow money from elsewhere, so as to enable him pay-off the loan to Co-operative Bank of Kenya Limited, so be it. I find no justifiable reason for the respondent's failure to comply with the orders.

For those reasons, I direct that a warrant of arrest, for the respondent, Peter Ndegwa, should issue forthwith. I also order that the respondent shall be committed to civil jail for a period of four months, initially. However, if he should comply with the court orders, and provides the Insurance Company of East Africa, with the log book prior to his arrest or prior to the expiration of the jail term, the respondent will automatically earn his freedom.

Finally, the respondent shall pay the costs of the application dated 18<sup>th</sup> December 2003.

Dated and Delivered at NAIROBI, this 10th day of November 2006.

**FRED A. OCHIENG**

**JUDGE**