



REPUBLIC OF KENYA



KENYA LAW
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**FMB v MBM (Originating Summons 11 of 2022)
[2022] KEHC 14776 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 11 OF 2022
JN ONYIEGO, J
OCTOBER 28, 2022**

BETWEEN

FMB APPLICANT

AND

MBM RESPONDENT

RULING

1. Through a Notice of Motion dated August 18, 2022, FMB (hereafter) the applicant approached this court under Article 48 and 50 (1) of *the Constitution* of Kenya 2010, Section 1A, 1B and 3A of the *Civil Procedure Act*, Section 5 (1) (b) of the *Matrimonial Property rules 2022* and all other enabling provisions seeking orders as follows;
 - a. That this matter be certified as urgent and service be dispensed with in the first instance.
 - b. That pending hearing and determination of this application inter partes, this Honourable court be pleased to issue an order of mandatory injunction compelling the defendant to return, surrender and/or handover motor vehicle registration number KBS xxx to the plaintiff in good condition, repair and service.
 - c. That pending hearing and determination of this application inter partes and in the alternative to prayer 2 above, this honorable court be pleased to order that motor vehicle registration number KBS xxx be recovered and preserved at the nearest police station.
 - d. That pending hearing and determination of this suit, this honorable court be pleased to issue such other equitable orders to protect the subject motor vehicle.
 - e. That the costs of this application be awarded to the applicant
2. The application is premised upon grounds stated on the face of it and further amplified by an affidavit sworn on August 18, 2022 by the applicant.



3. The applicant's case is to the effect that sometime 2019, she contracted a statutory marriage with the respondent at the AG's Office Mombasa. That due to irreconcilable differences, she petitioned for divorce on August 19, 2022 *vide* divorce cause No 105/2022 Mombasa which suit is still pending.
4. That during the subsistence of the said marriage, the respondent acquired motor vehicle Reg No KBS xxx through a loan facility from her employer the County Assembly of Mombasa. That sometime June 2022, the respondent took possession of the said motor vehicle and left with it for Bungoma where he is currently residing. That every effort to get the motor vehicle back has been unsuccessful thus rendering her stranded.
5. She therefore prayed for the court to order surrender of the motor vehicle to her as she is the sole financier in acquiring the same. That unless the order sought is granted she will stand to lose.
6. Despite service of the application herein, the respondent did not file any response. During the hearing, there was no appearance by the respondent service of the hearing notice notwithstanding. Accordingly, the application proceeded to hearing *ex parte*. Mr Ndeche holding brief for Mr Ndere for the applicant merely reiterated the content of the affidavit in support of the application. He invited the court to allow the application as prayed taking into account that it was not opposed.
7. I have considered the application herein which is not opposed. However, the mere fact that the application is not opposed is no guarantee that the application must succeed. The applicant has a duty to establish and convince the court that the application is merited. See *Gideon Sitelu Konchellah vs Julius Lekakeny Sunkuli and 2 others* (2018) e KLR.
8. The applicant is seeking to repossess a motor vehicle she allegedly bought through a loan facility but gave possession to the respondent her husband. She attached loan appraisal and approval form for a sum of Ksh 900,000 for the purchase of motor vehicle Reg. No KBS xxx. This bid of evidence has not been rebutted nor controverted. The said motor vehicle having been acquired during coverture is therefore deemed to be matrimonial property which must then be preserved.
9. The applicant at prayer two prayed that the subject motor vehicle be returned to her. This prayer cannot apply as it was subject to hearing of the application inter parties which is already spent. In any event, it seeks to determine the matter with finality through an application. For that reason, that prayer cannot issue.
10. As to prayer three, the first limb will not equally apply as it is already spent. The only available option is the second limb which is seeking preservation of the motor vehicle at any nearest police station. It was however not specified as to which police station is to implement the order.
11. Nevertheless, since the respondent is said to be residing in Bungoma county, the OCS Bungoma police station is hereby directed to impound and take possession of motor vehicle Regn. No KBSA xxx E and thereafter hold it until further orders from this court.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF OCTOBER, 2022.

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J. N.ONYIEGO

JUDGE

