

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLANEOUS APPLICATION NO. 2365 OF 2016

**(ARISING OUT OF EMA NO. 1966 OF 2016)
(ARISING FROM CIVIL SUIT NO. 161 OF 2016)
(CHIEF MAGISTRATE’S COURT MENGO AT LAW DEVELOPMENT CENTRE)**

FRED MUKAMA APPLICANT / OBJECTOR

VERSUS

HARRIS MOTORS (U) LTDRESPONDENT/ JUDGMENT CREDITOR

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application made under 0.22 rr 55 91), and 57 and 0.52 rr 1 and 3 C.P.R the Applicant sought orders of this court releasing motor vehicle registration No. UAU 074K Toyota Premio from attachment.

Costs of the application were also applied for.

The grounds of the application briefly are that:-

- 1) The motor vehicle already above described is not liable to attachment.
- 2) That the Applicant was in possession of the vehicle prior to its being attached before judgment.
- 3) The vehicle was handed to Mutabazi Sam who made an inventory that the vehicle had been attached from the Applicant. – Annexure D to affidavit.
- 4) That on 15.08.15, the Applicant brought the vehicle from Bisereko Patrick Akiiki – Annexure A, copy of sale agreement.
- 5) After purchase of the vehicle, Bisereko Patrick handed over the previous agreement dated 20.03.15 to the Applicant. – Annexure C.
- 6) It is in the interests of justice that the motor vehicle be released from attachment.

The application is supported by the affidavit of the Applicant.

There is an affidavit in reply deponed by Mark Azhar, the Managing Director of the Respondent Company.

5 The application was called for hearing on 17.11.16 in the presence of both Counsel and the Representatives of the Respondent, but in absence of the Applicant.

Counsel for the Applicant went through the grounds of the application and the supporting affidavit, contending that the issue was **whether the vehicle should be released from attachment.**

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Emphasizing that the Applicant had been in possession of the vehicle at the time of attachment, Counsel relied upon the case of **Kiwalabye vs. Uganda Commercial Bank and Another [1994] KLR 633** and the case of **Joseph Mulenga vs. Photo Focus (U) Ltd [1996] KLR 615** - where it was held that ***“the applicant has to plead possession in the affidavit”***. – Counsel then referred court to paragraphs 8, 9 and 11 of the supporting affidavit.

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The case of **Mineral Waters Ltd vs. Kampala Mineral Waters Ltd [1996] KLR 466** – Justice Musoke Kibuuka was relied upon for the holding that ***“what court has to investigate is not ownership of property being attached. But has to determine applicant was in possession of attached property on his own account and not on account of judgment debtor or some other person.”***

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That the order given is provisional and not conclusive and a suit may be filed to claim the property despite the order.

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Counsel argued that as long as the Applicant shows that he has interest in the property on his own account; the property has to be released from attachment.

Referring to paragraph 2 of the supporting affidavit, Counsel contended that the Applicant had proved purchase of the vehicle and possession on his own account.

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It was also the submission of Counsel for the Applicant that the Respondent’s application for execution was barred by the Limitation Act S.3 (1) (a) – which forbids the bringing of any action founded on contract after the expiration of six years.

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The contract between the Respondent and Bisereko is dated 11.08.09. The suit was installed in 2016 instead of 11.11.15. Yet there was no extension of time.

The case of **Uganda Railways Corporation vs. Ewan & 5 Others CA 185/2007 – [2000] HCB 61** was cited for the holding that ***“instituting the suit out of time without extension is an illegality which can be raised at any stage of the proceedings with or without prior knowledge of the parties.”***

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Asserting that *“a court of law cannot sanction what is illegal..”* the case of **Proline Soccer Ltd vs. Mulindwa and 4 Others MA 0459/2009** was cited for the holding by Justice Bamwine that *“court will not lend its aid to a person who found his claim upon an illegal act.”*

5 Reiterating that the Applicant was in possession of the vehicle on his own account before it was attached, Counsel prayed for release of the same adding that the Respondent premised the execution on an illegality and ought not to have been heard. Costs of the application were also applied for.

10 In reply, Counsel for the Respondent referred to the affidavit in reply and paragraphs 2,3,4 and 6 of the Applicant’s affidavit contending that the Respondent dealt with Migadde Semakula and not with the Applicant.

15 Therefore that, the Applicant was unknown to the Respondent since the agreement upon which Migadde bought the vehicle forbade him from transferring it before completion of payment. - Annexure Z to the Respondent’s affidavit.

