



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J.)

CIVIL SUIT NO. 2 OF 2021 (O.S)

IN THE MATTER OF DIVISION MATRIMONIAL PROPERTY AND

IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

DNK.....PLAINTIFF

VERSUS

KM.....DEFENDANT

JUDGEMENT

1. The Plaintiff and the Defendant got married under the *Marriage Act*, Chapter 150 on 8th August, 1995. Their union was blessed with 2 issues.
2. On 5th February, 2020 before the Senior Principal Magistrate's court at Mombasa through *Divorce Cause No.21 of 2019; KM versus DN* their marriage was dissolved.
3. During the subsistence of their marriage, the Plaintiff and the Defendant had executed an Agreement of Division of Matrimonial Assets dated 11th May, 2018 and an Addendum of Matrimonial Assets dated 18th June, 2018.
4. By an Originating Summons taken out by the Plaintiff dated 11th March, 2021, the Plaintiff seeks the following orders:-

1. **WHETHER** it can be declared that the property (Immovable) listed herein with all developments thereon acquired and developed by the joint funds and efforts of the Plaintiff and Defendant during their marriage and registered jointly in the name of both the Plaintiff and the Defendant in the case of property (a) herein below and registered in the name of the Defendant in the case of property (b) herein below be shared in the manner agreed by the parties in the Agreement for Division of Matrimonial Assets dated 11th May, 2018 and the Addendum Matrimonial Assets dated 18th June, 2018 more particularly as follows:-

A. Z Apartments, Apartment No. xxx, 2nd Floor, Block VI being the premises known as MN/Sec.1/xxxxx comprised in a Certificate of Title registered in the Land Titles Registry at Mombasa as lessees for a term of Nine Hundred and Ninety Nine (999) years from the First Day of March One Thousand Nine Hundred and Twenty Six (1926) at an annual Peppercorn Rent subject to the terms and conditions contained in the said Certificate of Title to be transferred to the Defendant.

B. M/N/xxxx measuring 4.86Ha approximately 12 acres, registered in the name of the Defendant be transferred to the Plaintiff.

2. **WHETHER** an order should issue declaring that the matrimonial property be divided in the manner agreed by the parties in

their Agreement of Division of matrimonial assets dated 11th May, 2018.

3. WHETHER the Deputy Registrar ought to be empowered to sign any documents that the Defendant may refuse to sign.

4. Who should pay the costs of this suit.

5. The Summons is based on grounds that:-

a. The properties set out in the schedule hereinabove was acquired by the joint contribution of the Plaintiff and the Defendant during the course of their marriage.

b. The Plaintiff and the Defendant have an agreement on Division of matrimonial property that provided for the Division of the matrimonial property owned by the parties.

c. The Defendant has refused and/or neglected to take steps to actualize the Agreement between the parties necessitating the intervention of this court through a declaration and action of this Honourable Court.

d. It is in the interest of justice that the orders above be granted by the court.

6. In her witness statement dated 13th May, 2021, the Plaintiff stated that she was living with the Defendant as of 1989 but officially got married to the Defendant on 8th August, 1995.

7. According to the Plaintiff, the Defendant moved out with another woman to Namanga permanently but has started showing up at the suit property sporadically and that people unknown to the Plaintiff have started showing up at the property claiming to be potential purchasers, a clear intention by the Defendant to alienate the suit property in breach of the agreement.

8. In her evidence, the Plaintiff stated that she was selling earnings, necklaces and shoes. While relying on her witness statement, she stated that she contributed by doing casual jobs, farming and shop keeping. It was her evidence that she was paying the contractors and buying cement hence contributing towards the construction. Apart from that she was cultivating and doing poultry and livestock.

9. It was her case that they agreed with the Defendant that the Defendant would give her 12 acres as per the agreement which was exhibited. She disclosed that she was ready to give the Defendant the Mombasa House despite the fact that it was jointly purchased.

