



REPUBLIC OF KENYA



**KENYA LAW**  
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**NWT v BKG (Civil Suit 51 of 2017) [2025] KEHC 3646 (KLR)  
(Family) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3646 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**CIVIL SUIT 51 OF 2017**

**PM NYAUNDI, J**

**MARCH 21, 2025**

**BETWEEN**

**NWT ..... PLAINTIFF**

**AND**

**BKG ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, took out Originating Summons dated 11<sup>th</sup> August 2017 against the Defendant seeking the following;
  1. A declaration that Ngong/ Ngong/ xxxx is matrimonial property and the rental proceeds to be shared equally pending determination of the couple's contribution
  2. A declaration that the plaintiff having been and still being lawfully married to the defendant herein is entitled to and / or obliged to benefit from the matrimonial property and the defendant be compelled to render accounts of rental income since 2013 which should be shared equally, In the alternative a declaration that the defendant do pay the plaintiff rent equivalent to the determined share since 2013 to date at market rates.
  3. A protection by way of permanent injunction of plaintiff's rights and/ or interest over and in respect of the matrimonial property (a) above and on Kitengela plot no. 330 measuring 5 acres (untitled) which shall have been declared and / or decreed in favour of the plaintiff and pending determination of couples contribution to the acquisition of the matrimonial property.
  4. Whether the plaintiff is entitled to costs of the suit.
2. The Summons was supported by the affidavit of the Plaintiff sworn on 11<sup>th</sup> August 2017, her further affidavit sworn on 30<sup>th</sup> September 2020 and witness statement dated 14<sup>th</sup> July 2023. The Respondent



- filed a response vide replying affidavit sworn on 14<sup>th</sup> March 2023 and witness statement signed on the same date. He also submitted witness statements by Martin Lenana Nepish and Philip Mwangi Gateru.
3. The matter proceeded by way of viva voce evidence with the witnesses adopting their respective pleadings and witness statements as their evidence in Chief and being cross examined
  4. It emerged from the pleadings and the evidence that the parties had on 3<sup>rd</sup> January 2013 entered into a deed of separation that purported to also resolve how the parties would distribute the properties at issue in this Petition.
  5. At paragraph 8 of her affidavit the Plaintiff averred  
That the defendant/ respondent and his advocates one P M Gatheru, tricked me to enter into an agreement purporting to distribute our matrimonial property Ngong/ Ngong/ xxxx which agreement I entered through duress, misrepresentation of material facts and fraud and have been advised by my advocates now on record to be null and void ab initio.
  6. The question as to whether the deed is valid must be considered as a preliminary issue as it is goes to the core of the merits of the originating Summons.
  7. At the hearing in her evidence in Chief the Plaintiff averred that she executed the Deed under duress, that her ex-husband and his brother summoned her to the office of the Advocate. She carried the titles to the 2 parcels of land. He had evicted her from the house on Nov 27<sup>th</sup> 2012. She stated she was under pressure and she was ill. She was forced to sign the documents. She stated that the agreement did not reflect the status at the time, as at that date she had already sold the 2 ½ acres and so it was no longer owned by them. They sold the land in 2011, to settle some debts that the Defendant had and to set up the auto spares business.
  8. In cross examination she reiterated that she was under stress when she signed the deed of separation. She stated that she was ill at the time she signed the Deed, she however did not present any documents to show she was ill. She was accompanied to the lawyer's office by her brother GN and her Cousin PM.
  9. The Defendant in submissions dated 17<sup>th</sup> February 2025 submits that the properties acquired during the subsistence of the marriage between the Petitioner and the Respondent were divided through a valid deed of Separation dated 3<sup>rd</sup> January 2013.
  10. In her submissions the Plaintiff submits that the Deed of Separation dated 3<sup>rd</sup> January 2013 is 'null and void, as not only is it unconscionable, but it was also procured through economic duress, misrepresentation, of material facts and fraud'.
  11. The Plaintiff challenges the deed as it divests her of 'her rights to and/ or interests in the matrimonial properties and purports to state that the Petitioner denounced her proprietary rights/ interests in property that she helped acquire. It is therefore unconstitutional from the very onset, and it cannot be upheld as a legal document'.
  12. The Plaintiff references the decisions in South African case Medscheme Holdings (Pty) Limited & Another vs Bhamjee as cited in Euromec International Limited vs Shandong Taikai Power Engineering Company Limited ( Civil Case E527 of 2020 ) [2021] KEHC 93 (KLR) and also the obiter in LTI Kisii Safari Inns Ltd & 2 Others vs Deutsche Investitions- Und Entwicklungsgellschaft ( Deg) & Others [ 2011] KECA 1(KLR).
  13. It is submitted that the Matrimonial Properties Act does not contemplate the distribution of property in such a manner and the distribution of matrimonial property cannot precede dissolution of marriage.