20 It was the further contention of Counsel that the Applicant’s alleged possession of the vehicle arose out of forgeries. He referred to Annexure B to the Applicant’s application claiming that the cause from which the application for issue of a duplicate certificate arose was false. The application was supported by a statutory declaration instead of an affidavit.

The documents purportedly issued by the Chief Magistrate’s Court Buganda Road have different headings and therefore are not consistent.

25 The name of the Judicial Officer who gave the orders and the parties are not named and that therefore the Applicant cannot reply upon such document to seek assistance of court.

30 Also that S. 3 (1) Limitation Act was not applicable as the vehicle had already been attached. And the party against whom the Limitation would apply is not a party to this application.

Adding that, he who comes to equity should come with clean hands, Counsel argued that equity could not assist the Applicant since his claim is based on falsehoods already referred to in this application.

35 Relying on the cases cited by Counsel for the Applicant in respect of illegalities, Counsel for the Respondent asserted that the application could not be entertained by court.

40 Further that the rules under which the application was brought do not apply as they refer to Judgment Debtors. And that the car was rightly impounded as the purchase price was not fully paid. Court was then urged to disallow the application with costs.

In rejoinder, Counsel for the Applicant reiterated earlier submissions regarding possession on account of the Applicant and stated that this was not disputed by the Respondent. Asserting that the Applicant did not rely on alleged forgeries to acquire possession.

And that while the documents relied upon by the Applicant lack proper form, there is no proof that they were forged. 0.6 R 17 CPR was relied upon to emphasize that ***“no technical objection can be raised against any pleadings on ground of any alleged want of form.”***

5 Further that Counsel for the Respondent’s objection relying on 0.22 r 5 C.P.R is misleading as any person in possession of the property can object.

Also that, the application is not to determine ownership of property. Once the vehicle is released, the Respondent can file a suit against the Applicant to claim ownership. Objection proceedings, Counsel stated, protect third parties against improper and misconceived executions.

Reiterating earlier prayers, Counsel added that the Warrant of Attachment and Sale should be set aside.

15 **Whether the vehicle should be released from attachment** is the issue to be determined by this court.

Bearing the submissions of the parties in mind, this court finds that it has been established by decided cases that ***“in objection proceedings, the investigation the court does is restricted to the issue of who was in possession on the date of attachment and not necessarily who has title over the property.”*** – See **Kiwalabye vs. Uganda Commercial Bank (Supra)** and **Joseph Mulenga vs. Photo Focus (U) Ltd [1996] KAL R615 at 616.**

However, while possession is emphasized, the emphasis must be read in light of 0.22 r 56 C.P.R which says that ***“the objector should show that he has interest in the property other than possession.”*** - **Kiwalabye’s case (Supra).**

In the present case, the Applicant pleaded that he was in possession of the attached vehicle as evidenced by Annexure D to the supporting affidavit that was issued by the Bailiff.

Further that he had bought the vehicle from one Bisereko Patrick Akiiki – See Annexure A – copy of the sale agreement.

The Applicant has accordingly proved the two requirements of possession and interest in the property on his own account and not on account of the Judgment Debtor or some other person.

The other issue raised by the Applicant will not be delved in by court at this stage. That is, issues of limitation and the attendant illegality of the proceedings leading to the attachment of the vehicle.

40 This is because the order given in objection proceedings are not conclusive. The Respondent can still file a suit to claim the property where all the issues of limitation and the issues raised by Counsel for the Respondent that the Applicant was unknown to the Respondent as the person who first bought the vehicle was forbidden from transferring before completion of payment and that the Applicant alleged possession arose out of forgery could be effectively dealt with.

Forgery, it has been established by decided cases cannot be proved merely by affidavit. There is need for the Respondent to file a suit, setting out all particulars and calling evidence to prove the same.

5 The application is accordingly allowed. The vehicle should be released from attachment.

Before I take leave of this ruling, I wish to point out that, after the hearing of the parties, it was discovered by court that the purported Counsel for the Applicant does not appear on the list of registered Advocates.

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However, I also take cognizance of the fact that courts have held that “...*documents drawn by an Advocate without a practicing certificate should not be regarded as illegal or invalid simply because the Advocate had no valid practicing certificate when he drew or signed such documents.*”

15 **While there is need to discourage the commission of such acts, the interests of the innocent party should not be swept under the carpet in appropriate cases.**

Each party to bear its own costs.

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**FLAVIA SENOGA ANGLIN
JUDGE
20.02.17**