



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL CASE NO. 81 OF 2019 (OS)**

**PMM.....PLAINTIFF/APPLICANT**

**VERSUS**

**MGM.....DEFENDANT/RESPONDENT**

**RULING**

**Notice of Motion**

PMM, the Applicant, has brought this application against the Respondent citing Section 3, 3A and 63 (c) and (e) of the Civil Procedure Act, Cap.21 Laws of Kenya and Order 36 Rule 1, Order 40 Rules 1, 2 and 8 and Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. He is seeking the following prayers:

1. That this Application be certified urgent and heard *ex parte* in the first instance.
2. 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 hand over motor vehicle registration number KCJ [...]H to the Plaintiff in good condition, repair and service.
3. That pending hearing and determination of this application *inter partes* and in the alternative to prayer 2 above, this Honourable court be pleased to order that motor vehicle registration number KCJ [...]H be recovered and preserved at the nearest police station.
4. That there be an urgent *inter partes* hearing date for this application.
5. That pending hearing and determination of this suit, this Honourable court be pleased to issue such other equitable orders to protect the subject motor vehicle.
6. That the costs of this application be borne by the Defendant.

The Applicant has filed grounds in support of the application to the effect that he is the registered owner of Motor Vehicle No. KCJ [...]H which forms part of the matrimonial property subject of the Originating Summons herein; that this court has issued an order restraining the Respondent from encumbering or disposing of the motor vehicle; that subsequent to the filing of this suit, the Respondent filed, prosecuted *ex parte* and obtained a divorce against the Applicant in Meru Chief Magistrate's Court Divorce Cause No. 24 of 2018, relocated from the matrimonial home in Nairobi to Meru carrying away the Plaintiff's personal effects, academic certificates and documents of title to matrimonial properties herein; that the Respondent illegally and without justifiable cause or the Applicant's consent took away, disabled car track and alarm systems of the Applicant's Motor Vehicle registration number KCJ [...]H together with all other motor vehicles registration numbers KCH [...]Z and KCW [...]F in the names of the Respondent and forming part of matrimonial property herein leaving the Applicant to suffer hardship, financial stress, mental anguish and inconvenience in hiring and seeking alternative means of transport.

The Applicant has advanced further grounds to the effect that despite numerous requests to the Respondent to return or surrender the motor vehicle, she has ignored, neglected and/or refused to comply or respond; that a search by the Applicant at the records of the National Transport & Safety Authority for the copy of the motor vehicle registration number KCJ [...]H does not indicate the current owner or details thereof; that the Respondent will not suffer prejudice if ordered to release the motor vehicle to the Applicant because she owns motor vehicle registration number KCH [...]H. The Applicant states that unless this Application is heard urgently and interim orders granted the Applicant is apprehensive that the Respondent intends to, has threatened and is in the process of and/or is about to sell, dispose of and transfer the subject motor vehicle to third parties without the Applicant's consent.

The supporting affidavit is sworn by Mr. Oscar Litoro, learned counsel for the Applicant on 2<sup>nd</sup> September 2020. He deposes that the Application discloses a prima facie case in that the Applicant is the registered owner of motor vehicle registration number KCJ [...].H; that this court issued an order restraining the Respondent from encumbering and/or disposing of the subject motor vehicle. He reiterates the grounds in support of the application found on the face of the application and adds that the Notice of Motion will be rendered nugatory unless the subject matter is preserved by the reliefs sought.

In her Replying Affidavit sworn on 17<sup>th</sup> September 2020, the Respondent opposes the application. She deposes that the Applicant and herself are divorced and live separately and that she has lived in Meru since 2015 with occasional visits to Nairobi where she stays in the M's family home at [Particulars Withheld]. She denies carrying with her the Applicants personal effects, documents and/or their matrimonial properties stating that their matrimonial home was in [Particulars Withheld]. She denies having left with any motor vehicle or disabling the car track systems. She claims that she solely and without support of the Applicant purchased with her own money motor vehicle registration number KCJ [...].H paying a total of Kshs 980,000 and states that the subject motor vehicle does not form part of the matrimonial property. She further states that in June 2019 both the Applicant and herself agreed to sell the subject motor vehicle and the Applicant personally drove the said motor vehicle to Meru and handed the same over to the buyer Charles Mwenda who paid cash for the motor vehicle; that the Applicant has refused to effect the online transfer of the subject vehicle to the new owner. She avers that the application lacks merit and is an abuse of this court's process and urges that the same be dismissed with costs to her.

