



**ECO v JKOS (Family Originating Summons E017 of 2024)  
[2025] KEHC 2185 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2185 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
FAMILY ORIGINATING SUMMONS E017 OF 2024**

**JM NANG'EA, J  
FEBRUARY 5, 2025**

**BETWEEN**

**ECO ..... APPLICANT**

**AND**

**JKOS ..... RESPONDENT**

**RULING**

1. In this Originating Summons (“the O.S.”) the Applicant seeks these reliefs;
  - a. That this honourable court be pleased to declare that properties known as:
    - i. Njoro/Ngata Block 1/XXX
    - ii. Plot Number XX (hived from) Njoro Township Block1/XXX
    - iii. Plot Number XX (hived from) Njoro Township Block1/XXX
    - iv. Plot Number XX (hived from) Njoro Township Block1/XXX
    - v. Motor Vehicle Registration Number KBD XXX[Toyota-S Wagon]
    - vi. Motor Vehicle Registration Number KBY XXX[Mitsubishi - Lorry]
 are matrimonial property acquired by the Applicant and the Respondent.
  - b. That this honourable court be pleased to declare that the Applicant made contribution, financial and otherwise, to the acquisition of the stated properties known as;
    - i. Njoro/Ngata Block 1/XXX
    - ii. Plot Number XX (hived from) Njoro Township Block1/XXX
    - iii. Plot Number XX (hived from) Njoro Township Block1/XXX



- iv. Plot Number XX (hived from) Njoro Township Block1/XXX
- v. Motor Vehicle Registration Number KBD XXX[Toyota-S Wagon]
- vi. Motor Vehicle Registration Number KBY XXX[Mitsubishi - Lorry]

and thus she is entitled to a share thereof.

c. That this honourable court be pleased to issue an order that the said properties known as:

- i. Njoro/Ngata Block 1/XXX
- ii. Plot Number 65 (hived from) Njoro Township Block1/XXX
- iii. Plot Number 69 (hived from) Njoro Township Block1/XXX
- iv. Plot Number 70 (hived from) Njoro Township Block1/XXX
- v. Motor Vehicle Registration Number KBD XXX[Toyota-S Wagon]
- vi. Motor Vehicle Registration Number KBY XXX[Mitsubishi - Lorry]

Be divided according to the contribution between the Applicant and the Respondent as may be determined by the Honourable Court upon independent valuation.

d. That the costs of the O.S. be provided for.

2. Simultaneous with the O.S. the Applicant also bring a Notice of Motion dated 16<sup>th</sup> July 2024 praying for reliefs as hereunder;

- 1. Spent
- 2. Spent
- 3. Spent
- 4. A temporary injunction restraining the Respondent and/or his agents whosoever from transferring, charging, selling or in any other manner interfering with properties described as Njoro/Ngata Block 1/XXX; plot Nos. XX, XX and XX (all hived from land parcel No. Njoro Township Block 1/XXX) and motor vehicles registration numbers KBD XXX (Toyota Station Wagon) and KBY 064M (Mitsubishi Lorry) pending hearing and determination of this Originating Summons.

3. The Respondent reacted to the application by taking out a Preliminary Objection on a point of law to wit, that the court lacks jurisdiction to hear and determine the matrimonial cause since there is no valid marriage between the parties. It is contended that even if it was presumed that the parties entered into a customary law marriage, such marriage has not been registered contrary to provisions of Rule 3 of the Marriage (Customary Marriage) Rules, 2017.

4. I will first briefly set out the Applicant's affidavit evidence before analysis of the parties' submissions. The Applicant avers that she and the Respondent co-habited as spouses under Gusii Customary Law from 2010. During the subsistence of the marriage they acquired several properties including Njoro/Ngata Block 1/XXX, plot Nos. XX, XX and XX, all hived off Title No. Njoro Township Block 1/XXX and motor vehicles registration Nos. KBD XXX (Toyota Station Wagon) and KBY XXX (Mitsubishi Lorry).



