

**THE REPUBLIC OF UGANDA,**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO 824 OF 2015**  
**(ARISING FROM CIVIL SUIT NO 650 OF 2015)**

**JOHN MATOVU}.....APPLICANT**

**VERSUS**

- 1. YUSUFU KABUYE }**
- 2. MAWANDA JOHN BOSCO}.....RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application under the provisions of section 98 of the Civil Procedure Act, Order 41 rule 7 (1) (a) and 9 of the Civil Procedure Rules for a mandatory injunction to issue by which motor vehicle Mitsubishi FUSO chassis number FS 429S – A 40045 registration number UAS 759T (hereinafter referred to as the suit property) be impounded, detained and preserved in court custody until the hearing and determination of the main suit. Secondly it is for the maintenance of the status quo concerning the said vehicle until the hearing and determination of the main suit. Lastly there is a prayer for costs of the application to be provided for.

The grounds of the application as set out in the Notice of Motion are that the Applicant/Plaintiff purchased the suit property in Hong Kong and requested the first Respondent/first Defendant to ship/transport and clear into Uganda. Secondly in the first Respondent without any claim or colour of right altered the ownership of the suit property into his names. Thirdly the first Respondent purportedly sold the vehicle to the second Respondent to defeat the Applicant/Plaintiff's interest. Fourthly the Applicant/Plaintiff filed the main suit for recovery of

the motor vehicle. On the fifth ground if the suit vehicle is not detained and preserved, the Respondents would dispose of or damage it rendering the main suit nugatory. Lastly that it is in the interest of justice that the application is granted.

The grounds of the application are further set out in the affidavit of the Applicant Mr John Matovu who deposes that he purchased the suit property on 21 July 2015. Thereafter he requested the first Respondent who is his relative and with experience in clearing to ship the suit property from Hong Kong to Uganda on his behalf. The first Respondent without any colour of right altered the ownership of the motor vehicle into his names according to copies of the bill of lading and the vehicle profile attached to the affidavit. The first Respondent purportedly sold the vehicle without his authority to the second Respondent. The first Respondent was in the process of transferring ownership into the names of the second Respondent when they lodged a caveat against the transfer. The caveat itself is in danger of been removed if there is no court order. Once a caveat is removed, the Respondents are likely to transfer the suit vehicle and ultimately dispose of it. He wrote through his lawyers to the first Respondent to hand over possession of the suit property which he refused to do so. Furthermore the first Respondent refused to reply to the demand letter served on him to deliver possession of the vehicle.

Consequently the Applicant filed HCCS 650 of 2015 for recovery of the suit vehicle. He argues that if the motor vehicle is not detained and preserved, the Respondent/Defendants would dispose of or damage it rendering the main suit nugatory. Furthermore if the Respondents dispose of the suit property he would suffer irreparable damage which cannot be compensated by an award of damages. He further deposes that the balance of convenience is in his favour and that it would be in the interest of justice that the suit property is impounded, detained and preserved pending the hearing and determination of the main suit.

The affidavit in reply of the second Respondent Mr Mawanda John Bosco has depositions to the following effect. On the basis of information of his Counsel, he deposes that the application is bad in law, without merit and ought to be dismissed with costs. Secondly that the Applicant did not come before the court with clean hands since he fraudulently obtained an interim order prior to the application without joining him yet he knew or ought to have known that he is a bona fide purchaser of the suit vehicle. The essence of the application is for the Applicant to deny the

actions of the first Respondent whom he duly held out to third parties as the lawful owner of the vehicle by registering the bill of lading in the first Respondent's names. The Applicant is therefore barred by the doctrine of estoppels from denying his representation to the second Respondent's detriment. He further deposes that the main suit has no merit and will yield nothing so it will not be rendered nugatory by the continued possession by him, of the suit property. The Applicant is not in possession of the vehicle and the balance of convenience does not favour him but rather favours the second Respondent.