In Response to the Replying Affidavit by the Respondent, the Applicant filed a Supplementary Affidavit sworn on 23<sup>rd</sup> September 2020. In summary, the Applicant denies that they separated while living in [Particulars Withheld] and reiterated that they separated while living in [Particulars Withheld]. He reiterated that he is the owner of the subject motor vehicle and denied agreeing to sell the same to Charles Mwenda or receiving money from the latter as payment of the said vehicle stating that there is no sale agreement between him and the purported buyer. He claims that the Respondent is misrepresenting and distorting material facts when she claims to have bought the subject vehicle with her own money. He asserts that the entire purchase price was wholly paid for by him. He states that during the time of buying the subject motor vehicle he was working in Mombasa and instructed the Respondent to buy the motor vehicle using her funds which he later fully reimbursed; that he caused the registration of the vehicle in his name a fact admitted by the Respondent in paragraph 10 of her Replying Affidavit. He denied the allegations by the Respondent that he personally drove the subject motor vehicle to Meru claiming that Charles Mwenda had borrowed the vehicle through the Respondent to drive to Meru and that this was a trick for the Respondent to leave their matrimonial home in [Particulars Withheld]. The Applicant further deposes that the Respondent is in contravention of the court order restraining her from encumbering or disposing of the vehicle.

### **Submissions**

Each party has filed their written submissions in compliance with this court's directions that this application be disposed of by way of written submissions. In his submissions dated 18<sup>th</sup> November 2020, the Applicant identifies the following as the only issue for determination by this court:

**Whether there exists a valid court order dated 23<sup>rd</sup> December 2019 restraining the Respondent from disposing of the Applicant's and Respondent's matrimonial property which includes Motor Vehicle registration number KCH [...].Z.**

Being the only issue for determination identified by the Applicants, his submissions are on this one issue. In summary, the Applicant submits that the Respondent's allegations in her Replying Affidavit that she owns the motor vehicle in question and that the same had been sold in June with consent of both the Applicant and the Respondent is an afterthought. He submits that the Respondent did not disclose this to the court when the order of 23<sup>rd</sup> December 2019 was issued; that the Respondent did not oppose the Application leading to that order and that she has not challenged the order. The Applicant relied on **MEW v. JLL & RL [2017] eKLR** on that point and argues that the Respondent ought to have obeyed the court order and thereafter seek to set it aside or file an appeal against the order. The Applicant argues, citing **Johnson v. Walton (1990) 1 LFR350 at 352** cited with approval in **Africa Management Communications International Limited v. Joseph Mathenge Mugo & another [2013] eKLR**, that:

**“It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place”**

The Applicant further submits that the Respondent has not commented on the existence of the court order or its validity and that the Matrimonial Property Act Section 12(1) prevents the Respondent from disposing of matrimonial property during the subsistence of the marriage. He submits that the court order dated 23<sup>rd</sup> December 2019 is premised on the understanding that the properties listed therein constituted matrimonial property and as such should be preserved through a court order pending the hearing and determination of the main suit.

On her part, the Respondent has argued in her submissions dated 7<sup>th</sup> December 2020 that the submissions of the Applicant are at variance with his application in that the entire submission is about disobedience of the court order. She identifies three issues for determination, namely:

- (a) Is the application dated 2<sup>nd</sup> September 2020 a contempt application?
- (b) Has the Respondent disobeyed any court orders?
- (c) Is motor vehicle KCJ [...].H available for return to the applicant and can a mandatory injunction issue in the circumstances herein?

