

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

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**MISC. APPLICATION NO. 355 OF 2004
(Arising from HCCS No. 367 of 2004)**

NASSER KIYINGI :::::::::::::::::::::::::::::: APPLICANT/PLAINTIFF

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VERSUS

NAGRA TRADING CO. :::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT

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BEFORE : THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

RULING :-

20 This is an application brought under Order 37 rules 7(i)(o) and 9 of the Civil Procedure Rules. It seeks orders that a motor vehicle Reg. No. UAF 961 J Toyota Corona, Black in colour currently in the possession of the Defendant/Respondent and/or its agents/employees/servants be detained and preserved pending the hearing of the main suit HCCS No. 367 of 2004.

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The application is supported by the affidavit of the Applicant/Plaintiff Mr. Nasser Kiyingi dated 2nd June 2004. In brief the Applicant states that some time in March 2004, he entered into an agreement with the Respondent/Defendant to buy the aforesaid vehicle. The Motor Vehicle was then unregistered but had a
30 Chassis No. ST 190(0035044).

The purchase price was (U) Shs. 10,700,000/=, and he made a down payment of Shs. 3,000,000/= for which he got a receipt dated 29/03/2004 (Annex 'B') from the Defendants/Respondents. The down payment was to assist the Respondents pay the taxes for the vehicle and then have it released to the Applicant. The Applicant further depones that the vehicle was then registered under Registration No. UAF 961 J, but the Respondent refused to deliver it to him. He states that the vehicle is currently on the road and being used by the Defendant's agents/employees/servants. Furthermore the Respondent now wishes to sale it to a third party.

Counsel for the Applicant argues that if the vehicle is sold the Applicant shall suffer loss, which cannot be atoned for by damages. Such a situation it is further submitted would render the main case useless or nugatory. He further argues that the Respondents will not be prejudiced by this application.

The Respondents filed an affidavit in reply by one Shar Afgan a Director of the Respondent Company dated 14th September 2004. The reply in brief states that the said vehicle is not in the hands of the Respondents/ its agents/servants. Actually the vehicle was sold to two purchasers namely the Applicant Nasser Kiyingi and one Ayub Manafa Sheikh. The Respondents further depones on the strength of Written Statement of Defence which is annex 1 to the affidavit in reply that the arrangement was that the agreement of sale was to be in Mr. Manafa's names while the receipts were to be in Mr. Kiyingi's name. Indeed a further Shs. 5,000,000/= was paid towards the purchase price leaving a balance of Shs. 2,700,000/= and Shs. 100,000/= being a small loan for repairs to the said car. The Written Statement of Defence further states that the counterclaim has not been responded to so the Defendants/Counterclaimants have written to the Registrar of this Court to enter judgment on the said counterclaim.

Counsel for the Respondent/Defendant submitted that since the car is not in the hands of the Respondents the orders sought shall be superfluous. He further submits that no case has been made as to why the alleged loss to the Applicants cannot be atoned to by an award in damages.

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Order 37 rule 7(1)(a) states

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

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a) make an order for the detention, preservation or inspection of any property which is the subject matter of such a suit or as to which any question may arise therein.”

15 Order 37 rule 7(1)(a) appears to give the court wide powers to detain, preserve and or inspect any property which is the subject matter of the suit. Like other reliefs available under Order 37 like that of a temporary injunction I see that the granting of any such order under order 37 rule 7(1)(a) is an exercise of Judicial discretion. Not many applications are brought under Order 37 rule 7(1)(a) as
20 most parties prefer to apply for orders under Order 37 rules 1 and 2.

I find that the test to be taken into account by court under Order 37 rule 7(1)(a) would not be very different from those to be applied when applying for a temporary injunction under rules 1 and 2 of the same order. However, as a
25 preliminary matter it would appear to me that the court will have to make an inquiry as to where the property which is the subject of the suit is and who has possession of it so that the order made is focused if granted.

In this particular case the evidence so far adduced by affidavits shows a strange
30 contractual arrangement that has to be looked at carefully by way of a trial. The

Respondent actually depones that the said vehicle is with the purchasers, one of whom is the Applicant!

5 The Agreement of Sale relied on by the Respondents is not very clear but was made some time in April 2004, and a receipt was made out to one Nasser Kiyingi (I suppose the Applicant in this application) on the 8th April 2004. Even though the Applicant Mr. Kiyingi exhibits an earlier receipt dated 29/03/2004 he does not attach the alleged agreement he entered into with the Respondents in March, 2004.

10 I find it difficult to resolve the issue of who has the said vehicle and where it is now on the basis of these clearly conflicting affidavits. This is an issue to be determined at trial. I agree the court should guard against giving superfluous orders and the onus to move court to exercise its discretion in favour of the orders sought in the application rests squarely on the Applicant. The Applicant prays that the order be made against the Defendant/Respondent, its agents/employees/servants because they are in possession of the vehicle. The Defendant/Respondents deny that they have possession but rather the Applicant/Plaintiff has possession of the vehicle together with one Mr. Manafa. In 15 these circumstances, I am unable to exercise my discretion in favour of Applicant.

I accordingly dismiss this application with costs. The main suit should instead be fixed for scheduling.

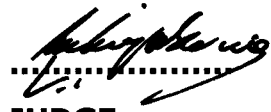
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JUDGE

17/09/2004.

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17/09/2004:- Byaruhanga for Respondent
Applicant present in person
Rose Emeru Court Clerk

5 **Court :-** Ruling read.

A handwritten signature in black ink, appearing to read 'F. K. W.', is written over a horizontal dotted line.

JUDGE

17/09/2004.