



**QMAO v DAW (Matrimonial Cause E022 of 2021)  
[2024] KEHC 4952 (KLR) (Family) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4952 (KLR)

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

**FAMILY**

**MATRIMONIAL CAUSE E022 OF 2021**

**MA ODERO, J**

**MAY 13, 2024**

**BETWEEN**

**QMAO ..... APPLICANT**

**AND**

**DAW ..... RESPONDENT**

**No legal bar to a man and wife entering into a binding contract with each other**

Reported by Kakai Toili

**Family Law** – marriages – contracts between parties to a marriage - whether a couple while in a marital union could enter into a legally binding contract with each other.

**Family Law** – marriages – customary marriages – nature of customary marriages - what was required to prove the existence of customary marriages?

**Family Law** – matrimonial property - property acquired by a couple prior to getting married - whether property acquired prior to a couple getting married was matrimonial property - whether parties to a marriage had to prove monetary or non-monetary contribution in order to be entitled to a share of matrimonial property - Matrimonial Property Act (cap 152), section 6.

**Brief facts**

The parties got married to each other in February 2017. The marriage later experienced problems and the couple separated in December 2018. Their marriage was later dissolved through a decree *nisi* and a decree *absolute*. The applicant filed the instant suit seeking division of properties which she claimed were acquired during the subsistence of the marriage. The applicant stated that the parties entered into a settlement agreement dated August 27, 2019 (the agreement) detailing the manner in which the assets acquired during the marriage were to be divided. She prayed that the agreement be given full effect by the court.

The applicant sought for among other orders; an order declaring that the applicant had equal beneficial interest in the property, rental income and proceeds from the following properties; Summer Breeze Apartments,



Signature Apartments and Greenspan Apartment; and that the court adopt the agreement as a final order and judgment of the court.

### **Issues**

- i. What was the nature of a customary marriage and what was required to prove its existence?
- ii. Whether property acquired prior to a couple getting married was matrimonial property.
- iii. Whether parties to a marriage had to prove monetary or non-monetary contribution in order to be entitled to a share of matrimonial property.
- iv. Whether a couple while in a marital union could enter into a legally binding contract with each other.

### **Relevant provisions of the Law**

#### **Matrimonial Property Act (cap. 152)**

#### **Section 6 - 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.*

### **Held**

1. Section 6(1) of the Matrimonial Property Act (cap 152), defined matrimonial property. The parties were once married and both were in agreement that their marriage stood dissolved by law.
2. He who alleged must prove. In law the burden of proof lay upon the party who asserted the existence of a fact or set of facts. The applicant asserted that the parties entered into customary union before their statutory wedding in February 2017. A customary marriage was one that was conducted in accordance with the communal norms of a particular community. The applicant had been deliberately vague about in the details of the alleged customary marriage. Additionally;
  1. The court was not told exactly when the dowry ceremony took place.
  2. The applicant had not specified under which of the 42 communities in Kenya's rites the customary marriage was conducted.
3. Marriages in Kenya and indeed across Africa were celebratory events at which family, kin and neighbours were present. A ceremony to pay dowry would not be conducted in a secret or clandestine manner. The applicant had not named or called as witnesses any person who was present in her home when the respondent allegedly came to pay the dowry. Further, the persons who received the alleged dowry were not called to testify. The evidence in support of the alleged customary marriage was non-existent. A party who claimed that a customary union occurred was under an obligation to adduce evidence to prove the same.
4. The applicant's claim that she and the respondent contracted a customary marriage fell flat on its face. She did not even bother to specify which out of the 42 ethnic groups of Kenya's marriage customs were followed. The applicant had merely referred to a customary marriage but the same had not been proved on a balance of probability. No customary marriage occurred between the couple.
5. Both the Summer Breeze Property and the Greenspan Property having been acquired prior to the marriage between the applicant and the respondent and not during the subsistence of the marriage, fell outside of the definition of matrimonial property provided by section 6 of the Matrimonial Property Act. Both properties therefore did not constitute matrimonial property and could not be considered by the court in a suit for division of matrimonial property. The applicant remained at liberty to pursue any claim she could have to those properties by way of a civil suit.
6. Despite the constitutional requirement that parties to a marital union shall have equal rights, each party must be able to prove either monetary or non-monetary contribution in order to merit entitlement to a share of matrimonial property.