The first Respondent is represented by Counsel Alexander Tuhimbise of Messieurs Tuhimbise & Company Advocates while the second Respondent is represented by Counsel Sam Serwanga of Messieurs Serwanga Maiteki and company advocates.

The court was addressed in written submissions which I have duly considered.

The Applicant submitted on whether there is a prima facie case to have the vehicle impounded, detained and preserved in court custody until the hearing and determination of the main suit. Secondly he submitted on whether the status quo regarding ownership of the motor vehicle should be maintained until the hearing and determination of the main suit. Thirdly he submitted on the issue of remedies.

On whether a prima facie case is disclosed he relied on Order 41 rules 7 (1) (a) and 9 of the Civil Procedure Rules which allows the court in an application by a party to the suit on such terms as the court may think fit to order for the detention, preservation or inspection of any property which is the subject matter of the suit. Counsel relied on the case of **Nasser Kiyingi versus Nagra Trading Co. HCMA 355 of 2004** for the holding that the rule gives the court wide powers to detain and preserve or inspect any property the subject matter of the suit. The test to be applied under the rule is not very different from those applied under Order 41 rules 1 and 2. Counsel also relied on the case of **Sebunya Lule and 2 Other vs. Attorney General and three others HCM 8269 of 2001** as well as **Uganda Ex-Service Men Association versus Kiboga District Land Board and three others High Court Miscellaneous Application Number 91 of 2009**. The gist of the ruling is that the Applicant has a prima facie case with a likelihood of

success and secondly the purpose of a temporary injunction is to preserve the status quo until the head suit is finally determined. The grounds are established by affidavit evidence.

Regarding the second issue of whether the status quo should be maintained, Counsel relied on the case of **Noor Mohamed Jan Mohamed vs. Kassamali Virji Madhani civil appeal number 42 of 1951** for the purpose of an injunction which is to maintain the status quo until the question to be investigated in the suit can be finally disposed off. In the case of **Daniel Jakisa and 2 Others vs. Kyambogo University Misc Application No. 5429 of 2013** it was held that the status quo denotes the existing state of facts before a given particular point in time and the relevant consideration is the point in time at which the act complained of which is likely to affect or threatening to affect the existing state of things occurred.

In reply the second Respondent's Counsel agrees with the principles of law for the grant of a temporary injunction and particularly the case of **Nasser Kiyingi versus Nagra Trading Co** (supra) for the principle is that: the grant of a temporary injunction is an exercise of judicial discretion to maintain the status quo until the final determination of the dispute; secondly the Applicant must prove a prima facie case with a probability of success; thirdly the Applicant must prove that there are serious questions of law and fact to be tried and detention or preservation orders will not be granted unless the Applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and lastly in case of doubt the court will consider the balance of convenience. These principles are also espoused in **Kiyimba Kaggwa versus Abdel Nasser Katende (1985) HCB 45; American Cyanamid Company versus Ethicon Ltd [1975] 1 All ER 509** and many other cases cited by the second Respondents Counsel.

On the first issue the Respondent's Counsel submitted that the main suit is frivolous and vexatious with no likelihood of success. He contended that there was no prima facie case on the basis of the fact that the Applicant purchased the suit property and requested the first Respondent to ship it. The first Respondent is the named consignee and admits that it sold the vehicle to the second Respondent. The second Respondent bought the vehicle from the first Respondent. The Applicant is barred by estoppels from claiming ownership of the suit vehicle because he allowed with the first Respondent to be the consignee of the suit vehicle.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

The second Respondents Counsel further submitted that the suit has no likelihood of success because the second Respondent lawfully acquired the suit vehicle from the named consignee. In the premises the second Respondent properly dealt with the first Respondent who is the consignee of the vehicle.

On the questions of maintaining of the status quo, the status quo is that the second Respondent is in possession of the vehicle and was not a party to the application for an interim order for impounding of the vehicle.

