



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**MISCELLANEOUS APPLICATION NO. E024 OF 2020**

**IN THE MATTER OF**

**MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

**LAWS OF KENYA**

**IN THE MATTER OF**

**THE NATIONAL TRANSPORT AND SAFETY AUTHORITY ACT NO. 33 OF 2012**

**AND**

**IN THE MATTER OF**

**AN APPLICATION FOR INJUNCTIVE ORDERS PREVENTING**

**THE ALIENATION OF MOTOR VEHICLE REGISTRATION NO. KCP xxxx BY WAY OF SALE, LEASE,**

**CHARGE, GIFT OR OTHERWISE**

**DNM.....APPLICANT**

**BETWEEN**

**LRNG .....RESPONDENT**

**RULING**

1. By his undated amended Originating Summons filed against **the Respondent LRNG**, the Applicant **DNM** seeks the following:

**1. Spent.**

**2. THAT this Honourable Court be pleased to issue a declaration that motor vehicle registration no. KCP xxxx forms part of the Applicant's and the Respondent's matrimonial property and that the Applicant has beneficial interest in the same.**

**3. Spent.**

**4. THAT this Honourable Court be pleased to issue orders directing the Respondent to deposit, in a joint interest earning account to be opened in the Applicant and Respondent's names, the sum of Kenya Shillings Three Million Six Hundred and Eighty-Five Thousand) being the purchase price paid during the acquisition of motor vehicle registration no. KCP xxxx as security in Court pending hearing and determination of the requisite matrimonial causes proceedings to be instituted by parties in these Court proceedings.**

**5. THAT costs of this Application be in the Cause.**

2. It is the Applicant's case that during the parties' marriage which lasted from 2008 to August 2019, they acquired the following properties

in their joint names:

- a. L.R. NO. xxxx
- b. Nyandarua/Melangine/xxxx
- c. Nyandarua/Melangine/xxx
- d. Nyandarua/Melangine/xxxx
- e. Nyandarua/Melangine/xxxx
- f. ¼ acre plot in Kisyombunguo area, purchased through GMEA Housing Sacco

3. The parties also acquired motor vehicle registration no. KCP xxxx (the vehicle), which was registered in the Respondent's name in trust for both parties. The vehicle was purchased through an employee purchase scheme at the Respondent's place of work, Isuzu East Africa Limited. The purchase price was paid from funds from the parties' joint account no. 2027xxxxxx held at Absa Bank Kenya PLC and balance was to be paid by the Respondent through his credit card from the same bank.

4. The Applicant avers he was involved in an accident 4.7.2020 and the vehicle was taken to the Isuzu East Africa Limited for repairs. Once the vehicle was repaired, the Respondent took custody and possession and disposed of the same without consulting the Applicant. The Applicant has moved to this Court seeking an order to preserve his interest in the vehicle and to have the Respondent compelled to deposit an amount equal to the purchase price of the vehicle, pending the hearing and determination of what he refers to as the requisite matrimonial causes claim. The Applicant further averred that the division of the immovable properties shall be dealt with in an appropriate cause but that the present Application seeks to preserve the suit vehicle or its monetary value pending the filing of an appropriate cause for the division of matrimonial property

5. The Respondent in her replying affidavit sworn on 6.4.21 acknowledged that during their marriage, the parties acquired in their joint names, the immovable properties listed by the Applicant. The Respondent further averred that they also separately acquired in their individual names other properties including personal vehicles. For her part, she initially purchased motor vehicle KAT xxxx. She thereafter sold the same and purchased another vehicle, KBX xxxx. Following an accident in 2018, this vehicle was written off and she received Kshs. 1,714,000/= in compensation. She purchased the suit vehicle through her employer's car purchase program. The purchase price of Kshs. 3,685,000/= came from the compensation amount and the balance of Kshs. 1,303,960/= was from a Sacco loan and moneys from the parties' joint account. The Respondent averred that the parties had agreed that the suit vehicle was to be her own personal use as the Applicant had his own vehicle KCD xxxx, which was purchased through a loan and from funds in their joint account. This vehicle was purchased after disposal of the Applicant's vehicle KBJ xxxx.