7. It was common in recent times and probably circumspect for couples to enter into what was commonly termed a pre-nuptial agreement settling out how they would divide assets should the marriage fall apart. In the instant case, the agreement entered into between the parties could not be termed as a pre-nuptial agreement as it was not executed before the marriage. The agreement was entered into during the subsistence of the marriage when the couple realized that their marriage was unstable and that they would probably part ways. The settlement agreement dated August 27, 2019 was a post-nuptial agreement and was enforceable by the court.
8. In the current administration of justice, parties were encouraged to pursue alternative methods of dispute resolution. The settlement agreement was tantamount to a contract or a mediation settlement agreement between the parties. A contract was binding and could only be repudiated and/or set aside in certain specific circumstances. The discussions leading to the settlement agreement were not initiated by the court but were autonomous in that the parties themselves and their advocate initiated the discussions which led to the agreement, on how the matrimonial property was to be divided.
9. The fact of marriage did not preclude spouses from entering into a validly binding contract with each other.
10. The couple realized that their marriage was on the rocks and decided to come to an agreement regarding how their properties would be divided when the marriage was eventually dissolved. There was no legal bar to a man and wife entering into a binding contract with each other. The settlement agreement of August 27, 2019 amounted to a contract between the plaintiff and the respondent. In the circumstances, the duty of the court was merely to give effect to and enforce the terms of the contract.
11. The respondent admitted that he signed the agreement voluntarily. The settlement agreement was signed in the office of a senior counsel and was witnessed by advocates, representing both parties. The respondent's claims of duress and coercion had no basis. They were merely feeble attempts to turn his back on a document which he voluntarily signed. The settlement agreement bound the respondent. Clause 4(d) and (e) of the agreement reinforced the binding nature of the settlement agreement.

*Application partly allowed.*

### **Orders**

- i. *The only property which could be dealt with as matrimonial property in the matter was the Signature Property. The parties themselves after receiving legal counsel came to an agreement as to how the Signature Property was to be divided in event of a divorce.*
- ii. *The settlement agreement dated August 27, 2019 was entered into and executed voluntarily by both parties. There were no valid grounds to repudiate and/or set aside the same.*
- iii. *The apartment on Signature Residence shall be divided in accordance with paragraph 4 of the settlement agreement dated August 27, 2019.*
- iv. *Each side to meet their own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *DNK v KM Civil Suit 2 of 2021; [2021] KEHC 868 (KLR) - (Applied)*
2. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another Petition 164B of 2016; [2018] KEHC 7130 (KLR) - (Applied)*
3. *Gatobu, M'Ibuutu Karatho v Christopher Muriithi Kubai Civil Appeal 78 of 2006; [2014] KEHC 7202 (KLR) - (Applied)*
4. *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) Petition 11 of 2020; [2023] KESC 4 (KLR) - (Applied)*
5. *Langat, Pius Kimaiyo v Co-operative Bank of Kenya Limited Civil Appeal 48 of 2015; [2017] KECA 152 (KLR) - (Applied)*



6. *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* Civil Appeal 95 of 1999; [2001] KECA 362 (KLR) - (Applied)

### **United Kingdom**

*Pao On v Lau Yiu Long* [1979] 3 All ER 65; [1979] UKPC 17 - (Applied)

### **Regional Court**

*Kimani v Gikanga* [1965] EA 735 - (Applied)

### **Texts**

Black, HC., (Ed) (1995), *Black's Law Dictionary Online Legal Dictionary* The Lawbook Exchange Ltd 2nd Edn

### **Statutes**

#### **Kenya**

1. Civil Procedure Act (cap 21) sections 3, 3A - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 40 - (Interpreted)
3. Constitution of Kenya articles 45(3); 68(ii) - (Interpreted)
4. Evidence Act (cap 80) section 107(1)(2) - (Interpreted)
5. Matrimonial Property Act (cap 152) sections 2, 6(1)-(4); 14; 17 - (Interpreted)

### **Advocates**

*Stella Wangui Muraguri* for the applicant.

*Samson Ngeru* for the respondent.

