



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 33 OF 2018**

**SAMMY TRADERS LTD. ....APPELLANT**

**VERSUS**

**PHILIP OBONYO OLUOCH.....RESPONDENT**

**[Appeal from the Ruling and Order of Honourable J. Mitey (Resident Magistrate) dated and delivered on the 18<sup>th</sup> May 2018 in the original WINAM PMCC No. 7 of 2018]**

**JUDGMENT**

The Appellant, **SAMMY TRADERS LIMITED** has lodged this appeal to challenge the Ruling dated 18<sup>th</sup> May 2018, through which its Managing Director was held to be in contempt of Court.

1. The genesis of the proceedings which gave rise to that Ruling is an order dated 26<sup>th</sup> January 2018, in respect to an application dated 21<sup>st</sup> January 2018.
2. By his application dated 21<sup>st</sup> January 2018 the Respondent, **PHILIP OBONYO OLUOCH** had sought orders to compel the Appellant to release to him two motor vehicles, being Registration Numbers **KCL 331U** and **KCL 239T**, respectively.
3. Those 2 vehicles had been purchased by the Respondent, from the Appellant. The Respondent had been given possession of the vehicles, although he was still paying the balance of the purchase price.
4. Following defaults by the Respondent, the Appellant repossessed the vehicles and had put in place steps to sell them.
5. It is the Appellant's actions, of repossessing the 2 vehicles, and setting in motion the process of selling them, which prompted the Respondent to file the application dated 21<sup>st</sup> January 2018.
6. The trial court granted ex parte orders on 26<sup>th</sup> January 2018, requiring inter alia, that the Appellant should release the vehicles to the Respondent.
7. Notwithstanding the said orders, the Appellant failed to release the vehicles to the Respondent. It was then that the Respondent moved the court to cite the Appellant for contempt of court.
8. The learned trial magistrate held that the Appellant's Managing Director, **CHAUDHRY SHAHZAD AHMED**, was in contempt of court. It is that finding that is challenged in this appeal.
9. At the hearing of the appeal, the Respondent failed to file any submissions. Nonetheless, the court has given due consideration to the Appellant's submissions, with a view to ascertaining whether or not they met the requisite standards that would warrant the setting aside of the impugned Ruling.
10. It is common ground that after the Respondent had sought and obtained the orders for the release of the vehicles, he approached the Appellant.
11. It is further common ground that the parties held negotiations which culminated in a written agreement.
12. The learned trial magistrate was of the considered view that even though the parties entered into an agreement, the same could not justify the Appellant's violation of the court order. This is what the trial court said;

***“The said court order issued on 26/1/18 as it stands, has not been discharged nor set aside; the same is valid.***

***The agreement entered by the parties whereby the applicant is said to have committed himself to pay, and the evidence of payment tendered, does not in any way affect the order given on 26/1/18, and if the parties so wished, that it would affect the court’s directives then the same should have been brought to the attention of the court, for it to be adopted as a court order.***

***This court therefore finds that the court order was still valid despite the said agreement/commitment by the applicant, and the same has no consequence with regard to court order dated 26/1/18.”***

13. Having been held to be in contempt of court, the Appellant filed an application before this Court, pending the hearing of the appeal. The said application sought a stay of execution of the orders which were the subject matter of the appeal.

14. On 11<sup>th</sup> October 2018 the Court delivered a Ruling, in which it granted orders for stay of execution. In the said Ruling I noted as follows;

***“After the parties held negotiations, they signed an Agreement, pursuant to which the Respondent gave a commitment to make the following payments within one month from 29<sup>th</sup> January 2018;***

***‘1. KCL 239T ..... Kshs 383,000.00***

***2. KCL 331U ..... Kshs 516,000.00’***

***It is significant that the negotiations were held after the court had given the Order in issue. The parties made a conscious decision to voluntarily engage in the said negotiations.”***

15. And it is not lost on the court that it was the Respondent who initiated the negotiations.

16. I hold the considered view that by initiating negotiations after obtaining the court order, the Respondent intended to make the Appellant believe that the order was not an end in itself. I so hold because the Respondent could simply have taken steps to execute the court order, if he wished to do so. However, he made a choice to make an offer to the Appellant, and eventually to give an undertaking that he would make payment for the vehicles.

17. As the court order would not have required him to make any payment as a pre-condition for the release of the vehicles, the fact that the Respondent nonetheless executed an undertaking to pay for the vehicles implied, that he was not intent to give effect to the order in issue.

18. The Respondent incorporated into the agreement the following words;

***“This agreement also halts any court proceedings concerning the said motor vehicles. And I have signed this Agreement without duress.”***

19. In my considered opinion, nothing could have been clearer than those words: they expressly halted any court proceedings. Therefore, the Respondent ought not to have been permitted to turn around from an agreement that halted the proceedings, and then take steps in the same said proceedings or in any other proceedings.

20. I find that the learned trial magistrate erred when she concluded that the Appellant’s Managing Director was just utilizing the agreement as an excuse. The Agreement was intended to be binding upon the parties, and the trial court ought to have held as much.

21. Accordingly, I allow the appeal, and set aside the finding that the Appellant was in contempt of court. I substitute the finding of the trial court with an order dismissing the Notice of Motion dated 10<sup>th</sup> April 2018.

22. The Respondent will pay to the Appellant, the costs of the appeal, as well as the costs of the application dated 10<sup>th</sup> April 2018.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**