



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 306 OF 2018**

**NIC BANK PLC.....APPLICANT**

**VERSUS**

**1. WILLIAM KIPKORIRI ARUSEI**

**2. GATHOGO T/A VALLEY AUCTIONEERS**

**3. EMPRO ELECTRICAL & MECHANICAL ENGINEERS**

**COMPANY LIMITED.....RESPONDENTS**

**RULING**

1. On 18/12/2018 when parties attended court by counsel and after hearing the said counsel the court gave among other orders an order to the effect that:-

**“Additionally, it has come to the attention of the court by papers filed that the hire purchase agreement was for Kshs.5,088,000/= and only about 500,000/= was outstanding at the date of repossession and being cognizant of the provisions of Consumer Protection Act, I direct that Ms. Empro Electrical & Mechanical Engineers Co. Ltd, 3<sup>rd</sup> Respondent, pays to the bank the sum of Kshs.500,000/= upon which payment the motor vehicle be released to it forthwith”.**

2. On 16/01/2019 there was filed a notice of motion dated 15/01/2019 by the Applicant seeking orders that the several directors and officials of the 1<sup>st</sup> Respondent be committed to civil jail for being in contempt of the aforementioned court orders in that payment had been made but the vehicle had not been released. The court certified the matter urgent and directed that it be served for hearing *interpartes* on a date taken at the Registry on priority basis. On the 30/1/2019 when the matter came up for hearing, it could not be reached owing to workload of the day and it was then stoodover to the 26/3/2019.

3. Before that date set, two other applications were then filed by both sides. The Respondents filed the notice of motion dated 25/2/2019 the same day seeking that the court be pleased to set aside the orders of 18/12/2018. That application was also certified urgent and directed to be heard together with the earlier application on the 12/3/2019.

4. However before the date set, the Applicant also filed yet another application dated 7/3/2019 but filed on 8/3/2019 this time round seeking that the suit motor vehicle be impounded and kept at a police station or be produced and kept at the disposal of the court and that the persons cited for contempt avail themselves in court at the hearing of the application and that prior to complying with the orders of 18/12/2018 they not be accorded audience. To that application an order was made that the suit motor vehicle be availed in court within 3 days and on default the OCPD Nairobi area traces and impounds it for being kept in safe custody. The said application was then ordered to be served forthwith for being on the 12/3/2019.

5. Today when the parties came before me, Mr. Atonga for the initial applicant took an objection that Mr. Kongere's client being in apparent contempt of the court orders of 18/12/2018 and 8/3/2018 should not be heard till they purge the contempt. The counsel submitted that for dignity of the court and its processes to be upheld, no party should be given succour for deliberate disobedience of the court order.

6. In response, Mr. Kongere submitted that to him there has not been an adjudication on whether or not his client is in contempt and that to deny him audience would be to preempt both application for contempt and that for setting aside. Counsel quoted to court the decision in **AKBER ABDULLAH KASSAM ESMAIL VS EQUIP AGENCIES LTD & OTHERS[2004] eKLR** for the proposition of the law that even a contemnor or already adjudged to be in contempt need to be heard at the time of showing cause why he cannot be punished.

7. There is no argument that the general rule remain that a party in contempt or disobedience of a court order ought not to be heard until unless he purges the contempt<sup>[1]</sup>. The purpose and rationale of the rule is that if parties are to choose what orders to obey and which not to obey then it is the rule of law and administration of justice that suffers because both would be exposed to ridicule a scenario that portend anarchy and chaos. That is not to be encouraged in a country like Kenya which has chosen to be governed by the rule of law.

8. Here having made the Order, and the payment of the sum the parties said formed the dispute between them having been made, the Respondents are yet to release the suit motor vehicle and have preferred no reason for that failure. In addition, even if their fear was to be that the motor vehicle may be destroyed or just hidden from them, there is a second order by the court that the vehicle be availed at the disposal of the court or with police pending the hearing of the pending applications but even that the Respondents are yet to obey and continue with the disobedience.

9. I hold the view that in the circumstances of this case, to allow the Respondent audience would not be towards promotion of respect of the court process and its orders. It would impede the proper adjudication of this matter and would clearly offend public policy. I decline to accord Mr. Kongere or indeed any of the other advocate on behalf of the Respondents, until and unless the court orders, atleast that of 8/3/2019, shall have been complied with or set aside. I will not prior to compliance accord to the Respondence the audience for the purposes of their application dated 25/02/2019 which I hereby direct to be kept in abeyance pending compliance.

10. I once again give to the 1<sup>st</sup> Respondent upto the 15/3/2019 to either release the motor vehicle to the Applicant, deliver it to any of the court houses in Nairobi or Mombasa or to the OCS Central Police Station, Nairobi.

11. In the meantime, let the application by the Applicant dated 15/01/2019, to which responses have been filed, be heard on the 4/4/2019.

12. It is so ordered.

**Dated and delivered at Mombasa this 12th day of March 2019.**

**P.J.O. OTIENO**

**JUDGE**

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<sup>[1]</sup> Rose Detho vs Ratilal Automobile & 6 others