## **JUDGMENT**

1. Before this court for determination is the originating summons dated May 3, 2021 by which the applicant QMAOW seeks the following orders:-
  - “(i) That an order do issue declaring that the applicant has equal beneficial interest in the property, rental income and proceeds from the properties listed below;
    - a. Apartment No AXX, Summer Breeze Apartments, LR No 2/XXX Nairobi
    - b. Apartment No DXX, Signature, LR No 209/XXXX
    - c. Apartment No XXX, Greenspan Apartment LR No Nairobi/Block XXXX
  - ii. That this honourable court be pleased to adopt an agreement between the parties dated August 27, 2019 as a final order and judgment of this honourable court.
  - iii. That this honourable court be pleased to declare that the applicant is entitled to the properties listed in 1 above on the basis of both financial and non-financial contribution towards their acquisition.
  - iv. That this honourable court be pleased to grant such further or other relief as may be just in the circumstances.
  - v. That the respondent be ordered to pay the costs of this suit.”



2. The summons which was premised upon articles 45(3), 68(Jii) of the Constitution 2010, sections 3, 3A of the Civil Procedure Act, order 40 of the Civil procedure Rules, sections 2, 6, 14 and 17 of the Matrimonial Property Act 2013 and all other enabling provisions of the law was supported by the affidavit of even date sworn by the applicant.
3. The respondent DAW opposed the summons through his replying affidavit dated August 19, 2021. The summons was canvassed by way of *vive voce* evidence.

### **Background**

4. The parties herein got married to each other in February, 2017. Their union resulted in the birth of one child a son BSW born on July 13, 2016. The marriage later experienced problems and the couple separated in December 2018. Their marriage was later dissolved through a *decree nisi* dated March 5, 2021 and a decree absolute dated April 22, 2021.
5. The applicant has now filed this suit seeking division of properties which she claims were acquired during the subsistence of the marriage. The applicant states that the parties entered into a Settlement Agreement dated August 27, 2019 (hereinafter ‘the Agreement’) detailing the manner in which the assets acquired during the marriage were to be divided. She prays that this Settlement Agreement be given full effect by the court.
6. As stated earlier the respondent vehemently opposed the summons.

### **The Evidence**

7. The applicant told the court that she is a business woman running a fashion brand in Kenya. She states that she met the respondent a South African National who at the time was working with CocaCola Company Limited in Kenya in the year 2014. That they began a courtship and that sometime in August, 2015 the respondent visited the applicants parents and paid dowry constituting an African customary marriage. Thereafter the couple solemnized their union on February 4, 2017 at the Windsor Golf and Country Club in Nairobi. A copy of the Marriage Certificate Serial No 18xxxx appears as Annexure ‘QM2’ to Affidavit dated October 26, 2021.
8. The applicant told the court that the marriage soon fell into problems as the respondent was domineering and would not allow her to work or to go to school. That they separated in the year 2018.
9. Thereafter the respondent filed in the Chief Magistrates Court in Nairobi, Divorce Petition No E1164 of 2020 which resulted in the dissolution of the marriage. A *decree nisi* was issued on March 5, 2021. [See Annexure QMI to the affidavit dated October 26, 2021] followed by a decree absolute which was issued on April 6, 2021 [See Annexure ‘QM I’]
10. The applicant avers that during the subsistence of both the customary and statutory union the couple jointly acquired the following three properties:-
  - i. Apartment No AXX, Summer Breeze Apartment situate on LR No 2/XXX Nairobi registered in the name of the Respondent - hereinafter referred to as ‘the Summer Breeze Apartment.’
  - ii. Apartment No DXX, Signature, situate on LR 209/XXXX (original No 209/XXXX) registered in the joint names of the applicant and the respondent hereinafter referred to as ‘Signature Apartment’



