



**BNM v PMT (Matrimonial Cause 14 of 2017)  
[2024] KEHC 13106 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13106 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE 14 OF 2017  
PN GICHOHI, J  
OCTOBER 30, 2024  
IN THE MATTER OF AN APPLICATION BY BNM  
THE OF MATRIMONIAL PROPERTY ACT 2013**

**BETWEEN**

**BNM ..... APPLICANT**

**AND**

**PMT ..... RESPONDENT**

**RULING**

1. The subject of this ruling is an oral application made on 5/02/2024 by Mr. Chege for Defendant soon after the Defendant's was cross-examined by Mr. Wesonga for Plaintiff in the Originating Summons dated 6<sup>th</sup> June 2017.
2. The gist of that application is that though the Defendant had indicated they would be calling two witnesses for his case, his witness died after the Plaintiff testified and before the Defendant had given his evidence. That the said defence witness had already recorded his statement before he died.
3. Counsel therefore applied that the witness's statement by one KN dated 24/09/2021 be admitted in evidence for the defence under Section 33 of the *Evidence Act*.
4. While orally opposing that application, Mr. Wesonga submitted that the statement is not a dying declaration and therefore not within the purview envisaged by Section 33 of the *Evidence Act*. That the statement refers to payments by a third party who had not been called as a witness and neither was evidence of payment produced in court.
5. Further, Counsel submitted that it would be against public policy and legitimate expectation for the statement to be admitted without a party it is admitted against having an opportunity to cross-examine him.



6. It was his submissions that the statement is not an affidavit and its authenticity cannot be determined. That the statement is not corroborated and therefore it would be a hearsay and of no probative value. Counsel therefore urged that the defence does close their case.

### **Determination**

7. This Court has heard both parties on the issue as to whether the statement of KN (deceased) is admissible. Section 33 of the Evidence Act which is in relation to Statements by Persons who Cannot be Called as Witnesses provides that: -

“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–

- (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;
- (b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
- (c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
- (d) when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;
- (e) when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;
- (f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person



belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;

- (g) when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13 (a);
- (h) when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.”

8. It is clear that section 33 of the *Evidence Act* gives specific instances for exceptions to the hearsay rule. Those exceptions include a statement of a witness who is dead so as to permit its admissibility.

9. In recorded by KN on 24<sup>th</sup> September 2021 the witness states that pursuant to instructions by STM, he was “involved in the building of maisonette in Land Parcel [Particulars Withheld]” and that “the building materials were purchased by STM who also used to pay him and other artisans every Saturday.

10. KN continues in his statement: -

“That the said STM (Deceased) at the time of construction in 1997 told me that he was building the maisonette in consideration of love and affection for his son PMT...I do recall that BN would at times visit the site. I knew her as the wife of PMT...my assignment was limited up to the masonry work. I was not involved in the roofing and the finishing phases of the Maisonette.

That is all I wish to state.”

11. From the above, the statement by KN is not a dying declaration of alleged utterances by STM who is now deceased and father to the Plaintiff. It purports to say what STM used to tell him as to the reason he was constructing the house. That statement refers to actions by a third party who is deceased but there are no documents or material availed in the case to support the claim by the maker that STM used to pay him and other artisans every Saturday.

12. Bearing in mind the dangers posed by such a statement to the other party, the Defendant should demonstrate the reliability of KN’s statement so as to give it exception to hearsay rule.

13. That statement is not a sworn affidavit by the maker. The circumstances under which it was recorded have not been demonstrated. The Plaintiff’s opportunity to cross- examine the maker (KN) is his legitimate expectation as to a fair trial. That opportunity has been lost through death of the maker during the pendency of this trial.

14. The reliability of the said statement remains questionable and therefore inadmissible.

15. In conclusion, this Court makes the following orders: -

- 1. The oral application by the Defendant is hereby dismissed.
- 2. Due to circumstances of the matter before Court, each party will bear his own costs of this application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:-



Mr. Wesonga for the Plaintiff  
Mr. Munene Chege for the Defendant  
Ruto, Court Assistant