10. In cross-examination, she stated that by the time of the agreement, they were still in the marriage and that the parcel of land she was claiming was where they had been staying for 27 years. She agreed that the land was inherited by the Defendant on 16th November, 2015 based on the Certificate of Confirmation and therefore she did not contribute towards its purchase. According to the Plaintiff, they had 12 acres. Though they had 40 acres, she discovered that the Defendant was selling the same so she placed a caution on the land in the interest of the children to bar the Defendant from selling the whole land and leave them landless. However, they entered into an agreement to have the caution removed.

11. The Plaintiff insisted that when they got married, she assisted in the construction and taking care of the children as well as paying their fees as well as the workers though she had no receipt since she was not expecting a dispute to arise. It was her evidence that she had stayed with the Defendant for 27 years. She disclosed that there was an apartment in Mombasa in their joint names for which it was agreed that in exchange for her share, the Defendant would give her Kshs 2.6 million which amount the Defendant paid to her. She however admitted that she did not pat the Defendant for the shares she was claiming but insisted that she contributed to the development. It was her evidence that the Defendant had even sold the house they were living in and was not paying even the fees for the children.

12. It was her evidence that by the time of the confirmation of grant she was already married to the Defendant. She denied that she forced the Defendant to sign the agreement. It was her evidence that she wanted the 12 acres on behalf of the family since she was still the mother of the children. The Plaintiff asserted that the Defendant had never repudiated the agreement.

Defendant's case

13. In support of his case, the Defendant swore a replying affidavit on 6th April, 2021. He deposed that he is the registered proprietor of M/N/xxxx which was hived out of the larger M/N/xxx, a property in the estate of UM (deceased), their grandfather. It was therefore his case that since he inherited the suit property, it does not form part of his property acquired with the Plaintiff.

14. According to the Respondent, the agreements herein were done during the existence of their marriage when he was working on ways to resolve their differences which among others included placing a caution on the property by the plaintiff after he had entered into sale agreements with third parties. He however, avoided the agreement after he realized that the Plaintiff was not for the idea of reconciliation.

15. It was averred by the Defendant, that after their divorce no agreement as to distribution was arrived at and he is not interested in transferring his inheritance to the Plaintiff. He therefore stated that the Plaintiff is not entitled to the Defendant inheritance as that would be unfair to him and his dependants and that if the orders sought by the Plaintiff are given, it will be a grave miscarriage of justice.

16. In his witness statement, the Defendant has stated that the Plaintiff has never contributed financially in building any house or buying any building that Defendant own. According to the Defendant, he built a shop for the Plaintiff to keep her busy since the Plaintiff was unemployed but the Plaintiff never wanted to live in a house built by the Defendant in Nguluni and was always on the road to Mombasa and

was not willing to work. Therefore, the Defendant saw it fit to sell the house at Nguluni and buy Z Apartment No.xxx, 2nd Floor, Block VI being premise known as M N/Sec.1/xxxxxx. However, the Plaintiff still did not want to stay at the apartment and continued with her unbecoming behavior.

17. In his oral testimony, the Defendant stated that he is a businessman in Namanga and relied on his witness statement as his evidence. He averred that M/N/xxx was his father's property from which he got 29.74 of which the Plaintiff is claiming 12 acres.

18. It was his evidence that he entered into the said agreement due to coercion because that was his father's property and when the title came, the Plaintiff started harassing him. Upon realizing that he had sold part of it, the Plaintiff placed a caution on it. They then agreed to have the same removed due to the fact that the caution stalled a certain project and it was only after the agreement that the Plaintiff removed the caution paving way for the completion of the transactions and enabling the Defendant to get money to complete the construction. When he sought the Plaintiff to sort out the matter, it was his evidence that he did not get her.

19. Regarding the Mombasa property, it was his evidence that they agreed to buy the Plaintiff's share since she wanted to sell it. However, the Nguluni property was inherited and not purchased.

20. In cross-examination, the Defendant stated that the disputed property was hived off from plot no. xxx. He disclosed that he gave one of his uncles 6 acres of the said family so that the said uncle could release the land to them as he was holding the same on behalf of the family. He also disclosed that he had sold part of the land to Diamond hence its incorporation in the succession cause as a purchaser.