- iii. Apartment No XXX, Greenspan Apartment situate on LR No Nairobi Block 82/XXXX registered in the joint names of applicant and the respondent hereinafter referred to as the 'Greenspan Apartment'
11. The applicant states that this Greenspan Apartment was gifted by the respondent to her mother as part of the dowry payment. That the signature Apartment is occupied by a tenant called CU.
  12. According to the applicant the Summer Breeze Apartment was their matrimonial home where they lived with their son.
  13. The applicant asserts that she made both financial and indirect, non-monetary contribution to the acquisition of the three (3) apartments by taking care of the house, supervising domestic chores, taking care of the baby, providing companionship and by nursing the respondent when he was ill including bathing him.
  14. The applicant now prays that the court proceed to assess her contribution and divide the said matrimonial properties accordingly.
  15. The applicant further avers that when the marriage began to experience problems she and the respondent entered into a Settlement Agreement which detailed the manner in which the matrimonial property was to be distributed in the event that the couple parted ways. That the said Settlement Agreement was voluntarily entered into and executed by both parties in the presence of their Advocates and after both had received extensive legal advice from their counsel. The applicant prays that the said Settlement Agreement be implemented/adopted fully by the court.
  16. On his part, the respondent in his evidence confirmed that he got married to the applicant through a statutory marriage which took place on February 4, 2017 at the Windsor Golf and Country Club in Nairobi. However the respondent vehemently denies ever having entered into any customary union with the applicant and denies having paid any dowry to the applicants mother/parents.
  17. The respondent goes on to confirm that a son was born during the period of their cohabitation but he is disputing the paternity of said child.
  18. The respondent further confirms that their marriage was relatively short-lived and the couple separated in December, 2018. He later filed Divorce Petition No EXXX of 2020 in the Chief Magistrates Court and their marital union was dissolved vide a decree absolute issued on April 6, 2021.
  19. The respondent categorically denies that the properties in question were acquired through the joint efforts of himself and the applicant. He asserts that the properties were acquired by himself single handedly and that he only had them registered in their joint names because he believed the marriage would last.
  20. The respondent avers that he acquired Summer Breeze Apartment the in the year 2016 well before he and the applicant got married. That he took out a mortgage to acquire the said property which mortgage the respondent is still servicing to date.
  21. That the Signature Apartment was acquired by the respondent in the year 2019 and that he is continuing to service the substantial mortgage alone without any assistance and/or contribution from the applicant.
  22. Finally the respondent states that he acquired the Greenspan Apartment in the year 2016 and fully paid for the same before he married the applicant. The respondent totally denies ever having gifted this Greenspan Apartment to the applicants mother as dowry.



23. Regarding the Settlement Agreement the respondent readily concedes that he did execute the said Agreement but states that he did so under duress and coercion from the applicant. He urges the court to disregard the said Agreement as he did not execute the same voluntarily. Upon close of oral evidence the parties were directed to file their written submissions. The applicant filed the written submissions dated June 26, 2023 whilst the respondent relied upon his written submissions dated September 27, 2023.

### **Analysis and Determination**

24. I have carefully considered the summons before this court, the reply filed thereto, the evidence adduced in court as well as the written submissions filed by both parties. The following are the issues which arise for determination.
- i. Do the properties in question constitute matrimonial property.
  - ii. If yes is the applicant entitled to any share in the said properties.
  - iii. If so what share of the said properties is the applicant entitled to.
  - iv. Alternatively should the court give effect to the Settlement Agreement dated August 27, 2019.

### **Matrimonial Property**

25. The applicant has brought this suit under the *Matrimonial Property Act*, seeking division of what she terms ‘matrimonial property’

26. Section 6(1) of the *Matrimonial Property Act 2013*, defines ‘Matrimonial Property’ in the following terms:-

“6 (1) For the purpose of this Act, Matrimonial property means

- a. The matrimonial home or homes.
- b. Household goods and effects in the matrimonial home or homes.
- c. Any other immovable and movable property jointly owned / and acquired during the Subsistence of the marriage.” [Own emphasis]

27. It is not in dispute that the parties herein were once married and both are in agreement that their marriage now stands dissolved by law.

28. The question which then arises is during what period of time were the parties in a legal marital union. The answer to this question is crucial as this will determine whether the cited properties were in fact acquired ‘during the subsistence of their marriage.’

29. In the case of *JMV v FMC* [2018] eKLR the court stated as follows:-

“..... for a 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 the matrimonial property.....” [own emphasis]

30. The applicant claims that the couple contracted a ‘customary marriage’ in the year 2015 when the respondent visited her family and paid dowry. That they thereafter held a wedding on February 4, 2017.



31. The respondent however does not agree. He denies ever having entered into a customary union with the applicant and denies ever having visited her home to pay dowry. The respondent asserts that the only marital union he entered into with the applicant was the statutory marriage which took place on February 4, 2017.

32. It is trite law that “he who alleges must prove.” In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the *Evidence Act* cap 80, Law of Kenya provides as follows:

“Burden of Proof

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- (1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

33. The applicant asserts that the parties entered into customary union before their statutory wedding in February 2017. A customary marriage is one that is conducted in accordance with the communal norms of a particular community.

34. The applicant has been deliberately vague about in the details of this alleged customary marriage. Firstly the court is not told exactly when this dowry ceremony took place. Secondly the applicant has not specified under which the 42 communities in Kenya’s rites this customary marriage was conducted.