The second Respondent's Counsel further submitted that there is no irreparable injury suffered by the Applicant that cannot be atoned for by an award of damages if it is proved that he is the rightful owner which the second Respondent denies. He further submitted that the status quo the Applicant seeks to protect by the filing and hearing of this application is in favour of the second Respondent. Secondly the second Respondent has proved that the Applicant has not adduced any evidence to substantiate the allegation that he requested the first Respondent to ship the suit vehicle on his behalf. The Applicant and the second Respondent agree that the first Respondent is the consignee of the vehicle from Hong Kong to Uganda. The order sought of impounding, and detention of the suit property would deprive the second Respondent who bought it from the persons who had bought it from the named consignee. In the premises the second Respondent prayed that the application is dismissed with costs.

In rejoinder the Applicant's Counsel submitted that the question at this stage is whether a prima facie case has been made out. The question is whether the suit vehicle should be impounded and preserved at the court premises. From the submission of the second Respondents Counsel he contended that there are serious questions that prove that there is a prima facie case with a likelihood of success.

The Applicant's case is that he purchased the motor vehicle and entrusted it to the first Respondent to transport and clear it on his behalf. The first Respondent instead the registered the motor vehicle into his names and was in the process of having it transferred pursuant to which the Applicant lodged a caveat with Uganda Revenue Authority prohibiting the transfer of the motor vehicle. Thereafter he filed the suit to recover the vehicle. The fact that the second

Respondent claims to have purchased the vehicle from one Kakooza Musa who claims to have purchased it from one Wamala Christopher who also claimed to have purchased it from the first Respondent raises an important question of fact regarding ownership and title of the suit vehicle that needs to be determined by this court. The application seeks orders that the status quo regarding ownership of the vehicle is determined. The second Respondent has admitted that he is in possession of the motor vehicle and should be ordered by the court to deliver it so that it is packed at the court premises for preservation until the main suit is determined. The question of who should own/possess the suit vehicle should be determined by this court in the main suit.

### Ruling

I have carefully considered the Applicants application which is brought under Order 41 rules 7 (1) (a) of the Civil Procedure Rules which provides as follows:

"(1) the court may, on the application of any party to the suit, and on such terms as it thinks fit

(a) make an order for the detention, preservation or inspection of any property which is the subject matter of the suit, or as to which any question may arise in the suit;"

I have carefully considered the purpose of rules 7 whose head note is the "detention, preservation, inspection, etc of property". In this particular application, the Applicant is seeking an order of detention and perhaps preservation of the suit property which is a vehicle he claims. The vehicle is in possession of the second Respondent according to his admission. The vehicle was imported by the first Respondent and the documents in support thereof in annexure "A" show that the Applicant paid for two units at a cost of US\$28,000. The Applicant is concerned with the Mitsubishi Fuso Truck whose particulars are described. The consignor is Brother Trading Co while the consignee is the first Respondent. The first Respondent is a relative of the Applicant. The vehicle profile annexure "C" shows that the vehicle was registered in the names of the first Respondent. The Applicant subsequently lodged a caveat with Uganda Revenue Authority and in a letter dated 12th of October 2015 Uganda Revenue Authority wrote to the Applicant indicating that a caveat was processed and placed on the vehicle. They also indicated that the caveat on motor vehicles is an administrative decision adopted by Uganda Revenue

Authority to help clients in sorting out issues. In the absence of a court order the caveat was for two weeks after which it would be withdrawn by the caveator. The Applicant was advised to avail a court order to support the caveat or to withdraw it. On 26 October the Applicant in miscellaneous application number 825 of 2015 obtained an interim injunction ordering that the vehicle is impounded, detained and preserved in court custody in the interim until the hearing of the main application which was also fixed for 27 January 2016. The application was between the Applicant and the first Respondent only. Subsequently on 26 November 2015 in miscellaneous application number 979 of 2015 the second Respondent Mr Mawanda John Bosco filed an application in which he cited the Applicant and the first Respondent as Respondents to review the ruling on the interim order on the ground that the second Respondent is a bona fide purchaser. In that application the second Respondent claimed that the vehicle had been sold to one Kakooza Musa according to certain Annexure. He claimed to have bought the vehicle from one Christopher Wamala on the 21st day of July 2015. He was aggrieved that he was never heard in an application for the interim order.

