



**DNK v GS (Matrimonial Cause 4 of 2022)  
[2023] KEHC 26048 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MATRIMONIAL CAUSE 4 OF 2022  
SM GITHINJI, J  
NOVEMBER 29, 2023  
MATRIMONIAL CAUSE NO. 4 OF 2022 (O.S)**

**BETWEEN**

**DNK ..... PLAINTIFF**

**AND**

**GS ..... DEFENDANT**

**Courts in Kenya do not have the jurisdiction to set aside a prenuptial agreement that was entered into by parties in a different jurisdiction**

*The case involved a party that wanted to repudiate a prenuptial agreement on ground that the prenuptial agreement was authored without her involvement, that the same was in a foreign language, and that she was not conversant the language with at the language at the time she signed the prenuptial agreement. The High Court held that the court lacked jurisdiction to interrogate the validity of the said prenuptial agreement, the same having been made and executed in Austria, and the issue already determined by the courts at the place.*

Reported by John Ribia

**Family Law** – marriage – prenuptial agreements – legal framework governing prenuptial agreements in Kenya - jurisdiction of family courts to enforce prenuptial agreements entered into in a foreign jurisdiction in Kenya - what was the legal framework governing prenuptial agreements in Kenya - whether a court in Kenya had jurisdiction to set aside a prenuptial agreement that was entered into by the parties in a different jurisdiction - Matrimonial Property Act (Cap 152) sections 6, 12, 14, and 17.

**Brief facts**

The parties were once wed but before the marriage they entered into a pre-nuptial agreement in Austria. Upon dissolution of the marriage the court in Austria upheld the prenuptial agreement estopping the plaintiff from being considered as an owner of the immovable properties listed in the prenuptial agreement. Aggrieved the defendant filed the instant suit. She contended that the prenuptial agreement was authored without her involvement, that the same was in a foreign language, and that she was not conversant the language with at the language at the time she signed the prenuptial agreement. She stated that she wished to repudiate and renege the



said agreement entered between the parties on May 25, 2012 as the same was one sided, unfair and manifestly unjust as she was not in a position of power and the said agreement was entered contrary to the provisions of the law.

### **Issues**

- i. What was the legal framework governing prenuptial agreements in Kenya?
- ii. Whether a court in Kenya had jurisdiction to set aside a prenuptial agreement that was entered into by the parties in a different jurisdiction.

### **Held**

1. Section 6(3) of the Matrimonial Property Act recognized agreements executed by couples intending to enter into marriage. Section 6(4) provided for setting aside of the said agreement if influenced by fraud, coercion or was manifestly unjust.
2. A prenuptial agreement was a legally binding agreement between a couple, stating how the assets would be divided if the marriage fails to last. Prenuptial agreements were contractual in nature thus the general law of contract applied and they were enforceable just like any other contract. Therefore, they were subject to the court's scrutiny if allegations of fraud, coercion or manifestly unjust were pleaded by a party to the agreement. The court will however not interfere merely because the terms of the agreement were not balanced and were more favorable to one party than the other.
3. The prenuptial agreement in clause 6 expressly stated the operative law governing matrimonial property with bias to post marital activities to be the Austrian Law. The same was however, silent on what law governs the prenuptial agreement itself. The regional court in Dorbin, Department 13 of Austria determined that the prenuptial agreement was valid and legally enforceable and there had not been an appeal. The agreement was made in Austria where both parties were domiciled, were married, divorced and currently live.
4. The court lacked jurisdiction to interrogate the validity of the said prenuptial agreement, the same having been made and executed in Austria, and the issue already determined by the courts at the place. The mere fact that the plaintiff origin was Kenya and probably was a Kenyan, and the properties she claims were in Kenya, did not by itself confer to the court jurisdiction in the matter and neither did it entitle her to the said properties. The rightful court of jurisdiction made its decision and the issue could not be revisited afresh here or even appealed. The run was in Austria and the courts in Kenya were mere spectators.

