



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**DIVORCE CAUSE NO.2 OF 2017**

**D A J .....PETITIONER**

**VERSUS**

**E A L.....1<sup>ST</sup> RESPONDENT**

**B M C I.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioner/applicant has filed an application dated 8<sup>th</sup> May 2017 against the respondents seeking for orders that:-

*1.) That pending the final determination of this application this Honourable court be pleased to restrain the 1<sup>st</sup> respondent acting by himself or through his agents and/or servants from disposing of and/or seizing motor vehicle Reg. No.[particulars withheld] V Toyota Saloon from the physical possession of the petitioner.*

*2.) That pending the final determination of this application this Honourable court be pleased to restrain the 1<sup>st</sup> respondent acting by himself or through his agents and/or servants from disposing of, or in any way effecting transactions in the certificate of register vide L.R.No. South Wanga/Ekero/[particulars withheld].*

2. The application is supported by the affidavit of the petitioner/applicant sworn on the 8<sup>th</sup> May, 2017 in which she depones that she and the 1<sup>st</sup> petitioner began cohabiting as man and wife from the year 2006 with dowry being paid to the petitioner's family in the year 2007.

That the 1<sup>st</sup> respondent has indeed recognized her as his spouse. That during the course of the marriage the couple acquired a motor vehicle Reg. No. [particulars withheld] V Toyota Saloon and Land Parcel No. L.R. South/Wanga/Ekero/[particulars withheld] which both are registered in the name of the 1<sup>st</sup> respondent. Further that there is construction of residential units taking place on Plot No.[particulars withheld] and that the petitioner has been instrumental in their development through loans she acquired. She further depones that she has had the exclusion use of the motor vehicle. However that the 1<sup>st</sup> respondent has been involved in an adulterous relationship with the 2<sup>nd</sup> respondent as a result of which she, the petitioner, has filed for divorce in this matter. She depones that though the log book of the vehicle and the title deed of the land are in the name of the 1<sup>st</sup> respondent, the same are nevertheless held in trust for the petitioner.

3. The 1<sup>st</sup> respondent on the other hand deponed in his replying affidavit that he and the applicant are

married under African Customary Law. That in the year 2012, the 1<sup>st</sup> respondent married the 2<sup>nd</sup> respondent under African customary law as a second wife. That land Parcel No. South/Wanga/Ekero/[particulars withheld] was solely acquired by the 1<sup>st</sup> respondent for the settlement of the 2<sup>nd</sup> respondent. That the developments on the land are being carried out by the respondents without the petitioner's input. However that the motor vehicle in issue was bought through contributions from both the petitioner and the 1<sup>st</sup> respondent. That the vehicle was being parked at Chavakali where the petitioner and the 1<sup>st</sup> respondent have a house.

That occasionally the petitioner had the benefit of using the vehicle when not in use by the 1<sup>st</sup> respondent. That the motor vehicle was meant for use by both parties including the 2<sup>nd</sup> respondent as a family vehicle though the same is registered in the name of the 1<sup>st</sup> respondent. That if the petitioner is given exclusive use of the vehicle pending the hearing of the case, it will defeat the 1<sup>st</sup> respondent's and the entire family's proprietary rights over the same which is against the rules of natural justice and equity.

4. The petitioner on the other hand contended that she is the one who has solely been utilizing the motor vehicle and largely funding the ongoing construction of the rental units and hence that that is the reason why she is in possession of the proprietary documents of the two properties. That as such it is only fair that she be shielded from irreparable losses in the event that the matrimonial property is disposed of by the 1<sup>st</sup> respondent.

5. I have considered the issues raised in the application. I have also considered the submissions made by the advocates for the respective parties. It is not in dispute that the petitioner and the respondent are married under Luhya Customary Law. It is not in dispute that both parties contributed to the purchase of the motor vehicle and hence the motor vehicle forms part of their matrimonial property.

6. However the parties do not agree as to how the plot in issue was acquired. The petitioner says that she contributed to the acquisition of the property and that she has been financing the ongoing construction on the plot. The 1<sup>st</sup> petitioner on the other hand says that the plot was acquired solely from his own efforts and that the construction on the site is being done by himself and the 2<sup>nd</sup> respondent. That the plot is not part of the petitioner's matrimonial property.

7. The advocates for the respondents, Z.J. Auto & Co. Advocates, submitted that since the 1<sup>st</sup> respondent is the registered owner of the motor vehicle, his proprietary rights over the same cannot be taken away from him at an interlocutory stage without determining all the issues on merit. That he is entitled to full usage and enjoyment of the vehicle pending the hearing and determination of the petition. He submitted that the petitioner has not established the necessary ingredients for grant of interlocutory injunction.

8. The advocates for the petitioner, Amasakha & Co. Advocates, on the other hand submitted that the petitioner has established that the property was acquired during the subsistence of the marriage. That prima facie, the two properties fall under the definition of "matrimonial property" as defined under **section 6(1)(a)** of the Matrimonial Property Act. That the petitioner is entitled at this stage to the protection afforded by **section 14(9)** of the Matrimonial Property Act.

Determination:

9. The application is seeking for preservation of the property pending the hearing of the petition. The facts presented before the court shows that the property herein was acquired during the marriage of the petitioner and the 1<sup>st</sup> respondent. Matrimonial property is defined in section 6(1) of the Matrimonial Property Act as:-

“.....  
.....

.....  
6(c) any (other) immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

**Section 14(1)(a)** of the Act provides that:-

*“Where matrimonial property is acquired during the marriage in the name of one spouse, there shall be a reputable presumption that the property is held in trust for the other spouse.”.*

10. It is herein admitted that the motor vehicle was bought through joint contribution between the petitioner and the 1<sup>st</sup> respondent.

It is therefore matrimonial property that was jointly owned and acquired during the subsistence of the marriage. Though there is dispute as to whether or not the petitioner contributed to the purchase of the contested parcel of land, there is evidence that the land was acquired during the subsistence of the marriage between the petitioner and the 1<sup>st</sup> respondent. There is therefore a presumption that the land is being held in trust for the petitioner. If the 1<sup>st</sup> respondent disposes of the land, the petitioner will suffer loss, if it is true that she is still financing a loan used to acquire and develop the property.

11. It was admitted that the motor vehicle was being parked at the petitioner’s matrimonial home at Chavakali. It was pleaded that the 1<sup>st</sup> respondent took out his goods from the matrimonial home at Chavakali and went to live with the 2<sup>nd</sup> respondent. He appears not to have taken the motor vehicle with him. It would appear that though the motor vehicle was family property, it was at most times at the use of the petitioner. Since the parties cannot agree on how the vehicle can be preserved during the pendency of the divorce proceedings, it is my considered view that it should be placed in the custody of the petitioner pending the hearing of the divorce cause.

12. For the aforesaid reasons, I am of the considered view that the prayers sought are merited. In the premises prayers 4 and 5 in the notice of motion dated 8<sup>th</sup> May 2017 are hereby allowed, save that the same are allowed pending the hearing and determination of the divorce cause herein.

Each party to bear its own costs.

**Delivered, dated and signed at Kakamega this 3<sup>rd</sup> day of August, 2017.**

**J. NJAGI**

**JUDGE**

In the presence of:

Amasakha..... for petitioner absent

Miss Atieno HB Aluto .....for respondents

George .....court assistant

Petitioner.....absent

1<sup>st</sup> respondent ... absent

2<sup>nd</sup> respondent ...absent