21. The Defendant admitted that during the succession, they were already married with the Plaintiff. He admitted that the Plaintiff placed a caution on plot xxx though he only became aware of the same when he sent a surveyor to the land. The Plaintiff told him that he placed the caution because he had sold part of the land and she insisted that he shares the land with her as a condition for the removal of the caution. The agreement, he admitted, was entered into before his then advocates but he was never advised on the same. It was his contention that he was unhappy because he was deprived of his children and his property but did not mention this to his advocate. According to the Defendant, they were with the buyer, Wahome, who was holding on to his money and he had called him to confirm that the caution was being removed. According to the Defendant he signed the agreement out of frustration and that he was not in his right senses when he did so.

22. The Defendant contended that the Plaintiff poisoned the children against him. Though the agreement stated that he would give the plaintiff Kshs 2.6 million and 12 acres, he did not give her the said 12 acres since he later realised that the plaintiff had cheated him though he did not inform his advocate about this but simply declined to transfer the said 12 acres until they were agreed.

23. According to the Defendant, it was Diamond that paid the money which was used in purchasing the Mombasa Apartments and which he registered in the joint names.

Plaintiff submissions

24. In her submissions, it is submitted that the issue for determination is whether the court may proceed to enforce the Agreement and the Addendum thereto between the parties and divide the matrimonial property in the manner provided by the parties in their agreement.

25. As to whether the agreement between the parties is enforceable, it is submitted that the terms of the Agreement and the Addendum have not been disputed. Reliance was placed on Section 7 and 6(3) of the ***Matrimonial Property Act, 2015*** and this court was urged to take into consideration post-nuptial agreements that the parties may have on division of matrimonial properties during pendency of marriage. Reliance was placed on the cases of **OKN vs. MPN [2017] eKLR** and in **CYC vs. KSY [2017] eKLR**.

26. It was submitted that the Agreement and Addendum indicate the clear intention of parties regarding the manner of division of the matrimonial property hence the court should only set aside the agreement if it was influenced by fraud, coercion or is manifestly unjust. The Defendant gave the Plaintiff the title deed for the 12 acres and paid half of the Mombasa apartment to the Plaintiff. It was submitted that the Defendant's advocates communicated to the Plaintiff the 12 acres was not to include the matrimonial home nor the duka built on the matrimonial property.

27. According to the Plaintiff the agreement was not vitiated in any manner and the oral testimony cannot stand. The Plaintiff therefore urged the court to divide the matrimonial property in the manner agreed by parties in the Agreement dated 11th May, 2018.

28. As to whether M/N/xxxx is considered as matrimonial property, it was submitted that the suit property is a matrimonial since it was inherited by the Defendant after marriage. According to the Plaintiff, it is not in dispute that the Plaintiff and Defendant got married on 5th August, 1995 and also not in dispute that the inherited property was hived off in 2015. Reliance was placed on the case of **SN vs. FM [2019] eKLR** in which the court, while interpreting Section 5 of the ***Matrimonial Property Act*** held that property inherited during the subsistence of the marriage cannot be excluded from matrimonial property unless acquired before marriage. **Musyoka J.** in **ENK vs. JNK [2015] eKLR** was of the same view that it is not excluded from the matrimonial property if inherited during subsistence of the marriage.

29. As regards the apartment in Mombasa, it was submitted that it is not in dispute that it was a joint property between the Plaintiff and Defendant hence a presumption of law that the same was equally owned by them. According to the Plaintiff, the presumption has not been rebutted since the Defendant offered to buy out the Plaintiff and he did so by paying half of the value of the apartment to the Plaintiff, money which is not denied by the Plaintiff. It was submitted that the Plaintiff has shown willingness to sign all documents with a view of transferring her share to the Defendant.

30. According to the Plaintiff the division of the matrimonial property between the Plaintiff and Defendant in terms of the Agreement and the Addendum is justified.

