



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 31B OF 2018

SAMMY TRADERS LTD.....APPELLANT

VERSUS

OLIMA OSCAR OBONDO.....RESPONDENT

[Appeal from the Ruling and Order of Honourable Onkunya (Senior Resident Magistrate) in Kisumu Dated and delivered on the 6th April 2018 in the original Kisumu CMCC No. 166 of 2017]

JUDGMENT

By a Ruling dated 6th April 2018 the learned trial magistrate ordered the Defendant to release the Log Book for the motor vehicle Registration KCG 736E to the Plaintiff.

1. The Defendant lodged an appeal to challenge that decision, because it was of the view that the court erred by ordering the release of the Log Book whilst there were still some unresolved issues, touching on the payment of the purchase price.
2. The Defendant expressed the view that an unconditional release of the logbook, at the interlocutory stage of the proceedings, would expose the vehicle to alienation to third parties, which could thereafter complicate the whole case.
3. As far as the Defendant was concerned, there was still an outstanding balance of Kshs 600,000/= from the Plaintiff.
4. The learned magistrate is said to have failed to have a full appreciation of the Accounts placed before the court, hence her conclusion that the full purchase price had already been paid.
5. It is common ground that the Respondent, **OLIMA OSCAR OBONDO**, entered into a Sale Agreement with the Appellant, **SAMMY TRADERS LIMITED**.
6. Olima was buying a motor vehicle Registration **KCG 736E** from Sammy Traders.
7. The agreed Purchase Price was Kshs 2,200,000/=.
8. It was the Respondent's case that he had paid the full purchase price:

However, the Appellant had failed to release the Logbook to him.

9. It was for that purpose that the Respondent filed suit seeking the following relief;

“(a) A permanent injunction to restrain the Defendants by themselves, their servants or agents, or otherwise howsoever from retaining or coming into possession of the Plaintiff's Motor Vehicle KCG 736E.

(b) Costs of the suit and interests thereon until payment in full.”

10. In its Defence, the Appellant asserted that the Respondent had only paid a total sum of Kshs 1,650,000/=; thus leaving an outstanding balance of Kshs 600,000/=.

11. The Appellant specifically indicated that some of the payments which the Respondent alleged to have made, were never received by the Appellant.

12. In the Ruling dated 6th April 2018 the trial court expressed itself thus;

“In the instant case it is apparent that the suit motor vehicle is still in the possession of the Plaintiff/Applicant and his rights have therefore not been infringed by the Defendant.

In the premises I find that the applicant has not established a prima facie case to warrant the grant of a permanent injunction.”

13. It is important to note that the only substantive claims in the suit did not relate to the logbook of the vehicle which the Respondent was purchasing.

14. The Respondent’s claim was for an order that the Appellant be restrained from retaining the vehicle, or from taking possession of the same.

15. The trial court made a very clear finding, that the Respondent had possession of the motor vehicle.

16. In the circumstances, the court held that the Appellant had not infringed the rights of the Respondent.

17. Accordingly, the court declared that the Respondent was not entitled to any permanent injunction.

18. Having come to that conclusion, the learned trial magistrate ought to have dismissed the application for a temporary injunction.

19. However, the court directed the parties to file their respective Statements of Account, and the parties thereafter complied.

20. In effect, the court allowed Prayer 3 in the application dated 7th April 2017.

21. At the time the court ordered the parties to file their respective Statements of Account, the court expressed the following opinion;

“In view of the rival arguments by both sides it is imperative that the parties reconcile their statement of accounts and file their respective reports within 30 days from the date herein before the court can make a determination on the application.”

22. That pronouncement was being made in the court’s Ruling, which was in respect of the application dated 7th April 2017.

23. A Ruling is a determination of an application.

24. When the court formed the opinion that the parties needed to file their respective Statement of Account, which were necessary before a determination could have been made, the court ought to have given Directions, as opposed to a Ruling.

25. Nevertheless, neither of the parties has taken up any issue from the orders made on 14th September 2017, therefore, nothing turns upon that.