5. The Applicant laments that the respondent has secretly married another woman with whom he sired two children and he has ejected her from their matrimonial home.
6. For the stated reasons inter alia the Applicant decided to bring this application.
7. Turning to the parties' submissions, the applicant submits that the preliminary point does not raise a pure point of law for the reason that there is no law prohibiting a party married under customary law from invoking the provisions of Section 17 of the *Matrimonial Property Act* to claim proprietary rights. Citing the famous case of Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd. [1969] EA 696, the Applicant's Counsel submit that a preliminary point of law raises a point of law which is argued on the assumption that all the facts pleaded by either side are correct and it cannot be raised if any fact has to be ascertained. The court is told that the Respondent is inviting the court to engage in conjecture or hearsay in the determination of the Preliminary Objection which according to her does not raise a proper point of law.
8. The Applicant further asserts that she has met the threshold for grant of an order for temporary injunction as long settled in the case of Giella v Cassman Brown & Co. Ltd. [1973] EA 358. It is contended that she has established a prima facie case with a reasonable probability of success at trial and for that she would suffer irreparable loss if the application is not granted and she eventually succeeds in the action.
9. The Respondent's Counsel on the other hand retort that the court is bereft of jurisdiction on the stated ground that there is no valid marriage between the parties. The court is referred to various decided cases in support of the submission including MNM vs DNMK & 13 Others [2017] eKLR; Hortensia Wanjiru Yawe v Public Trustee (Civil Appeal No. 13 of 1976 and Christine Nduta Mathu vs Cosmas Mwangi Kiarie [2017] eKLR. In all these decisions, it was held that marriage must be proven in any proceedings premised on existence of a marriage, otherwise the proceedings will be null and void.
10. The Respondent contends that the Applicant has not proven existence of any marriage including Customary Law Marriage. The court is told that Customary Law Marriage is proven by registration thereof pursuant to Section 96(2) of the *Marriage Act*, 2014. According to the Respondent, proof of registration of such marriage has not been offered by the Applicant.
11. The Respondent further submits that the Applicant has not surmounted the conditions laid down in the case of Giella vs Cassman Brown & Co. Ltd. supra for grant of the relief of temporary injunction pending determination of a claim. The court is therefore urged to dismiss the application.
12. Two issues arise for determination herein;
  - a. Whether the court has jurisdiction to entertain the O.S. and the application for temporary injunction before it.
  - b. Whether the application for temporary injunction is merited.
13. As correctly submitted by the parties, a preliminary point of law is properly taken where there is no dispute as to the relevant facts. If certain facts are to be proved by evidence then a Preliminary Objection in the circumstances would be premature.
14. Whether or not there is a valid marriage between the parties is a hotly contested matter. The issue can only be resolved upon hearing of the O.S. after the parties testify orally. The preliminary point does not therefore raise a pure point of law capable of disposing of the action at this point and is dismissed.



15. Regarding the merits of the application for temporary injunction the Applicant claims an interest in the stated properties saying that she contributed to their acquisition. It would be appreciated that if she proves her marriage to the Respondent then even her indirect contribution to acquisition of property during the subsistence of the marriage is recognized under Section 2 of the *Marriage Act*. The court is therefore satisfied that the Applicant has made out a prima facie case with a reasonable chance of success at trial.
16. Does the Applicant stand to suffer irreparable loss if injunction is not granted? Because of sentimental value usually attached to matrimonial property, loss of the property may not be compensated by costs. I find in the affirmative that irreparable loss could result if injunction is not granted.
17. In light of the court's findings on the first and second limbs of Case Law of *Giella v Cassman Brown & Co. Ltd supra*, it is unnecessary the third limb, the question of balance of convenience.
18. Consequently, an order of temporary injunction issues restraining the Respondent and/or his agents whosoever from transferring, charging, selling or in any other manner interfering with properties described as Njoro/Ngata Block 1/XXX; plot Nos. 65, 69 and 70 (all hived from land parcel No. Njoro Township Block 1/XXX) and motor vehicles registration numbers KBD 779B (Toyota Station Wagon) and KBY 064M (Mitsubishi Lorry) pending hearing and determination of this Originating Summons.
19. The costs of the application shall be in the cause.

**RULING DELIVERED THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2025**

IN THE PRESENCE OF:

**J. M. NANG'EA, JUDGE.**

Advocate for Applicant, Absent

Advocate for Respondent, Ms Injendi

The Court Assistant (Jeniffer)