35. Marriages in Kenya and indeed across Africa are celebratory events at which family, kin and neighbours are present. A ceremony to pay dowry would not be conducted in a secret or clandestine manner. The applicant has not named or called as witnesses any person who was present in her home when the respondent allegedly came to pay the dowry. Neither were the persons who received the alleged dowry called to testify.

36. In the case of *Kimani v Gikanga* [1965] EA the court of Appeal observed as follows:-

“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case” [Own emphasis]

37. I find that the evidence in support of this alleged customary marriage is nonexistent. A party who claims that a customary union occurred is under an obligation to adduce evidence to prove the same.

38. The applicant’s claim that she and the respondent contracted a customary marriage falls flat on its face. She did not even bother to specify which out of the 42 ethnic groups of Kenya’s marriage customs were



followed. The applicant has merely referred to a 'customary marriage' but the same has not been proved on a balance of probability. I therefore find that no customary marriage occurred between the couple.

39. As such I find that the only legally recognizable union between the applicant and the respondent was the wedding which took place on February 4, 2017. A copy of the Marriage Certificate Serial Number 18XXXX is annexed to the applicants affidavit dated October 26, 2021. (Annexure QM'2') Accordingly the only property that can be considered and treated as matrimonial property are those which were acquired/purchased between February, 2017 and April, 2021 when the couple were in a legally recognizable marital union.
40. The respondent stated that he acquired the Summer Breeze property in 2016 which was before he married the applicant. Annexed to the replying affidavit dated August 19, 2021 is a Lease Agreement dated July 19, 2016 between [particulars withheld] Developers Ltd and the respondent DAW for purchase of this [particulars withheld] Apartment for a consideration of Kshs 40,000,000 (Annexure DAW '8').
41. The respondent also stated that he has single handedly serviced all the mortgage repayments for the loan taken to purchase this property. He has annexed the mortgage repayment statement as proof (Annexure DAW '9').
42. Similarly the respondent avers that he acquired the Greenspan Apartment in the year 2016 which again was before he married the applicant.
43. This particular property was purchased on November 7, 2016 and is registered in the joint names of the applicant and the respondent. A copy of the Purchase Agreement appears as Annexure DAW '1D' to the respondents replying affidavit.
44. The applicant states that this Greenspan Apartment was given over to her mother as dowry payment. I have already dismissed the allegation that a customary marriage took place between the couple. Moreover according to the applicant this dowry ceremony took place in the year 2015 yet the Greenspan Apartment was purchased in November, 2016 almost one year later. How could a property which was acquired in November, 2016 have been gifted as dowry in a ceremony which allegedly occurred well before the said property was acquired.
45. The purchase price for this Greenspan Apartment was Kshs 9,417,599.00. It is a prime and extremely valuable piece of real estate. If the respondent had intended to 'gift' it to the applicants mother then I have no doubt that an agreement to that effect would have been drafted and executed. Such a prime property cannot be transferred by mere word of mouth.
46. Finally it is curious from 2015 no date to transfer of this property to the applicants mother has been signed and/or registered. I reject the motion that the Greenspan Apartment was part of a dowry payment to the applicant's mother.
47. Although this Greenspan Property is registered in the joint names of the couple, the fact that the same was acquired in November, 2016 which was before the couple got married, takes it outside of the realm of matrimonial property. As stated earlier section 6 of the *Matrimonial Property Act* is very clear that only properties acquired during the subsistence of a marriage may be considered as matrimonial property.
48. It is pertinent to note that under cross-examination the applicant admitted that

“I have never lived in the Greenspan Apartment. The property was bought in 2016 before I got married to the respondent. I made no financial contribution towards the acquisition



of Greenspan. I made improvements and renovations to the Apartment. I do not have any receipts.....”

