

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS CAUSE No. 003 OF 2022
Arising From Execution No. 035 Of 2021
All Arising From Election Petition No. 08 Of 2021

MUGISA GIDEON ::: APPLICANT/OBJECTOR

VERSUS

- 1. HON. MBALIBULHA KIBANZANGA TABAN CHRISTOPHER**
- 2. ACROBERT KIIZA MOSES**
- 3. THE ELECTORAL COMMISSION ::: RESPONDENTS**

BEFORE: HON JUSTICE VINCENT EMMY MUGABO
RULING

Introduction

This is an objector application to release the motor vehicle reg. no. UAX 326W, Suzuki Escudo Vitara 4WD (the vehicle) from attachment and sale and for costs of this application. It is made by notice of motion under the provisions of Section 98 of the Civil Procedure Act (CPA), Order 22 rules 55 and 56, and Order 52 rules 1 and 3 of The Civil Procedure Rules (CPR).

The applicant contends that the vehicle in issue is not subject to attachment in so far as it is not the property of the judgment debtor but rather that of the applicant, having purchased it from one Wambi Charles on 24th April 2020. It is claimed that at the time of the attachment, the applicant was in full and exclusive possession of the vehicle.

The application is supported by the affidavit of Mugisa Gideon the applicant wherein he states that he is the equitable owner of the vehicle having purchased the same from Wambi Charles in April 2020 and that he is not

the judgment debtor in any case before court. He notes that upon purchase of the vehicle, he started using it for his personal business and that at the time of its attachment, it was at his home. Further that he only learned of the attachment when the vehicle was actually impounded from his home and taken by the auctioneers. He prays that court investigates the rightful owner of the vehicle and release it from the wrongful attachment.

The 1st respondent filed an affidavit in reply but did not oppose the application. He only supported the objector's claim.

The 2nd respondent filed an affidavit in reply and states among others that the vehicle was properly attached because it belongs to the 1st Respondent/Judgment debtor. Further that the applicant has no interest in the vehicle and that it was impounded at the home of the 1st Respondent. He deposes that the 1st respondent was using the vehicle in the 2021 election campaigns. He challenges the authenticity of the purported sale between the objector and Wambi Charles. He deposes that this application is a waste of court's time and intended to frustrate the 2nd respondent's execution efforts.

The 3rd respondent also opposed the application through the affidavit of Kunihira Robert, the Bundibugyo District Registrar of the 3rd respondent. He deposes that the application against the 3rd respondent is not properly before the court, is premature as the 3rd respondent has not taken any execution measures against the applicant or the judgment debtor.

Background

The 1st respondent is a judgment debtor in Election Petition No. 008 of 2021. The 2nd and 3rd respondents are judgment creditors. After taxation

of the resultant costs of the petition and of all matters arising therefrom, the 2nd respondent obtained a warrant of attachment and instructed straight auctioneers to attach among others the motor vehicle reg. no. UAX 326W. This is the vehicle that the applicant now seeks to be released from the said attachment.

Representation and hearing

The applicant was initially represented by Mr. Guma David of Guma & Co. Advocates and later by Borris Advocates. Mr. Wahinda Enock of Ahabwe James & Co. Advocates represented the 2nd respondent. Mr. Kugonza Enock of the 3rd Respondent's Legal Department represented the 3rd respondent. Kiyonga-B-Asasira & Co. Advocates represented the 1st respondent.

During the hearing, counsel for the 2nd respondent applied to cross examine the applicant on his affidavit and his prayer was granted by court. Written submissions were filed on behalf of all the parties except for the 1st respondent. I have considered the Advocates' submissions in this ruling.

Consideration by court

Under **section 44 of The Civil Procedure Act**, property liable to attachment and sale in execution of decree includes moveable property that is sellable belonging to the judgment debtor, whether it is held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf. In the instant case, it is contended by the applicant that by reason of the transaction of purchase that took place a between the Wambi Charles and the applicant in April 2020, the vehicle equitably belongs to the applicant, who is not the judgment debtor and as such it

was not available for attachment in execution of the decree to which the objector is not party.

In order to succeed on an application like the present one, and in line with **Order 22 Rules 55 and 56 of The Civil Procedure Rules** the applicant as objector must prove that at the time of the attachment; (1) he had some interest in the property attached, (2) the property attached was in his possession, (3) he was holding possession of the attached property on his own account and not on account of the Judgment debtor, and / or (4) that the property was not in possession of the Judgment debtor or some person in trust for him or her; or (5) that the property was not in occupancy of a tenant or other person paying rent to the Judgment debtor; or finally (6) that although being in the possession of the Judgment debtor at such time, it was so in the possession of the judgment debtor not on the judgment debtor's own account or as the judgment debtor's own property.

The crucial consideration therefore in applications of this nature is one of possession of the property at the time of the attachment. If the Objector was in possession, or if some other person was in possession on account of the Objector, coupled with some interest in the property in favour of the objector, then the property should be released from attachment (see ***Haria and Co. v. Buganda Industries Ltd. [1960] EA 318; Joseph Mulenga v. FIBA (U) Ltd, H. C. Miscellaneous Application No. 308 of 1996***). It is a determination of possession and not ownership.