The application was dismissed by the registrar with costs on 1 February 2016. On 23 October 2015 in miscellaneous application number 873 of 2015 the second Respondent applied to be added as a party to the main suit. I have carefully perused the record and it shows that the second Respondent was added as a party by consent on 9 February 2016. The court order was that the second Respondent would be served with all the necessary amendment of the pleadings to reflect the addition within 15 days of the order of addition. The Applicant subsequently filed an amended notice of motion on 18 March 2016 in which he included the second Respondent.

The first Respondent never filed a reply to the application. I have also perused the main file and I do not see any written statement of defence by the first Defendant/Respondent.

I have carefully considered the affidavit in reply dated 14<sup>th</sup> of April 2016 and no evidence whatsoever has been attached by the second Respondent who claims to be in possession of the suit property. The only documents available on the court record show that the Applicant purchased the suit property and instructed the first Respondent who is his relative to ship the goods from Hong Kong. The fact that the goods are in the names of the first Respondent does not mean that there is no contract or arrangement between the first Respondent and the Applicant.

Having the vehicle in the names of the first Respondent allows him to deal with it. In the absence of any written document showing in the very least that the vehicle was transferred or that there was a sale agreement of any kind, I find it difficult to consider the Respondents submissions because they are not based on any documentary proof.

The Applicant on the other hand has shown that he is the owner of the vehicle. In addition to Order 41 rules 7 of the Civil Procedure Rules, the Applicant has also moved under section 98 of the Civil Procedure Act. Order 41 rules 7 deals with preservation of property. The application could have been filed under Order 41 rule 2 (1) of the Civil Procedure Rules.

In the absence of any defence by the first Respondent or any documentary evidence about any transaction between the second Respondent and one Christopher Wamala who is not even a party to the suit, the Applicant has a prima facie case being the owner of the motor vehicle and which was wrongfully dealt with by his agent. The vehicle was not transferred and he duly lodged a caveat to stop any transfers of the vehicle from the first Respondent.

The status quo is that the vehicle is still in the names of Mr Yusuf Kabuye. The Applicant seeks a declaration that the motor vehicle belongs to the Plaintiff and an order to hand over possession of the vehicle to him. His case is that the first Defendant/Respondent was in the process of transferring ownership into the names of third parties whereupon he lodged a caveat with Uganda Revenue Authority. In the plaint and on the basis presumably of the second Respondent's applications, it is averred that the vehicle was purportedly sold without authority to the second Defendant. There are no facts in the plaint as to how or who sold the vehicle to the second Defendant/second Respondent.

On the question of status quo, the status quo as far as the registry is concerned is that the vehicle was imported by the first Respondent and it is still in his names. The first Respondent has not deemed it fit to defend the suit and the status quo is that the vehicle was imported prima facie on the instructions of the Applicant. On the other hand there is no evidence showing how the vehicle ended up in the hands of third parties. The acceptable prima facie status quo is that the vehicle is registered in the names of the first Respondent who has not deemed it fit to file a defence to the Plaintiffs claim and is deemed to have admitted the Plaintiff's suit. It is the second



Respondent who applied to add himself as a party to the suit. In the premises the status quo and the balance of convenience lies with the Applicant who moved in a timely fashion to prevent any further dealings between the first Respondent and third-parties.