31. The Plaintiff prays for:-

a. A declaration be given that the matrimonial properties subject of the Agreement thereto dated 18th June, 2018 be shared in manner agreed by the parties in the said Agreement and the Addendum thereto.

b. Therefore the matrimonial property be subject of the Agreement between the parties being M/N/xxxx and a Mombasa Apartment be and is hereby divided in the manner agreed by the parties in the Agreement for Division of Matrimonial Assets dated 11th May,2018 and the Addendum thereto dated 18th June,2018 produced before the Honourable court.

c. The Deputy Registrar be empowered sign instead of the Defendant all documents necessary for the transfer of the land known as M/N/xxxx to the Plaintiff, where the Defendant refuses to do so.

32. According to the Plaintiff, the Defendant refused to honour the terms of the Agreement, it is just that the Defendant bear the costs of the suit.

Defendant Submissions

33. In his submissions, the Defendant submitted that the issue for determination is whether the agreement dated 11th May 2018 and the Addendum dated 18th June, 2018 are valid. On this issue, the Defendant submitted that the court should interrogate the intention of parties and whether parties entered into this contracts willingly. According to the Defendant, he was subjected to economic duress when the Plaintiff placed a caution on the property and due to the financial burden that was to befall the family, he agreed to the Plaintiff's terms by signing the contract. It is submitted that it is after the contract was signed that the Plaintiff withdrew the caution and entered into sale transaction with third parties one being **Mr. Wahome**, a Director of Pioneer Feeds.

34. On economic duress reliance was placed on the cases of **Dimskal Shipping Co. vs. ITF [1992] 2AC** where the House of Lords recognized illegitimate economic pressure as a form of duress that would justify avoidance of a contract and in **Kenya Commercial Bank Ltd & Another vs. Samuel Kamau Macharia & 2 Others Civil Appeal No.181 of 2004 (unreported)** where the court recognised the doctrine of *economic duress*.

35. According to the Defendant, without the caution he would not have entered into the contracts. It was submitted that the Defendant intended to avoid the calamitous losses to the family and not to give away his inherited property. It was submitted that the Defendant gave the Plaintiff Kshs. 2,600,000/- since he wanted the Mombasa property to remain in the family and not to be sold by the Plaintiff. According to the Defendant, he has never signed any transfer documents and does not require the Plaintiff to transfer the Mombasa property to him.

36. It is submitted that the Plaintiff received payment for the Mombasa apartment from proceeds of one of the sale transaction as per paragraph 2 of the Agreement dated 11th May, 2018. The Defendant urged the court to set aside the Agreement and the Addendum herein on grounds of coercion through economic duress.

37. The second issue raised by the Defendant, is whether the Plaintiff is entitled to 12 acres of land which forms part of the Defendant's inheritance. Reliance was placed on Section 7 of the ***Matrimonial Property Act*** to the effect that matrimonial property will vest in the spouses according to their contribution towards its acquisition. Reliance was also placed on **JWG vs. GGW (2019) eKLR**, **Mburu Echaria vs. Priscilla Njeri Echaria (2007) eKLR** and **PNN vs. ZWN [2017] eKLR**. Based on the decisions is submitted that the court ought to dispassionately scrutinize the direct and indirect contribution of each of the party in marriage in acquisition and/or development of the suit properties.

38. According to the Defendant, the Plaintiff has not shown contributions which entitles the Plaintiff to 42% of the Defendant's inheritance. It is submitted that the Defendant has always been ready and willing to compensate the Plaintiff her fair share of the contribution from the estate. According to the Defendant, 12 acres amounts to 42% of the entire estate. To the Defendant, it will be unfair to give the Plaintiff the 12 acres yet he gave the Plaintiff Kshs.2, 600,000/- with a view of keeping the Mombasa property for the family. It is submitted that the Plaintiff never contributed financially to towards the acquisition of the Mombasa property.

39. The Defendant urged the court to find the agreement and the addendum to be unjust hence the application should be dismissed in its entirety.

Determination

40. I have considered the pleadings, oral and written submissions.

41. The dispute revolves around the distribution of matrimonial properties pursuant to an Agreement and an Addendum thereto executed between the Plaintiff and Defendant before they divorced.

42. It is not in dispute that the Plaintiff got married to the Defendant on 8th August, 1995 but the marriage was dissolved by court on 5th March, 2019. It is not in dispute that they had four issues of marriage. It is not disputed that the Plaintiff and Defendant entered in an Agreement on Division of Matrimonial Assets dated 11th March, 2018 and Addendum to the Agreement dated 12th June, 2018 during the subsistence of their marriage.