Turning to the application before me, the applicant in paragraphs 2, 3 and 5 of his affidavit in support, notes that he is the equitable owner of the vehicle having purchased the same from Wambi Charles. He relied on a copy of the log book of the vehicle in the names of the said Wambi Charles

and a copy of the sale agreement between himself and the said Wambi Charles dated 24th April 2020. Further that upon the said purchase, he started using the vehicle for his personal business until it was impounded by the bailiff at his home.

Counsel for the applicant relied on the vehicle sale agreement of 24th April 2020 and the case of **Prompt Facilities Ltd Vs Richard Onen T/A Richard Electrical Services & Joyce Ataro Kitgum HCMA No. 25 of 2008** to submit that the only question for determination in an objector application that of possession and that possession can either be physical or constructive. Counsel argued that the applicant was in possession of the vehicle at the time of its attachment.

Counsel for the 2nd respondent relied on photos of the vehicle to argue that the vehicle was attached while it was in the possession of the 1st respondent. Counsel argued that the vehicle sale agreement between the objector and the said Wambi Charles is suspect. It was prepared by Mr. Makasi Alfred, who is the advocate that represented the judgment debtor in the election petition from which this execution arises. Counsel further challenged the signature of the said Wambi on the log book as being different from that on the car sale agreement.

Counsel for the 3rd respondent maintained that the 3rd respondent has never attached the vehicle in question and that this application was wrongly filed against the 3rd respondent.

It is now a settled principle of law that a Court faced with an objector suit is obliged to investigate whether at the time of the attachment complained of, the objector or the judgment debtor was in possession of the suit property. If the judgment debtor was in possession, then the execution of

the warrant must continue. However, where the Court establishes that at that time the subject property was in the possession of the Objector, then the Court has to determine whether the Objector had such possession on his or her own account, or did so in trust for the judgment debtor. If it is the former, then the Court must release the property from attachment forthwith. However, if it is the latter, then the judgment debtor has legal possession of the suit property; and so, the attachment, in execution of the warrant, stands.

I would like to emphasise that in objector proceedings, the main consideration is possession of the subject property at the time of possession and not title to the same unless title affects the decision whether the possession is on account of another. It is apparent from the facts of this case that the ownership of this vehicle is contested. The 2nd respondent disputes that the sale of the vehicle ever took place between the said Wambi Charles and the objector.

In determining whether or not a sale in these circumstances was fraudulent or intended to shield the subject property from attachment, consideration may be given, among other factors, to whether: (i) the transfer/sale was to an insider; (ii) the debtor retained possession or control of the property transferred after the transfer; (iii) the transfer was disclosed or concealed; (iv) before the transfer was made, the debtor had been sued or threatened with a suit; (v) the transfer was of substantially all the debtor's assets or essential assets of the business; (vi) the debtor absconded; (vii) the debtor removed or concealed other assets; (viii) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; and (ix) the transfer occurred shortly before or shortly after a

warrant of attachment was issued; see ***Paklaki & Anor v Watoto Child Care Ministries (Miscellaneous Civil Application 174 of 2016)***.

A typical fraudulent transfer involves a judgment debtor that transfers personal or business property into the name of his or her spouse, parent, child or other family member in which case the court would inquire into whether the said insider holds the property on behalf of oneself or on behalf of the judgment debtor. There should be evidence of apparent lack of arm's length dealing.

The above set of parameters presupposes that the property so transferred is from the hands of the judgment debtor to another. In the present case, the subject motor vehicle is allegedly sold by Wambi Charles to the objector. The respondents have not challenged the alleged ownership by Wambi Charles but rather maintain that the vehicle was instead sold to the 1st respondent and not to the objector. No evidence was adduced to indicate that the judgment debtor ever owned the vehicle.

Apart from stating that the judgment debtor used the vehicle during his campaigns for the 2021 general election, I don't find the 2nd respondent's evidence sufficient to prove that the vehicle was in the possession of the 1st respondent/judgment debtor. The 2nd respondent states in 7 of his affidavit in reply that the bailiff had disclosed that he was in contact with Wambi Charles who confirmed to have sold the vehicle to the 1st respondent. He purports to attach an audio recording of the conversation between the bailiff and the said Wambi Charles but the same was not attached. No sale agreement was attached. To say the least, this paragraph contains hearsay evidence which may not be relied on by this court unless an exception is proved.

With due respect to the submissions advanced by counsel for the 2nd respondent, the evidence of the 2nd respondent fell short of linking the subject vehicle to the judgment debtor's possession at the time of attachment.

For purposes of the investigation into the objector's alleged possession of the subject vehicle, court allowed counsel for the 2nd respondent to cross-examine the objector. I find that the applicant's explanation and answers to the questions put before him would on a balance of probabilities favour his case against the 1st and 2nd respondents.

In the premises this application succeeds against the 1st and 2nd respondents. The motor vehicle reg. no. UAX 326W, Suzuki Escudo Vitara 4WD is released from attachment. I make no order as to costs.

The 3rd respondent as pleaded had nothing to do with the subject vehicle. It was not responsible for the attachment of the vehicle. One would wonder why the 3rd respondent was made a part of these proceedings. The application fails against the 3rd respondent. The applicant shall bear the 3rd respondent's cost of this application.

I so order

Dated at Fort Portal this 29th day of June 2022.



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the ruling to the parties



Vincent Emmy Mugabo

Judge

29th of June 2022.