

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 5 OF 2019 (OS)

L.B.B.....APPLICANT

VERSUS

M.W.W.....RESPONDENT

RULING

1. The applicant and the respondent got married under Luhya Customary Law in April 2004. They lived together upto 15th May 2017 when the applicant left the matrimonial home. They have two daughters, born on 24th June 2005 and 23rd November 2008. The applicant has filed divorce proceedings (**Petition No. 943 of 2018**) at the Chief Magistrate's Court in Nairobi. The matter has not been resolved.

2. It would appear not disputed that in the course of the marriage two houses, one in Nairobi and one in Mombasa, were acquired. Also acquired were motor vehicles, including vehicle registration number XXX. This vehicle has been partly paid for by the respondent. It is registered in the name of Realest Limited whose directors are close friends of the family. The vehicle was worth Kshs. 1,450,000/-. The respondent deposited Kshs. 690,000/-, leaving a balance of Kshs. 730,000/-. The intention of the respondent when buying it in October 2014 was that the applicant uses it for dropping children to school. She left the matrimonial home together with the children. Prior to this, she was having vehicle XXX which, according to her, the respondent withdrew when he gave her XXX. She stated that XXX was brought to her, at her place of work, by the respondent who said it was a gift. The respondent states that he gave her the vehicle to use for the children, but denied that it was gift. This is because it still belonged to Realest Limited who are still demanding payment. The applicant has since been paying for the insurance of the vehicle.

3. On 28th January 2019 the applicant filed Originating Summons seeking a declaration that the houses which were acquired during the existence of the marriage were matrimonial property in which her interest was at least one half in each. She also sought a declaration that she was the absolute owner of XXX which was acquired during the marriage and gifted to her by the respondent. She sought a permanent injunction to restrain the respondent, and all those acting under him, from interfering with, trespassing on or dealing with any of the properties.

4. On 19th February 2019 she filed the present Motion for a temporary injunction to restrain the respondent, his agents and / or servants, from taking, dealing, interfering, alienating or otherwise disposing of the vehicle XXX pending the hearing and determination of the Originating Summons. The basis was that the vehicle had been gifted to her by the respondent, and that, by dint of **Section 15 of the Matrimonial Property Act No. 49 of 2013**, it was presumed to belong to her absolutely.

5. The respondent denied that he gifted the vehicle to her. He stated that, in any case, he was not the owner of the vehicle and could not have gifted it.

6. The respective counsel filed written submissions and made reference to written authorities. I have considered them.

7. This application relates to only XXX. There is no dispute that it has been in the use of the applicant since October 2014. It was meant for family use, for her to use for the benefit of the children. The respondent paid the deposit. There is an outstanding balance. The vehicle is registered in the name of Realest Limited. The company is under Section 8 of the Traffic Act (Cap 403) the *prima facie* owner, until the full purchase price is paid (**IGNATIUS MAKAU MUTISYA –v- REUBEN MUSYOKI MULI [2015]eKLR**). Even if the respondent gifted the vehicle to the applicant, that was subject to the interest of the company which was the registered owner. A person can only pass a title if he has one.

8. Regarding the claim that the vehicle was matrimonial property because it was acquired during the subsistence of the marriage, my view would be that the couple's interest, if or at all, would be limited, to the deposit already paid.

9. I am aware of the principles in **GIELLA –vs- CASSMAN BROWN & COMPANY LIMITED [1973]EA 258** regarding the grant of interlocutory injunction. I do not consider that, in the particular facts of this Motion, the conditions have been met. Consequently, I dismiss the application.

10. This being a family dispute, I order that the costs do abide the cause.

DATED and DELIVERED at NAIROBI this 27TH DAY OF JUNE, 2019.

A.O. MUCHELULE

JUDGE