43. The Defendant disputes that M/N/xxxx is a matrimonial property since it was a suit property inherited from the Defendant's grandfather by the Defendant. The Defendant asserted that he entered into the said agreement and addendum as a result of economic duress exerted by

the Plaintiff.

44. The issue before this Court, as rightly appreciated by the parties, is simply whether the Agreement of Division of Matrimonial Assets dated 11th May, 2018 and the Addendum thereto dated 18th June, 2018 are valid and enforceable.

45. According to the Plaintiff, the Agreement and Addendum have not been vitiated by fraud or coercion since there was clear intention in respect of division of matrimonial assets. It is submitted that in cross-examination the Defendant admitted that the Defendant had never brought up the allegation of being forced or nagged by the Plaintiff to enter into an agreement. According to the Plaintiff, the Defendant's assertions are an afterthought as the agreement was not vitiated in any manner.

46. The Plaintiff urged the court to be guided by Section 7 and 6(3) of the *Matrimonial Property Act, 2015* and to take into consideration post-nuptial agreements that the parties may have on division of matrimonial properties during pendency of marriage. It is asserted by the Plaintiff that the Agreement and Addendum between the Plaintiff and Defendant are enforceable since the terms therein have not been disputed.

47. On the other hand, the Defendant asserted that he entered and executed the Agreement and Addendum as result of the economic duress avoid the financial burden that was to befall the family. According to the Defendant the duress was meant to ensure that he agreed to the Plaintiff's terms in the Agreement and Addendum thereto. It is submitted that the withdrawal of the caution by the Plaintiff after they signed the said agreement amounts to economic duress. According to the Defendant, without the caution in place he would not have entered into the said agreement. His case was that he was working on ways to resolve their differences which among others included placing a caution on the property after he had entered into sale agreements with third parties.

48. 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.

49. 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 Defendant has asserted that he was subjected to economic duress by the Plaintiff to execute the Agreement and Addendum.

50. In the case of **Federation of Women Lawyers Kenya (FIDA) vs. 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.”

51. The agreement entered into before marriage is referred to as a *Prenuptial Agreement*. The ***Black's Law Dictionary Free Online Legal Dictionary 2nd 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.”

52. On the other hand, the agreement entered into after marriage is referred to as a *Postnuptial Agreement*. Under the same dictionary *Postnuptial agreement* is defined as:-

“An agreement formed between a married couple, generally to provide specification regarding the division of assets in case the couple get separated or divorced.”

53. While the Act does not expressly recognize Postnuptial Agreements, it is my view that this does not mean that such agreements are not

enforceable. Being contractual in nature, 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 is manifestly unjust are pleaded by a party to the agreement. The Court will however not interfere merely because the terms of the agreement are favourable to one party and not the other. As was held in **National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**:

“it is clear beyond para adventure , hat 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.”

54. The same view was expressed by the Court of Appeal in **Pius Kimaiyo Langat vs. 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.”

55. In the case of **LTI Kisii Safari Inns Ltd & 2 others vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR** it was stated by the Court of Appeal that:-

“The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. In VANZANT V COATES. [1969] 14 D.L.O.R. 256 it was held that the transaction would, in the foregoing circumstances be rescinded.

The traditional view that “if people with their eyes open wilfully and knowingly enter into unconscionable bargains, the law has not right to protect them”- as held in **FRY Vs. LANE 1888 40 Ch. D 312** – has long been altered. Also I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of “overriding objective” which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.

The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.R. in **LLOYDS BANK LTD VS BUNDY [1975] Q.B. 326 AND SCHROEDER MUSIC PUBLISHING CO VS MACANLAY [1974] 1 W.L.R. 1308**, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

56. So guided, I agree with Muchemi J. in **Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) vs. Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR** where the Learned Judge held that:

“13. When a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see L'Estrange v. F Graucob Ltd [1934] 2 KB 394). A person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or non est factum.”

