



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 33 OF 2018

SAMMY TRADERS LTD.....APPELLANT/PLAINTIFF

VERSUS

PHILIP OBONYO OLUOCH.....RESPONDENT/DEFENDANT

[Appeal from the Ruling and Order of Honourable J. Mitey (Resident Magistrate)]

[Dated and delivered on the 18th May 2018 in the original WINAM PMCC No. 7 of 2018]

RULING

1. The application before me is for stay of execution pending the hearing and determination of an appeal which the Applicant has lodged.
2. The Applicant, **SAMMY TRADERS LIMITED**, was the Defendant in **WINAM PMCC NO. 7 OF 2018**.
3. In that case, the Respondent, **PHILIP OBONYO OLUOCH** obtained an Order in which **CHAUDHRY SHAHZAD AHMED** was cited for Contempt of Court.
4. The said **Chaudhry Shahzad Ahmed** is a Director of the Applicant.
5. It is common ground that the Applicant sold two (2) motor vehicles to the Respondent. The said vehicles were purchased on credit, and the Respondent was required to make payment by way of instalments.
6. According to the Applicant, there was a default on the part of the Respondent. Pursuant to the alleged default the Applicant sought and was granted an Order permitting it to repossess the vehicles in issue.
7. Using the said Order, the Applicant caused the repossession of the two vehicles.
8. Faced with the imminent disposal of the vehicles, through public auction, the Respondent rushed to court and obtained an interlocutory order barring the Applicant from selling the vehicles.
9. The Orders in question were granted in **WINAM PMCC NO. 7 OF 2018**, on 26th January 2018.
10. Prior to that, the Respondent had filed **CMCC NO. 612 OF 2017**, before the Chief Magistrate's Court, Kisumu. In that case the Respondent had sought orders to restrain the Applicant from impounding or seizing the vehicles which are the subject matter of the disputes between the parties herein.
11. Upon being served with Orders granted in **WINAM PMCC NO. 7 OF 2018**, the Applicant filed an application in that case, seeking to stay further proceedings. The reason why the Applicant sought a stay of those proceedings in that there was already an existing case, (being **CMCC NO. 612 OF 2017**), in which the same parties were fighting over the same issues.
12. If, as the Applicant has said, there was already in existence, another case which had been filed earlier, the Respondent will need to satisfy the court that he had good reasons in law, to justify ignoring that case, and then instituting fresh proceedings before a different court.
13. The Applicant drew this court's attention to an Agreement which the parties signed, subsequent to the orders in issue.

14. It is the Applicant's case that the Respondent approached it, and offered to remit payments of the balances which were still payable to the Applicant.

15. 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 29th January 2018;

"1. KCL 239T Kshs.383,000.00

2. KCL 331U Kshs.516,000.00"

16. It is significant that the negotiations were held after the court had given the Order in issue.

17. The parties made a conscious decision to voluntarily engage in the said negotiations.

18. The question that then arises is whether or not the consensus arrived at by the parties would or would not be capable of constituting a compromise of the Court Order.

19. On the face of the document exhibited by the Applicant, it would appear, on a prima facie basis, that the parties had every intention of compromising the Court Order. I so find because the post Court Order agreement contained a clause that reads as follows:

"This agreement also halts any court proceedings concerning the said motor vehicles. And that I have signed this agreement without duress."

20. Immediately below that clause, there is a signature that appears to be that of the Respondent, **Philip Obonyo Oluoch Abiba**.

21. There is also the signature of a Witness named **Tobias Owiti**.

22. Of course, the Respondent has now denied any knowledge of the negotiations and of the resultant agreement.

23. In my considered opinion, justice demands that the court should first determine whether or not the Agreement that was allegedly executed after the Court Orders could have the effect of compromising the Court Order. There is a possibility that the court could or could not accept the Applicant's contention.

24. If the court rejected the Applicant's contention, after giving a hearing to the Appeal, the Applicant would be said to be in contempt of court, and consequences would follow.

25. But if the court were to find that the Applicant was not in contempt of court, it would be a travesty of justice if the Applicant's Director had already been punished for the alleged contempt.

26. The Applicant is said to be in contempt of court because it has failed to release the 2 vehicles to the Respondent.

27. But it is also clear that the Respondent had not remitted all the payments to the Applicant.

28. In effect, the Applicant was being required to hand over the vehicles to the Respondent, yet the Respondent had not made full payment.

29. Mr. Ayieko, the learned Advocate for the Respondent sought directions from the court, concerning the question as to whether or not his client ought to continue making payments.

30. The court made it expressly clear that upon the remittance of the money payable by the Respondent, the vehicles were to be released to the Respondent.

31. Mr. Ayieko Advocate thanked the court for giving an assurance to his client, that as and when the vehicles were paid for, they would be released.

32. On his part, Mr. Kimanga the learned Advocate for the Applicant, confirmed that his client would release the 2 vehicles to the Respondent, as soon as the sums due from the Respondent were remitted to the Applicant.

33. In the circumstances, justice demands that there be a stay of execution of the Orders granted by **Hon. Mitey RM in WINAM PMCC NO. 7 OF 2018**, on 18th May 2018, until the appeal is determined by the High Court.

34. I therefore grant the Order for stay of execution until the appeal is determined.

35. The costs of the application dated 21st May 2018 shall be in the cause, in the appeal. If the appeal succeeds, the Appellant shall also have the costs of the application.

36. But if the appeal is not successful, the Applicant will also pay to the Respondent the costs of the application.

37. It is so ordered.

DATED, SIGNED and DELIVERED at KISUMU this 11th day of October 2018.

FRED A. OCHIENG

JUDGE