49. The applicant clearly admits that the Greenspan Property was acquired before she got married to the respondent (casting doubts on her claims of a customary marriage.) She further admits that she made no financial contribution towards the acquisition of this asset.
50. Therefore if the applicant wishes to stake a claim to this Greenspan Properties then she must file a Civil Claim in the Civil Division of the High Court. This court cannot consider the claim under a suit filed for division of matrimonial property.
51. The final asset under consideration is the Signature Property which is registered in the joint names of the applicant and the respondent and which was purchased on September 18, 2018 during the subsistence of their marriage. A copy of the Purchase Agreement dated September 18, 2018 (Annexure DAW ‘6’) is annexed to the respondents replying affidavit confirming that the Signature Apartment was registered in the joint names of the applicant and the respondent.
52. Based on the above analysis I find and hold that both the Summer Breeze Property and the Greenspan Property having been acquired prior to the marriage between the applicant and not during the subsistence of the marriage fall outside of the definition of ‘matrimonial property’ provided by section 6 of the Matrimonial Property Act. Both properties therefore do not constitute matrimonial property and cannot be considered by this court in a suit for division of matrimonial property. As stated earlier the applicant remains at liberty to pursue any claim she may have to the said properties by way of a civil suit.
53. Therefore the only property/asset which this court will consider for purposes of division is the Signature Property.
54. The applicant has prayed for division for matrimonial property. She asserts that she made both financial and non-financial contribution towards the acquisition of the asset [the Signature Property].
55. The respondent on his part insists that he purchased the signature property single handedly for a purchase price of Kshs 85,000,000. That he took out a mortgage from Standard Chartered Bank to pay the purchase price and that he has been servicing the monthly repayment of Kshs 812,423.80 on his own with no assistance from the applicant. That as at the time this suit was filed there remained a loan balance of Kshs 58,303,690.69 on the property. He has annexed a copy of the mortgage statement (Annexure ‘DAW 6’).
56. According to the respondent the applicant ought not be allowed to benefit from a property for which he took out of loan which he is servicing single handedly.
57. As a general rule in considering what share (if any) the applicant would have in this Signature Property, the court would need to assess whether the applicant has proved the level of her financial and/or non-financial contribution toward the acquisition of this property.
58. In Federation Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR the court stated that:-

“The law recognizes equal worth and equal importance of the parties in marriage. Thus the beneficial share of each spouse on the division of matrimonial property stands in Kenya ultimately depends on the parties proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. First, the Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a



party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.” [own emphasis]

59. This issue of how matrimonial properties should be divided was conclusively settled by the Supreme Court of Kenya in the case of *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* Petition No 11 of 2020 where it was held as follows:

“...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 of the purpose of enabling this court to pass property rights from one spouse to another by fact of marriage only...

...our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married...

...it is our finding that the stated quality under article 45(3) means that the courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she contributed...

...Therefore, in the event that a marriage breaks down, the function of any court is to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of the *Constitution*. To hold that article 45(3) has the meaning of declaring that property should be automatically shared at the ratio of 50:50 would bring huge difficulties within marriages and Tuiyot, J (as he then was) has explained why above. Noting the changing times and the norms in our society now, such a finding would encourage some parties to only enter into marriages, comfortably subsist in the marriage without making any monetary or non-monetary contribution, proceed to have the marriage dissolved then wait to be automatically given 50% of the marital property. That could not have been the intention of our law on the subject.” [own emphasis]

60. Based on the above cited case law and a plethora of other decided cases it is clear that despite the constitutional requirement that parties to a marital union shall have equal rights, each party must be able to prove either monetary or non-monetary contribution in order to merit entitlement to a share of matrimonial property.
61. Having noted the above I find that this is a very unique case because the parties entered into a Settlement Agreement detailing how the matrimonial property was to be divided.
62. It is common in recent times and probably circumspect for couples to enter into what is commonly termed a ‘Pre-nuptial Agreement’ settling out how they will divide assets should the marriage fall apart. In this case the Agreement entered into between the parties cannot be termed a Pre-nuptial Agreement as it was not executed before the marriage. The said Agreement was entered into during the subsistence of the marriage when the couple realized that their marriage was unstable and that they would probably part ways.



63. In a case which is on all fours with the present case *DNK v KM* [2021] eKLR where the parties executed into an Agreement of Division of Matrimonial Assets dated May 11, 2018 as well as an Addendum of Matrimonial Assets dated June 18, 2018 Hon Justice George Odunga (as he then was) in upholding the validity of the Agreement between the couple stated as follows:-

(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

d. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(3) 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) 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.”

(51) 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.”