*Summons failed for lack of jurisdiction.*

### **Orders**

*Each party was to pay its own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Anjere, Benson Owenga v Kivati Nduto & another* Civil Suit 2452 of 1982; [2013] KEHC 875 (KLR) - (Applied)
2. *AWM v JGK* Matrimonial Cause 49 of 2019; [2021] KEHC 4780 (KLR) - (Mentioned)
3. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* Petition 164B of 2016; [2018] KEHC 7130 (KLR) - (Followed)
4. *Kibic Star Electro Limited & 2 others v Southern Credit Banking Group* Civil Appeal 305 of 2015; [2022] KECA 71 (KLR) - (Followed)
5. *Langat, Kimaiyo v Co-operative Bank of Kenya Limited* Civil Appeal 48 of 2015; [2017] KECA 152 (KLR) - (Followed)
6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)



7. *Muigai, Ngengi & another v Peter Nyoike Muigai & 4 others* Civil Appeal 13 & 56 of 2007; [2018] KECA 475 (KLR) - (Applied)
8. *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* Civil Appeal 95 of 1999; [2001] KECA 362 (KLR) - (Followed)
9. *Ndoro ,Sospeter Kariuki Nthigav Mary Njeri Njihia & 2 others* Civil Appeal 34 of 2015; [2019] KEHC 4337 (KLR) - (Followed)
10. *NWM v KNM* Civil Suit 70 of 2013 (OS); [2014] eKLR - (Mentioned)
11. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Followed)
12. *TKM v SMW* Civil Appeal 146 of 2018; [2020] KECA 684 (KLR) - (Mentioned)

#### Statutes

##### Kenya

1. Civil Procedure Act (cap 21) section 3A — (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 37 rule 11 — (Interpreted)
3. Matrimonial Property Act (cap 152) sections 6, 12, 14,17 — (Interpreted)

#### Texts

Black, HC., (1995), *Black's Law Dictionary* Clark, New Jersey: The Lawbook Exchange Ltd 2nd Edition

#### Advocates

*Mr Olala & Mr Litoro* for for the respondent

*Ms Wangari* h/b for *Miss Mati* for the plaintiff

## JUDGMENT

1. By way of an originating summons dated September 19, 2022, brought under section 3A of the [Civil Procedure Act](#) and order 37 rule 11 of the [Civil Procedure Rules 2010](#) and section 6, 12, 14,17 of the [Matrimonial Property Act 2013](#), the plaintiff seeks the following orders;
  1. That the honourable court be pleased to declare and issue a declaration setting aside the prenuptial agreement concluded in Austria on May 25, 2012.
  2. That the honourable court be pleased to declare and issue a declaration that all the immovable properties set out in the schedule herein below which are registered in the name of the Defendant are held beneficially and or in trust for the plaintiff.

Schedule of properties; -

  - a. Title No 778 Watamu, Kilifi LR 27636.
  - b. Plot 677 Kilifi CR 24851.
  - c. LR Number Gede/Dabasao/1071.
3. That a declaration does issue that LR No 778 Kilifi LR 27636, LR No 667 Kilifi CR 24831 and LR No Gede/Dabaso 1071 were jointly bought but registered in the name of the defendant herein and are also partly held in trust and for the beneficial interest of the plaintiff and the plaintiff is entitled to the said properties as the defendant maintains the properties in Austria.
4. That in the alternative the honourable court does find that the respondent maintains the proceeds from LR No 667 Kilifi CR 2483 and the applicant be granted LR No Gede/Dabasao 1071 and LR No 778 Kilifi LR 27636.