14. The Plaintiff further relies on Section 6 (4) of the *Matrimonial Property Act* that allows a party to apply to the court to set aside an agreement if it finds that the agreement was influenced by fraud, coercion or is manifestly unjust.
15. The determination of this issue rests on whether the plaintiff has discharged her burden to prove that the Deed of Separation ought to be set aside. Notably, Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya) states that: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.”
16. Section 108 of the *Evidence Act* also stipulates as follows: -

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
17. Further, Section 109 of the *Evidence Act* stipulates that: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
18. In addition, Section 110 of the *Evidence Act* provides that: -

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
19. The Plaintiff seeks to nullify the Separation Deed, it rested on her to establish that the agreement was entered into under duress. The factors relied on are that it was entered into two weeks after she was evicted from the house, she was summoned to an Advocates office to execute the same, she was unwell at the time and finally, the agreement is skewed in favour of the Defendant.
20. Determination of rights of spouses to property acquired during the marriage is a grave matter and the Court must at all times be careful to safeguard the rights of each party in line with *the Constitution. The Constitution* of Kenya, 2010 at Article 45 recognises the family as the natural and fundamental unit of society and recognises that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
21. As with every other contract, Courts will defer to parties to the marriage except where those agreements as has been stated have been obtained by fraud or coercion or are unlawful. There is no law that makes it mandatory that parties share property acquired in marriage equally. The law requires that each party is entitled to a share of the property equal to their contribution (whether financial or non- financial). This was the finding of the Supreme Court in *Ogentoto vs Ogentoto Petition No. 11 of 2020*

(82) While therefore reiterating the finding in *Echaria*, we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.



22. An agreement therefore that awards one spouse a greater portion than the other is not void especially if it is demonstrated that the agreement was entered into voluntarily.
23. The Plaintiff herein was accompanied by her brother, cousin and a neighbour when she went to the Advocates office. She executed the agreement in January of 2013. She did not file this Originating Summons challenging that agreement until August 2017. Subsequent to that she filed a Divorce Petition in CM's Divorce Cause No. 369 of 2019 and relied on the Deed of Separation in her evidence both at the trial Court and at the Appellate Court in HC/CA. No. 147 of 2019 where she defended the legitimacy of the Deed. Interestingly the Respondent, then sought to wiggle out of the agreement on the same grounds as the Plaintiff now. The Appellate Court would have none of it and found that the agreement was valid.
24. There having been a determination that the deed of separation is a valid document by a Court of competent jurisdiction, the Plaintiff cannot be entertained at this juncture in her attempt to challenge its validity. I find these words from the judgment in the EUROMECA Case ( Supra) instructive-
  - (59) The party relying on duress must prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress...
  - (60) A court will use its power not to enforce a contract sparingly, and only in the clearest of cases in which the harm is substantially incontestable and proven. A court will decline to use the power where a party relies on abstract values of fairness and reasonableness to escape the consequences of a contract. The party who attacks the contract or its enforcement bears the onus to establish the facts.
25. The Court in its judgment went on to elucidate two principles; the first, that of the public policy that demands that contracts freely and consciously entered into must be honoured; and the second, that of 'perceptive restraint', that is 'a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases'
26. For the reasons stated above, I find that the plaintiff has not been successful in impeaching the Deed of Separation, accordingly I will dismiss the Originating Summons and hold that the parties had vide the agreement dated 3<sup>rd</sup> January 2013 settled on how the property acquired during the marriage would be distributed. The same is adopted as an Order of the Court.
27. Each party will bear their own costs.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**P M NYAUNDI**

**JUDGE**

In the Presence of

Omwanza for Respondent

Kimathi for Plaintiff

Kanja Court Assistant

