

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

MISCELLANEOUS APPLICATION NO. 388 OF 2017

**(ARISING FROM MISC. APPLICATION NO. 989 OF 2016)
(ARISING FROM HCT EMA. NO. 2033 OF 2015)
(ARISING FROM CIVIL SUIT NO. 514 OF 2013)**

BUSCAR EAST AFRICA LTD APPLICANT/ OBJECTOR

VERSUS

BERNARD MULINDA RESPONDENT/ JUDGMENT CREDITOR

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under 0.22 rr 55 (1), 56, 55 and 0.52 rr 1 and 3 C.P.R, seeking for orders releasing motor vehicles Nos. KCF 444Z and KCF 555Z from attachment; a declaration to be issued against the Respondent / Judgment Creditor to the effect that he is not entitled to execute against the Applicant /Objector.

Costs of the application were also prayed for.

The grounds of the application are briefly set out in the motion as follows:-

- 1) The Applicant /Objector was not a party to Civil Suit No. 514/2013 that preceded EMA No. 2033/2015.
- 2) Motor vehicles Registration Numbers KCF 444Z and KCF 555Z are not liable to attachment.
- 3) The said vehicles are property jointly owned by Chase Bank (K) Ltd and the Applicant Company.
- 4) It is in the interests of justice that the said vehicles be released from attachment.

The application is supported by the affidavit of Ali Mohammed Abubakar, which was read and relied upon at the hearing. There is no affidavit in reply.

On 06.03.17, when the application was called for hearing, Counsel for the Respondent came to court late after hearing had proceeded exparte. The affidavit of service indicated that the Respondent had been served but had not appeared in court and no reasons had been advanced for his absence or that of his Counsel.

Counsel for the Applicant then went through the provisions of the law under which the application was made, the orders sought and the affidavit in support.

He submitted that, the properties attached do not belong to the Judgment Debtor (Buscar (U) Ltd). Referring to paragraphs 4 of the supporting affidavit, Counsel asserted that Annexures D and E copies of the Log Book clearly indicate that the attached motor vehicles are jointly owned by Chase Bank (Kenya) Ltd and the Applicant Company. And that therefore the properties do not belong to the Judgment Debtor in Civil Suit No. 514/13.

It was at this juncture that Counsel for the Respondent came in court.

Court directed Counsel for the Applicant to continue with his submissions. And he pointed out that paragraph 6 of the supporting affidavit is to the effect that the Applicant Company was incorporated on 27.06.14 after Civil Suit 514/2013 had been filed and it has never been joined as a party to the main suit.

0.22 r 51 (1) C.P.R was relied upon as empowering court to conduct investigation if objection to attachment has been preferred.

Insisting that the attached vehicles do not belong to the Judgment Debtor, Counsel prayed court to issue all the orders set out in the motion and release the vehicles from attachment with costs to the Applicant.

Counsel for the Respondent then prayed court to set aside the ex parte hearing and grant her an adjournment to enable her file an affidavit in reply. She told Court that the Respondent had travelled to the Mutukula Border to clear his merchandise and was accordingly out of town, yet he had to file and serve affidavit in reply.

Counsel for the Applicant prayed for a short adjournment contending that the Applicant who runs a Passenger Interstate Services Company was suffering loss.

Court set aside the ex parte hearing, went through the submissions of Counsel for the Applicant and Counsel for the Respondent noted them down. She was directed to file and serve the affidavit in reply by the close of business on 06.03.17 and the next hearing for her reply was fixed for 09.03.17 at 9am which is today.

Court also directed that the vehicles be preserved until the application was disposed of.

Today, Counsel for the Respondent did not appear in Court and no reasons were advanced for her absence or that of the Respondent. The affidavit in reply has never been filed either. Court decided to go ahead and write the ruling based on the submissions of Counsel for the Applicant.

The issues for court to determine is **whether the two vehicles should be released from attachment and whether the Applicant is entitled to the rest of the remedies sought.**

The principle established by decided cases is that ***“in objection proceedings, the investigation the court does is restricted to the issue or who was in possession on the date of attachment and not necessarily who has title over the property”***. – Refer to **Kiwalabye Vs. Uganda Commercial Bank & Another [1994] KLR 633.**

According to the case of **Joseph Mulenga vs. Photo Focus (U) Ltd [1996] KLR**, ***“the Applicant has to plead possession in the affidavit.”***

Courts have further emphasized that ***“what court needs to investigate is not ownership of the property being attached. But has to determine that applicant was in possession of the attached property on his own account and not on account of the Judgment Debtor or some other person.”***- See **Mineral Waters Ltd vs. Kampala Mineral Waters Ltd [1996] KLR 466 Justice Musoke Kibuuka.**

It is clear from the decided cases that issues of ownership should not be investigated at this stage. However, this court finds that, considering the peculiar circumstances of this case, which have not been disputed by the Respondent, the Applicant has proved that he was in possession of the attached property, though be it constructive possession, as it runs a Passenger Service Business.

While the warrant of attachment and sale of the property and the notice to show cause were issued against the Applicant Company, it is not clear at what stage the Applicant Company became a party to the proceedings.

The proceedings available show Buscar (U) Ltd as the Judgment Debtor and later Starways Express Ltd (formally Buscar (U) Ltd).

The proceedings of HCCS 514/2013 though referred to are not on record.

This lends credence to the claim of the Applicant Company that it was incorporated after the said was filed. And there is nothing to indicate that the company was ever made a party to any proceedings before court until the execution stage.

This court also finds that the issue of ownership cannot be wholly ignored as the uncontested evidence is to the effect that the vehicles are jointly owned by the Applicant Bank (in possession on its own account and not on account of the Judgment Debtor) and Chase Bank (K) Ltd both Kenyan Companies. – Refer to S.98 CPA. – Which enjoins court ***“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”***

It is therefore in the interests of justice that the said vehicles be released from attachment as the continued attachment is likely to cause substantial and irreparable injury or loss to the Applicant which may not be atoned for by damages.

Without the Respondent filing any affidavit in rejoinder and upon failure to attend court although aware of these proceedings, this court finds that the Respondent knew he could not dispute the claims of the Applicant who was never party to the suit out of which the execution arises and whose vehicles may have been attached by mistake.

The balance of convenience also demands that the vehicles be released. The Applicant has shown that it has interest in the vehicles on its own account and not on account of the Judgment Debtor Buscar (U) Ltd.

The application is allowed for all those reasons and the following orders made:-

- 1) The Execution is set aside.
- 2) Motor Vehicles Nos. KCF 444Z and KCF 55Z be released from attachment.

3) The Judgment Creditor / Respondent is not entitled to execute against the Applicant who was not a party to the proceedings out of which the execution arises. – Refer to S.33 Judicature Act.

5 4) Costs of the application and execution are to be met by the Respondent.

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Flavia Senoga Anglin
JUDGE
09.03.17