57. That the court cannot rewrite contracts for parties was appreciated in the case of **Attorney General of Belize et al vs. Belize Telecom Ltd & Anoter (2009). 1WLR 1980 at page 1993**, where, citing **Lord Person in Trollope Colls Limited vs. North West Metropolitan Regional Hospital Board (1973) I WLR 601** at 609, it was held that:

“The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable.”

58. In this case, the Defendant's defence in respect of the enforceability of the Agreement and the Addendum is economic duress alleged to have been subjected to him by the Plaintiff.

59. As to what amounts to duress, in the case of **Pao on vs. Lau Yiu [1978] 3 All ER 65**, the Privy Council said at page 78:

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent. In determining whether there was a coercion of will such that there be no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it.”

60. As to what amounts to economic duress, **Tunoi JA.** (as he then was) in the case of **Kenya Commercial Bank Limited & another vs.**

Samuel Kamau Macharia & 2 others [2008] eKLR while citing *Williston on Contracts (3rd Edn., 1970 Chapter 47)*, stated that the commercial pressure alleged to constitute such duress must, however, be such that the victim:-

- (i) must have entered the contract against his will;
- (ii) must have had no alternative course open to him; and
- (iii) must have been confronted with coercive acts by the party exerting the pressure.

61. The Learned judge stated that:-

“A keen study of decisions on economic duress shows that American judges pay great attention to such evidential matters as the fact or absence of protest, the benefit received and the speed with which the victim has sought to avoid the contract.”

62. The Defendant asserted that were it not for the caution placed by the Plaintiff against the suit property, he would not have entered into the agreement and that he avoided the agreements after he realized that the Plaintiff was never of the idea of reconciling. It is however clear from the recitals E of the Agreement, that the Plaintiff was willing to remove the caution lodged by her against the suit property and indeed the caution was removed by the Plaintiff. It is further admitted by the Defendant that the Plaintiff had lodged a caution in the suit property when she found out that the Defendant was selling the suit property.

63. Clause 7 of the Agreement states:-

A. MATRIMONIAL PROPERTY

7. In consideration of the Husband's (Defendant) desire to keep the matrimonial house and the shop constructed next to the homestead and in recognition of the fact that the wife does not have another home save for the Matrimonial Property, the Husband has proposed and the wife has agreed that the Husband shall hive off and transfer 12 acres of the Matrimonial Property being vacant land to the wife to build a home for her and her children.”

64. From the above clause, it is clear that the Defendant's desire was to keep the matrimonial home and the shop hence his argument that were it not for the caution he would not have entered the contract is contrary to the terms of the Agreement. The Defendant was represented by an advocate in the negotiations. I therefore find that there was clear intention between the Plaintiff and Defendant to enter into the Agreement and the Addendum otherwise the Defendant had the option to proceed under Section 73 of the *Land Registration Act* to seek the removal or withdrawal of the caution. This section provides as follows:-

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.**
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.**
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.**
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.**
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.**
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.**

65. I find that there were clear intentions by both the Plaintiff and Defendant to execute the Agreement and the Addendum. The Defendant gave the Plaintiff the title deed for the 12 acres and paid half share of the value of the Mombasa apartment to the Plaintiff as per the terms of the Agreement and the Addendum. Accordingly, the defence of economic duress was not established by the Defendant as required by section 107 of the *Evidence Act*.

66. As regards the second issue, the Defendant contends that suit property M/N/xxxx (“the suit property”) was hived off from the main title number Machakos/Nguluni/xxx was inherited from his grandfather hence not a matrimonial property. However, Clause 6 of the Agreement provides that:-

“The parties have their matrimonial home in Nguluni area on Kangundo Road known as M/N/xxxx measuring 14 acres registered in the name of the Husband(hereinafter “the Matrimonial Property”).”

67. Clause 5 provides:-

“Property Division-.....Any matrimonial property not listed below belongs to the party who has it currently in their possession.”

68. It therefore follows that it was an agreement that any property not listed in the Agreement was to be regarded as belonging to the party who currently had it in possession. According to the Plaintiff, the Defendant was to hive off 12 acres from M/N/xxxx. It is not in dispute that the Mombasa Apartment was jointly owned by the Plaintiff and Defendant.