(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 v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR,:

“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.” [Own emphasis]

64. Therefore I find that the Settlement Agreement dated August 27, 2019 is a Post-nuptial Agreement and is enforceable by the court.
65. A copy of the said Settlement Agreement dated August 27, 2019 appears as Annexure ‘(1) M 4’ to the applicant’s affidavit dated October 26, 2021. The Agreement is duly signed by both parties and is witnessed by their respective Advocates.
66. Both the applicant and the respondent confirm that the Settlement Agreement was drafted by Judy Thongori - Senior Counsel and they both confirm their respective signatures on the document.
67. Paragraph 4 of the Settlement Agreement deals with “Property Settlement” and with respect to the signature property the Agreement provide as follows:-

“2 Apartment Number DXX, Signature Apartments LR No 209/XXXX; it is agreed that the same will be placed in the market for sale within 30 days of the execution of this Agreement and that the asking price will be Kshs 75,000,000.

In the event that the price is not reachable after 9 months parties will be bound to accept the highest price obtained provided that there is demonstrated capacity to conclude the sale on the part of the prospective purchaser (s)

In the meantime the property could be rented out and the income applied towards the mortgages if both parties agree. The proceeds of the sale will be shared as hereunder;

(i) To settle the balance of the mortgage and all incidental costs.

(ii) The balance of the proceeds if any will be share equally between the parties”

68. The applicant prays that this Settlement Agreement which she asserts was voluntarily signed by the parties after several weeks of discussion and after receiving extensive advice from their Advocates be enforced by the court.
69. The respondent on the other hand whilst conceding that he did sign the Agreement after discussions and after receiving counsel from his Advocate now seeks to repudiate the Agreement claiming that



he signed the same under duress and coercion by the applicant. He urges the court to disregard the Settlement Agreement.

70. The critical question then is whether the court ought to adopt and enforce the terms of this Settlement Agreement as a true reflection of the wishes of the parties pertaining the to division of their matrimonial property.
71. It is a recognisable fact in the current administration of justice that parties are encouraged to pursue alternative method of dispute resolution. Indeed article 159(2) of the Constitution of Kenya 2010 provides that

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles;-

- a. ....
- b. ....
- c. Alternative forms of dispute resolution including reconciliation, mediation arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)”

72. This is a situation where the parties themselves, without the prompting of the court upon realising that their marriage was on its last legs approached their Advocates and together crafted a Settlement Agreement dictating how their properties were to be divided.
73. This Settlement Agreement is tantamount to a contract or a Mediation Settlement Agreement between the parties. A contract is binding and may only be repudiated and/or set aside in certain specific circumstances. In *Lydia Wambui Mwangi v Paul Mundia Githae* [2016] eKLR, Hon Justice (Prof) Ngugi (as then was) in a case where parties had reached a Mediation Settlement Agreement, observed as follows:-

“----The law applicable is that where parties reach a settlement and voluntarily execute a Mediation Settlement Agreement disposing of the dispute, that Agreement is enforceable in the Matrimonial Cause No xxx of 2016 Page 13 same manner as any other written contract. Hence a party who has reached a Settlement agreement disposing of a dispute through mediation whether it is autonomous mediation or court-annexed Mediation – cannot unilaterally repudiate the agreement.” [Own emphasis]

74. In this case the discussions leading to the Settlement Agreement as stated earlier were not initiated by the court but was autonomous in that the parties themselves and their Advocate initiated the discussions which led to the Agreement, on how the matrimonial property was to be divided.
75. The question may arise as to whether a couple whilst still in a marital union may enter into a legally and binding contract with each other. In my view I do not see why not. The fact of marriage does not preclude spouses from entering into a validly binding contracts with each other.
76. This was a couple who realized that their marriage was on the rocks and decided to come to an agreement regarding how their properties would be divided when the marriage was eventually dissolved. I find no legal bar to a man and wife entering into a binding contract with each other.
77. I find that the Settlement Agreement of August 27, 2019 amounts to a contract between the plaintiff and the respondent. In the circumstances the duty of this court is merely to give effect to and enforce



the terms of said contract. In *Pius Kimaiyo Langat v Co-operative Ban & of Kenya* [2017] eKLR the court stated that:-

“----- alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved”

78. Likewise in the case of *Gatobu M 'ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR it was held that:-

“A court of law cannot re-write contracts between the parties. The parties are bound by the terms of their contract unless coercion fraud or undue influence are pleaded and proved” [Own emphasis]

79. The respondent now seeks to repudiate the entire agreement claiming that he was coerced and alleges that he signed same under duress from the applicant. That the applicant threatened to go to the respondents place of work at Cocacola Company where the respondent was a Senior Executive and embarrass him. The respondent further claims that the applicant sent out various posts on e-mail defaming his character.