On the first issue the Respondent submits that the Application is not one of contempt; that the Applicant does not seek to cite the Respondent

for contempt; that all the legal provisions relied on do not show that this is a contempt application and that the Applicant is trying to change his prayers in his submissions by seeking to cite the Respondent for contempt. She argues that for contempt application to stand there must be proof of the following as shown in **Wambui Kiragu (Suing as Administrator of the Estate of the Late Samuel Kiragu Michuki) v. Governor – Nairobi City County & another (2018)**:

- (a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) The defendant had knowledge of or proper notice of the terms of the order;
- (c) The defendant has acted in breach of the terms of the order; and
- (d) The defendant's conduct was deliberate.

The Respondent submits that there was no counsel representing her when the order in question was issued; that she was not aware of the same and that there is no affidavit of service filed or any other suggestion that the Respondent was aware of the court orders.

On the second issue, the Respondent submits that she has not disobeyed any court order and that this is not a prayer in the application. Relying on the **Wambui case** cited above the Respondent asserts that the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide* and that the Applicant has failed to discharge the burden of proof to the required standard to warrant the court to find that the Respondent is in contempt of court orders.

On issue 3, the Respondent submits that the motor vehicle belongs to her having bought it with her own funds and that they disposed of the same by mutual agreement and therefore the Respondent has not deliberately or wilfully disobeyed any court order. She further submits that mandatory injunctions are issued sparingly and in the clearest of cases. She cited **Deepak Ashwinkumar Maru v. Rahemat Essa Dosani & another [2013] eKLR** on this point and concludes by stating that this case is not one of the clearest ones. She submits that the subject motor vehicle is not available for return and that the application has not met the threshold for granting a mandatory injunction.

#### **Determination**

I have taken time to study this application by perusing the documents filed in court. I have considered the Application and the Supporting Affidavit, the Replying Affidavit by the Respondent and the Supplementary Affidavit of the Applicant. It is true as submitted by the Respondent that the Applicant submitted at length on the issue of disobedience of the court order by the Respondent. It is expected that the Applicant would have submitted in support of his application seeking mandatory injunction against the Respondent. It is apparent that the Applicant wants this court to decide whether there exists a valid court order dated 23<sup>rd</sup> December 2019 restraining the Respondent from disposing of the Applicant's and the Respondent's matrimonial property and whether the Respondent has disobeyed that order. That is the only issue the Applicant identified for this court to determine. All his submissions are aimed at supporting this one issue. My careful reading of his submissions did not disclose any submissions that touch on the issue of mandatory injunction that the Applicant is seeking in his Notice of Motion dated 2<sup>nd</sup> September 2020.

To put the issue before the court into perspective it is in order to give some little background of this case. Contemporaneously with the Originating Summons dated 3<sup>rd</sup> December 2019, the Applicant filed a Notice of Motion dated the same date. In it the Applicant sought prayers (a) to (e) all inclusive. Prayer (c) therein sought a temporary injunction restraining the Respondent either by herself or her agents from encumbering, or disposing of the matrimonial property listed in the schedule in that order, pending the determination of the main case herein. The properties in the schedule include Motor vehicle No. KCJ [...]H the subject matter of this application. On 9<sup>th</sup> December 2019 the Notice of Motion was certified urgent and placed for hearing on 19<sup>th</sup> December 2019. Court record shows that Mr. Odhiambo was present for the Applicant during the hearing of that application but there was no appearance for the Respondent and/or her counsel. Mr. Odhiambo informed the court that the application had been served. The court (Lady Justice Ali-Aroni) proceeded with the hearing and granted prayer (c) pending determination of the suit. The Respondent was also directed to allow the Applicant to collect his personal effects from the home. It is alleged that the Respondent did not obey that court order, specifically in respect of Motor Vehicle KCJ [...]H thereby necessitating this application.