69. Regarding the meaning of matrimonial property, Section 6 of the *Matrimonial Property Act* provides that:-

“(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...”

70. Musyoka J. in P.O.M vs. M.N.K(2017) eKLR stated that:

“This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”

71. Similarly, in the case of T.M.V. vs F.M.C (2018) eKLR, Nyakundi J. opined that:-

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”

72. In the Ugandan High Court, Mwangusya J. in Paul Kagwa vs. Jackline Muteteri (Matrimonial Cause-2005/23) [2006] UGHC 17 (18 May 2006) while citing Bossa, J. in John Tom Kintu Mwanga vs. Myllious Gafafusa Kintu (Divorce Appeal No. 135 of 1997) (unreported) expressed himself as hereunder:-

“On the last issue of whether the petitioner is entitled to matrimonial property, I clearly believe that she does and I so hold. Matrimonial property is understood differently by different people. There is always that property which the couple chose to call home. There may be property which may be acquired separately by each spouse before and after marriage. Then there is property which the husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse is entitled is that property which the parties choose to call home and which they jointly contribute to.”

73. Section 5 of the *Matrimonial Property Act* provides:-

Rights and liabilities of a person

Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.

74. While interpreting Section 5 (supra) in E N K vs. J N K [2015] eKLR, Musyoka J. pronounced himself thus:-

“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage...”

75. Mabeya J. on his part in SN vs. FM [2019] eKLR held that:-

“24. The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.

76. It is not in dispute that M/N/xxx was a property of UM (Deceased) before his demise. The Defendant has stated that UM (Deceased) was his grandfather. In the Certificate of Confirmation dated 16th November, 2015, the Defendant’s name appears as one of the beneficiaries of M/N/xxx. It is also clear that Land No. M/N/xxxx was hived off from M/N/xxx and was acquired during the coverture of the marriage. As regards the Mombasa Apartment it was acquired and jointly registered in the name of the Plaintiff and Defendant during the subsistence of their marriage.

77. Based on the evidence and the above legal provisions and authorities I have no difficulty in finding that the two properties are matrimonial properties.

78. Having found that the Agreement for Division of Matrimonial Assets dated 11th May, 2018 and the Addendum thereto dated 18th June, 2018 are valid, I hereby make the following orders:

1. A declaration that the property (Immovable) listed herein with all developments thereon acquired and developed by the joint funds and efforts of the Plaintiff and Defendant during their marriage and registered jointly in the name of both the Plaintiff and the Defendant in the case of property (a) herein below and registered in the name of the Defendant in the case of property (b) herein below be shared in the manner agreed by the parties in the Agreement for Division of Matrimonial Assets dated 11th May, 2018 and the Addendum Matrimonial Assets dated 18th June, 2018 more particularly as follows:-

A. ZApartments, Apartment No. xxx, 2nd Floor, Block VI being the premises known as MN/Sec.1/xxxxx comprised in a Certificate of Title registered in the Land Titles Registry at Mombasa as lessees for a term of Nine Hundred and Ninety Nine (999) years from the First Day of March One Thousand Nine Hundred and Twenty Six (1926) at an annual Peppercorn Rent subject to the terms and conditions contained in the said Certificate of Title to be transferred to the Defendant.

B. That 12 acres be excised from Title No. M/N/xxxx which measures 15 acres and which is registered in the name of the Defendant be transferred to the Plaintiff. In the event that the said land parcel no longer exists, a parcel of land excised therefrom measuring the same size to be transferred to the Plaintiff. Alternatively, parties may agree that the said 12 acres be excised from any other parcel of land registered in the name of the Defendant.

2. A declaration that the matrimonial property be divided in the manner agreed by the parties in their Agreement of Division of matrimonial assets dated 11th May, 2018.

3. The Deputy Registrar to sign any documents that the Defendant may refuse to sign to effectuate the said transfer.

4. Each party to bear own costs of this suit.

5. Liberty to apply granted.

Judgement read, signed and delivered in open Court at Machakos this 20th day of December, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Okimaru for the Plaintiff

CA Susan