5. That an order do issue declaring that the defendant is accountable to the plaintiff in respect all income derived from the said properties.
  6. That an order of injunction do issue stopping and/or restraining the sale, purchase, disposal of and/or alienation of the whole or any part of L.R No. Gede/Dabaso 1071 and LR No Kilifi 778 Kilifi 27636 by the defendant.
  7. That the honourable court do order that the defendant do provide and discloses comprehensive list of all properties, shares and bank accounts he may hold and own both locally and outside the jurisdiction of this court and that the said disclosed properties, accounts and share be shared equally between the plaintiff and the defendant if any.
  8. That an order do issue that the properties and the income from the same be settled in proportions aforesaid or as the court may order.
  9. That the defendant be ordered to pay the costs of these proceedings in any event.
  10. Such other relief or order as the honourable court may deem fit and just in the circumstances of the case.
2. The originating summons is founded on the grounds set out on its face and the verifying affidavit of DNK the plaintiff who deponed that the defendant and herself got married on June 12, 2012 and that prior to the marriage, the defendant had her sign a prenuptial agreement that he had authored without her involvement and the same was in a foreign language that she was not conversant with at the time. She stated that she wishes to repudiate and renege the said agreement entered between the parties on May 25, 2012 as the same was one sided, unfair and manifestly unjust as she was not in a position of power and the said agreement was entered contrary to the provisions of the law.
  3. Ms. DN further stated that the defendant acquired some parcel of land and set up a lodge trading as sunbird lodge which she was instrumental in setting up and once the business started to pick she quit her job and concentrated on the lodge business as she was one of the directors. In addition, with proceeds from the lodge, the defendant through her assistance purchased plots no Title no 778 Watamu Kilifi 27636, Plot No 677 Kilifi CR 24851 and LR Gede/Dabaso 1071 with the agreement that the properties would be registered in the defendant's name in trust for her.
  4. It was also stated that they started constructing their matrimonial home on L.R No. Gede/Dabaso 1071 in 2013 where they lived until mid-2019 when she had to leave due to the respondent's cruelty. She added that the defendant has been pushing to sell the properties without involving her.
  5. In response, the defendant filed a replying affidavit dated June 19, 2023 stating that the suit herein is frivolous, vexatious, devoid of merit, fails the legal and evidential threshold for the reliefs sought and otherwise an abuse of the court process.
  6. He deponed that their marriage was dissolved by the court in Austria on 16.03. 2022 following a petition by himself to the court. Further, that the allegation that the prenuptial agreement between the plaintiff and himself dated 25/05/2012 is one sided, unfair or manifestly unjust or was made without the plaintiff's involvement or understanding is an afterthought as the same was voluntarily executed upon full understanding of the terms therein in presence of their respective witnesses, a Notary Public and an interpreter who signed the said agreement to certify that the contents and terms were translated and interpreted to the plaintiff as shown on the contract in German and English Version. He added that on 24/05/2022, the Regional Court Dornbin, Department 13 of Austria determined that the Prenuptial agreement is valid and legally effective and there has been no appeal against the said judgment. Moreover, the court is divested with jurisdiction on the validity of the said contract as the same is



governed by Austrian Law where both of them are domiciled, were married, divorced and currently live.

7. Mr GS stated that the plaintiff did not contribute directly or indirectly to the acquisition, improvement and or maintenance of the suit properties nor were the same registered in his name to hold in trust for the petitioner or at any time matrimonial property.

### Plaintiff's Submissions

8. The plaintiff framed the following issues for determination; whether the honourable court should set aside the pre-nuptial agreement. The plaintiff submitted that at the time of the execution of the agreement, what was translated to her was not what was contained in the translated copy of the agreement which was presented to her in 2018 during the divorce proceedings. It was submitted that the threshold of setting aside a contract on equitable ground is the existence of any or all of the vitiating factors including mistake, misrepresentation, coercion and /or undue influence. The plaintiff relied on the authorities of *Benson Owenga Anjere v Kivati Nduoto & another* [2013] eKLR and *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others* [2018] eKLR. It was also submitted that the plaintiff was coerced and she did not get independent advice thus the same should be held invalid and set aside.
9. On whether the suit properties form part of the matrimonial property and whether the plaintiff contributed towards the acquisition of the matrimonial properties; it was submitted that the properties were bought through joint effort and the contribution of the plaintiff. The plaintiff cited the cases of *TKM v SMW* [2020] eKLR, *AWM v JGK* [2021] eKLR and *NWM v KNM* [2014] eKLR.