My reading and understanding of the Notice of Motion under consideration is that the Applicant is seeking mandatory injunction against the Respondent to compel her to return the motor vehicle or in the alternative an order to have the vehicle recovered and preserved at a police station pending the hearing of this matter. The problem I am having with the Applicant's submissions is that they do not support the application and the prayers sought. The submissions seem to seek citing the Respondent for contempt of court for disobeying that court order. The authorities the Applicant has cited are also aimed at contempt of court proceedings. In effect the Applicant, in his submissions, is arguing a different case, that of contempt of court, than what he set to seek in his Notice of Motion dated 2<sup>nd</sup> September 2020, which sought an order for mandatory injunction.

On that issue, it is my considered view that the Applicant has changed his pleadings at the submissions stage. It is trite that this change cannot be allowed through submissions. The only way pleadings can be changed is by amendment of the same. If the Applicant is allowed to do so at submissions stage, this would be against the law and practice. It will catch the other party and the court by surprise. The principle that parties are bound by what they have pleaded comes into play. There are many authorities on this principle. While considering this principle the learned judges in the Malawi Supreme Court of Appeal in **Malawi Railways Ltd v Nyasulu [1998] MWSC**, cited with approval an article by Sir Jack Jacob entitled "**The Present Importance of Pleadings**" published in [1960] Current Legal problems, at P174 whereof the author had stated;

***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a***

*different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

On the same principle, the Court of Appeal in **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another (2014) eKLR** held that:

*"We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So, what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it."*

Further the Court of Appeal in **Independent Electoral and Boundaries Commission v. Stephen Mutinda Mule and 3 others [214] eKLR** considered the decision of Nigerian Supreme Court in **"In Adetoun Oladeji (NIG) Ltd Vs. Nigeria Breweries PLC S.C. 91/2002** where the court said:

*"... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."*

I think I have said enough to demonstrate that the Applicant has changed his pleadings at the submissions stage which is against the law and procedure. On that point alone it is clear that the application is not supported by evidence and must fail. The law under Section 107 of the Evidence Act places the burden of proof on the party who desires the court to give a judgement as to any legal right or liability dependent on the existence of facts which he asserts. The Applicant has failed to do so.

Turning on the mandatory injunction the Applicant is seeking, I have taken note that courts have pronounced themselves on this matter in various authorities. In **Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR** the Court of Appeal stated that *"a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application."*

In **Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogetor [2017] eKLR** the court stated that:

*"A mandatory injunction is different from a prohibitory injunction in the sense that while in prohibitory injunction the applicant must, as was stated in the celebrated case of Giella vs Cassman Brown & Co. Ltd (1973) EA 358, establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor, an applicant in a mandatory injunction must, in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions."*

To my mind, a party seeking mandatory injunction must establish the following in order to obtain the orders he is seeking:

- (i) That he must establish the existence of a prima facie case with high chances of success;
- (ii) That he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted;
- (iii) That the balance of convenience tilts in his favour; and,
- (iv) That he must establish the existence of special circumstances.

This is what the Applicant ought to have addressed this court on and persuade it that he satisfies these requirements in order for the court to allow the application. The Applicant has failed to do so but has instead deviated from his case and submitted on matters that he has not pleaded and secondly he has failed to address this court on the applicable principles in granting mandatory injunctions. It is my finding that the Applicant has not established existence of clear and special circumstances in this case to warrant this court to rule in his favour and grant him the mandatory injunction he is seeking. As shown above, the Applicant has failed to support his case with evidence and again, his application must fail on that point. He will however find solace in the fact that this court (Hon. Lady Justice Ali-Aroni, J) had granted him temporary injunction restraining the Respondent either by herself or agents from encumbering or disposing of the matrimonial property

listed in that order pending the determination of the main case. As far as I know this order has not been overturned. It remains in force. If there is disobedience of the same, the Applicant is at liberty to move the court for necessary orders.

In conclusion, it is my finding, and I so hold, that the Applicant has failed to prove his case. Consequently the Notice of Motion dated 2<sup>nd</sup> September 2020 is hereby dismissed with an order that each party bears his/her own costs. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2021.**

**S. N. MUTUKU**

**JUDGE**