6. The Respondent stated that she has never laid claim to the Applicant's vehicles or proceeds of their sale. She accused the Applicant of approaching the Court with unclean hands and nondisclosure of material facts with a view to settle scores with her owing to their personal differences. To the Respondent, any stake the Applicant may have in the vehicle can be appropriated in the substantive matrimonial cause. She urged the Court to strike out with costs the Application which she terms frivolous and vexatious and without merit and a complete abuse of the Court process.

7. Parties filed their written submissions which I have duly considered. The issues that fall for determination are:

- i) Whether the suit vehicle is matrimonial property and whether the Applicant has beneficial interest in the same.
- ii) Whether the Respondent should be ordered to deposit, in a joint interest earning account of the parties, the sum of Kshs. 3,685,000/= pending hearing and determination of the suit to be instituted.

Whether the suit vehicle is matrimonial property whether the Applicant has beneficial interest in the same.

8. It was argued for the Applicant that under Section 14 of the Matrimonial Property Act that any property acquired during the subsistence of a marriage is matrimonial property notwithstanding that the same is registered in the name of one spouse. The Applicant submitted that the vehicle was acquired during the parties' marriage and that he contributed towards the purchase of the same. To the Applicant therefore, the vehicle ought to be preserved pending the hearing and determination of the "requisite matrimonial causes claim".

9. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

For the purposes of this Act, matrimonial property means—

- (a) *the matrimonial home or homes;*
- (b) *household goods and effects in the matrimonial home or homes; or*
- (c) *any other immovable and movable property jointly owned and acquired during the subsistence of the marriage*

10. A reading of Section 6 of the Act reveals that by definition, matrimonial property is only that property which is the matrimonial home or

homes of the parties and household goods and effects in such home or homes. Matrimonial property is also that property jointly owned by the parties and acquired during the subsistence of their marriage. It is clear from the definition stipulated in Section 6 that acquisition of a property during the subsistence of a marriage alone, does not necessarily make it matrimonial property. Such property *must* be acquired during the marriage *and* jointly owned by the spouses. The vehicle being registered in the sole name of the Respondent does not fall within the scope of the definition. My finding therefore is that the suit vehicle is not matrimonial property.

11. As regards the Applicant's interest in the suit vehicle, no submissions were made in respect of the same. Accordingly, the Court makes no finding in that regard.

12. I now turn to the issue whether the Respondent should be ordered to deposit the sum of Kshs. 3,685,000/= pending the hearing and determination of the suit that is yet to be filed. The law relating to injunctions is stipulated in Order 40 of the Civil Procedure Rules. Rule 1 provides:

**(1) Where in any suit it is proved by affidavit or otherwise—**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

13. The Court may in a suit, grant a temporary injunction where any property is in danger of being wasted, damaged or alienated. An injunction may also be granted to prevent frustration or obstruction or delay in execution of a Court's decree. Such injunction is granted pending the disposal of the suit. It must be noted that the grant of an injunction presupposes the existence of a suit. In the present case, the Applicant seeks in his application, injunction pending hearing and determination of a suit that is yet to be filed; a suit that is not in existence. Such an application is not tenable in law, as the Court cannot grant orders in a vacuum.

14. Even assuming that the Applicant had filed the "requisite matrimonial causes claim", the Application would still encounter headwinds as the prayers sought are in the nature of a mandatory injunction. It is trite law that a mandatory injunction such as sought by the Applicant herein will not be granted in an interlocutory application absent of special circumstances. In this regard, I am guided by the holding in Kenya Breweries Limited & another v Washington O. Okeyo [2002] eKLR, where the Court of Appeal stated:

***The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:***

***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application".***

The Court went on to state:

***Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

15. In the present case, the Applicant has not stated that any special circumstances exist to warrant the grant of a mandatory injunction at an interlocutory stage.

16. The upshot is that I find no merit in the Applicant's Application and the same is hereby ordered dismissed. There shall be no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF SEPTEMBER 2021**

---

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Applicant

..... for the Respondent

..... Court Assistant