### Defendant's Submissions

10. The defendant submitted that the grounds of challenge of the contract are causes of action in tort and can only be brought within three years. In addition, the Regional Court in Austria determined that the Prenuptial Contract is valid and enforceable. Further, that the prenuptial agreement incorporates Austrian Law hence parties intended that the court in Austria should determine questions of its validity. It was also submitted that the plaintiff is bound by the terms of the contract and cannot seek to amend or walk away from it. The defendant relied on the authorities of *Kibic Star Electro Limited & 2 Others v Southern Credit Banking Group* [2022] KECA, *Sospeter Kariuki Nthiga Ndoro v Mary Njeri Njibia & 2 Others* [2019] eKLR among other authorities.

### Analysis and Determination

11. I have considered the pleadings and submissions by the parties. The issue for determination is whether this court can set aside the impugned pre-nuptial agreement dated 25.05.2012.
12. Section 6(1),(3) and (4) of the *Matrimonial Property Act*, 2013 provides that: -

Meaning of matrimonial property

- (1) 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



- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determined that the agreement was influenced by fraud, coercion or is manifestly unjust.
13. Subsection 3 of the above section recognizes agreements executed by couples intending to enter into marriage. Subsection 4 thereof provides for setting aside of the said agreement if influenced by fraud, coercion or is manifestly unjust. The plaintiff has asserted that she was unaware of the contents of the pre-nuptial agreement as it was in a language she did not understand.
14. In the case of *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] eKLR, Mativo J observed that: -
- “40. Furthermore, subject to section 6 of the Act, the interest of any person in any immovable or movable property acquired or inherited before marriage does not form part of the matrimonial property. The *Act* introduced and recognizes prenuptial agreements which were previously not recognized by the courts. The *Act* allows parties to any intended marriage to enter into an agreement before their marriage to determine their property rights, which is enforceable provided that the agreement is not influenced by fraud, coercion or is manifestly unjust.”
15. The agreement entered into before marriage is referred to as a Prenuptial Agreement. The *Black's Law Dictionary Free Online Legal Dictionary* 2<sup>nd</sup> Edition defines Prenuptial agreement as: -
- “A legally binding agreement between a couple, stating how the assets would be divided if the marriage fails to last.”
16. Prenuptial agreements are contractual in nature thus the general law of contract applies and they are enforceable just like any other contract. Therefore, they are subject to the court's scrutiny if allegations of fraud, coercion or manifestly unjust are pleaded by a party to the agreement. The Court will however not interfere merely because the terms of the agreement are not balanced and are more favorable to one party than the other. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, the court held:
- “it is clear beyond para adventure that save for those special cases where equity might be prepared to release a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”
17. The same view was expressed by the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, where it held that:
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”
18. Having established that statute and case law provide for instances where a prenuptial agreement may be set aside, the question I am faced with is whether this court has jurisdiction to set aside the impugned



prenuptial agreement herein considering that the same was entered into by the parties in Austria. In *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR expressed itself as follows:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

This court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

20. I have examined the prenuptial agreement dated 25.05.2012. The said prenuptial agreement in clause 6 expressly states the operative law governing matrimonial property with bias to post marital activities to be the Austrian Law. The same is however, silent on what law governs the prenuptial agreement itself.
21. The defendant alleged, of which allegation is undisputed, that on 24/6/2022 the regional court in Dorbin, Department 13 of Austria determined that the prenuptial agreement is valid and legally



enforceable and there has not been an appeal. The agreement was made in Austria where both parties are domiciled, were married, divorced and currently live.

22. I do agree with the defendant that this court lacks jurisdiction to interrogate the validity of the said prenuptial agreement, the same having been made and executed in Austria, and the issue already determined by the courts at the place. The mere fact that the plaintiff origin is Kenya and probably is still a Kenyan, and the properties she claims are in Kenya, does not by itself confer to this court jurisdiction in the matter and neither does it entitle her to the said properties. The rightful court of jurisdiction made it's decision and the issue cannot be revisited afresh here or even appealed. The run is in Austria and the courts in Kenya are mere spectators.
23. The plaintiff case therefore fails for want of jurisdiction and it being a family dispute, each party is to bear own costs.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

In the presence of: -

Mr Olala & Mr Litoro for the Respondent

Ms Wangari holding brief for Miss Mati for the Plaintiff