The fact that the first Respondent is the consignee with authority to deal in the suit property can be argued in favour of the Applicant because the vehicle was imported on his instructions and he is the owner who allegedly paid for the vehicle and this seems not to be denied by the second Respondent. The Applicant acted promptly to prevent dealing in the property and the balance of convenience favours the Applicant who moved in a timely fashion to further prevent dealing in the vehicle by lodging a caveat and obtaining an interim order so as to be heard in the main suit in he which seeks possession of his vehicle if he succeeds in challenging any dealings. The second Respondent intervened in the suit by having him added as a party but was not originally sued.

I agree that the purpose of a temporary injunction is to preserve the status quo. Order 41 rule 2 (1) of the Civil Procedure Rules permits this court to issue a restraint order to prevent breach of contract which is what is being alleged between the Applicant and the first Respondent. Furthermore under section 37 (1) of the Judicature Act Cap 13 the High Court may grant an order of mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to be just or convenient to do so. An injunction can therefore be granted in any circumstances which the court deems just and convenient. It does not always follow that the Applicant must prove that he or she would suffer irreparable injury except where the words "irreparable injury" mean injury which includes breach of somebody's rights. An injunction can be granted to prevent injury. That is why section 37 (1) of the Judicature Act is couched in a wide terms. Breach of somebody's rights which is threatened can be prevented instead of waiting for an award of damages. The wrong can be prevented. The fundamental basis for the issuance of an injunction is the support of a legal right or the protection of a legal right. That is why an injunction can be issued to prevent an estranged husband from molesting his wife by visiting her. This was considered in the case of **Margaret, Duchess of Argyll (feme Sole) v Duke of Argyll and others [1965] 1 ALL E.R. 611** between pages 634 – 636. The consideration is whether there is a legal right that is threatened and a prima facie case or an arguable case established by

affidavit. The molesting cannot be atoned for by way of damages because it would be a breach of the law. In the premises the Applicant has established that if the injunction is not granted he would otherwise suffer violation of his rights to get his vehicle which he alleges is being unlawfully dealt in.

Last but not least the Applicant in effect seeks a mandatory injunction. The principles for the grant of a mandatory injunction are the same as that of a temporary restrain injunction. The aim of mandatory injunction is to maintain the status quo until arguable questions of fact or law which are disclosed in the suit are tried. In the case of the **Despina Pontikos [1975] EA 38** it was held that a mandatory injunction ought not to be granted unless the Respondent obviously has no defence to the action even if the order grants the final remedy sought. So far there is no documentary proof of ownership by the second Respondent. The first Respondent has not defended the action. A Bill of lading is merely a document of title but does not disclose the underlying contract, given the fact that clearing agents can be consignees with authority to clear the goods when there is a contract for them to deliver the goods to another person. For the moment the question of who should be the rightful owner of the goods is the subject matter of the suit and ought to be tried or decided now.

Considering the balance of convenience further, preservation of the status quo would mean that they would be no further dealing in the vehicle until the question of ownership is established. The vehicle would be kept at the court premises and none of the parties would be able to deal in it. The suit should be expeditiously dealt with.

In the premises a temporary injunction issues in which motor vehicle Mitsubishi. Fuso Chassis number FS 492S – A40045 Registration No. UAX 769T on which a caveat was placed to prevent any transfer pursuant to an application to Uganda Revenue Authority and subsequently ordered to be impounded and kept with the court shall be impounded and detained and preserved in court custody until the hearing and determination of the main suit.

Secondly the status quo regarding the ownership shall be maintained until the hearing and determination of the main suit.

The injunction shall last for a period of 90 days unless otherwise extended by court. In that period the issue of ownership is expected to be determined.

Thirdly as far as costs are concerned, the costs of this application as far as the first Respondent is concerned, shall be borne by the first Respondent. As far as the second Respondent is concerned, shall abide the outcome of the main suit.

Ruling delivered on 13 June 2016 in open court.

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Walter Mugumya holding brief for Alex Tuhimbise Counsel for the Applicant

Namusoke Jackie holding brief for Counsel Sam Serwanga for the second Respondent

Second Respondent is in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

13 June 2016