26. As regards the Ruling in contention, the trial court unequivocally declared that the Respondent had not established a prima facie case, and that therefore the Respondent was not entitled to an injunction.

27. I appreciate that the parties had filed their respective Statements of Account, as ordered by the court.

28. It appears that the court felt the need to seek more information than the parties had placed before it.

29. When the court calls for more evidence, on its own motion, there appears to be an unspoken acknowledgement that the reliefs sought cannot be granted on the basis of the material which the Applicant had chosen to present to the court.

30. Ordinarily, when the court concludes that an Applicant has not provided sufficient evidence to satisfy the court that it should grant the relief sought, the court ought to reject the application.

31. In this case the only substantive relief sought was for a permanent injunction to restrain the Defendant from taking possession of the motor vehicle which is the subject matter of the suit.

32. The trial court came to the conclusion that the Respondent failed to demonstrate that he had a prima case to warrant the grant of a permanent injunction.

33. As there is absolutely no other relief which the Respondent had asked for in the Plaintiff, the trial court ought to have rejected the Plaintiff's application after the court had held that there was no prima facie case to warrant the grant of a permanent injunction.

34. Why do I say so?

35. The answer rests in the fact that when a Plaintiff has not established a prima facie case with a probability of success, it would be most unlikely that the court which had come to that conclusion could find any other lawful justification for granting interim reliefs pending a full trial.

36. In this case the Plaintiff has possession of the vehicle. If the Defendant was compelled to release the Logbook to the Plaintiff whilst the case was pending, there is a real possibility that the Plaintiff could take steps which may put the vehicle beyond the reach of the court.

37. Furthermore, once the trial court came to the conclusion that the Plaintiff had already paid the full purchase price, and that the Defendant was under an obligation to fulfil its obligations as envisaged in the Sale Agreement, I find that constitutes a final determination of the entire suit.

38. The learned trial magistrate made a determination on contested facts, without giving to the parties an opportunity to test the evidence tendered by the opposite party, through cross-examination.

39. In effect, if the case were to proceed to trial after the definitive pronouncements rendered by the learned magistrate at the interlocutory stage of the proceedings, there is a possibility (however small it might be or however probable it might be) that the court could arrive at a finding inconsistent with that already arrived at.

40. It is a cardinal rule that whenever the court was called upon to make a decision on an interlocutory application, the court ought to be very cautious, so as to avoid making definitive findings which could occasion an embarrassment to the court when it later handles the substantive trial.

41. The Respondent quoted the following words from the case of **STEPHEN NDICHU Vs MONTY'S WINES & SPIRITS (2006) eKLR**;

“The principles governing the exercise of Judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it.

.....

.....

The nature of the action should be considered, the defence, if any, should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay, bearing in mind that to deny a litigant a hearing should be the last resort of a court.”

42. In this case the Defendant had said that the Plaintiff had still not paid Kshs 600,000/=.

43. In arriving at the conclusion that the Plaintiff had paid the full purchase price of Kshs 2,200,000/=, the learned magistrate noted that the Defendant's statement of account did not reflect the money which the Plaintiff said he had paid through bankers cheques.

44. Notwithstanding the Defendant's protestations that it had not received the said payments, the court concluded that the Plaintiff had proved that he had paid the said sums.

45. Of course, when payments are made by Bankers Cheques, it should be very easy to prove the person who received the said sums.

46. But when the alleged recipient denies getting the money, I find that the person who made the payments in question should provide evidence to prove his case, whilst the Defendant should be accorded an opportunity to put the evidence to test, through cross-examination.

47. In the result, there is merit in the appeal.

48. I therefore set aside the order made on 6th April 2018, to the extent that it ordered the Appellant to release the Log Book to the vehicle KCG 736, to the Respondent.

49. Instead, I order that Prayer 4 of the Application dated 7th April 2017 is dismissed.

50. The costs of the appeal as well as the costs of the application dated 7th April 2017 are awarded to the Appellant in any event.

DATED, SIGNED and DELIVERED at KISUMU

This 17th day of October 2019

FRED A. OCHIENG

JUDGE