80. The respondent claims that he was coerced into signing the Agreement. What was the nature of this duress and/or coercion. Who perpetrated the coercion. In *PAO & other v Lanliu & another* [1979] 3 All ER the Privy Counsel of England stated as follows:-

“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 was 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”. [own emphasis]

81. The respondent is not your ‘Ordinary Joe’. He is a Senior citizen with vast life experiences holding a very senior position in one of the largest corporate organizations in the world. I have no doubt that in the course of his duties the respondent has signed numerous contracts/agreements worth billions of dollars, on behalf of his employer. He clearly understood the implication of appending his signature to a legal document. Under cross-examination the respondent confirms that

“I am the Managing Director of East Africa Bottling Company in Ethiopia. I have a legal team that works under me. I am well educated. I am not illiterate. I can read and understand contracts. I absolutely understand the legal implications and consequences of signing contracts.”

82. The respondents signature on the agreement was witnessed by Samson Ngeru Advocate whilst that of the applicant was witnessed by Stella Wangui Muraguri Advocate. It is totally inconceivable that under the watchful eye of his Advocate the respondent could be forced and/or coerced by a young girl to sign this settlement Agreement.



83. In her evidence the applicant states that:-

“The Agreement was not signed under duress. We discussed the Agreement over a period of six (6) months. Each of us had legal representation of Judy Thongori a senior lawyer drew us the Agreement. The respondent was not coerced into signing the Agreement.”

84. The respondent claims that he was fearful that the applicant would go to his office and embarrass him. Yet took no steps to take out a restraining order to prevent the applicant from going to his office.

85. The respondent also complains of defamatory email posts which were put up online about him. Firstly these posts appear to have been put up in the years 2020 and 2021 long after the Settlement Agreement had been signed. The respondent under cross-examination admits that the screenshots which he was produced in court were taken after the Settlement Agreement had been signed. Thus they could not possibly have been a factor in coercing the respondent to sign the said Agreement.

86. Secondly the author of the posts is named as “*Malaya Mdaku*”. The respondent admits that he does not know who this “*Malaya Mdaku*” is. He says ‘I don’t know any such person.’ There is no evidence that the said posts were put up by the applicant and no link or connection is shown to exist between the applicant and this “*Malaya Mdaku*” The respondent when questioned about one of the articles goes on to admit under cross-examination that

“The article at Page 32 is in World News Platform. It is not authored by the plaintiff. The article is dated 21/4/2020. This is after we had signed the Settlement Agreement. The articles are all untrue. They were written after we has signed the Settlement Agreement----“  
[Own emphasis]

87. It is not possible that articles published in 2020/2021 would force the respondent sign an agreement reached two (2) years prior; to the publication of said articles.

88. Under cross-examination by applicants counsel the respondent says

“I confirm that I did sign the Settlement Agreement. I signed it in Nairobi at the offices of Judy Thongori Advocate SC. I was in the office with the plaintiff and her lawyer as well as my lawyer. I confirm my lawyer was also present. I did read the Settlement Agreement before I signed it.....

I entered into the settlement agreement voluntarily and with independent legal advice  
--“[own emphasis]

89. Finally the respondent goes on to concede that

“ Clause 4(e) states that the property division is final and irrevocable. I signed this Agreement.”

90. It is clear that the respondent had the time to read and consider the implications of the Settlement Agreement before he signed it. He benefitted from independent legal advice. If the respondent was signing the same under duress why he did not state so at the time of signing, or simply decline to sign the document. Further the respondent took no steps immediately after signing the agreement to seek orders to have the same set aside. The agreement was signed in the year 2019 and it is not until 2021 (two (2) years later) that the respondent suddenly realised that he had been coerced into signing the agreement.



91. Again under cross-examination the respondent confirmed that he made no complaint to any authority about coercion and/or duress either during or immediately after signing the Settlement Agreement. He further confirms that

“I did not approach the court seeking to cancel the Settlement Agreement”

92. The respondents allegation that he was coerced and/or manipulated into executing the Settlement Agreement must therefore be taken with a pinch of salt.

93. The respondent admitted that he signed the Agreement voluntarily. The Settlement Agreement was signed in the office of a Senior Counsel and was witnessed by Advocates, representing both parties.

94. It is obvious that the respondents claims of duress and coercion have no basis. They are merely feeble attempts to turn his back on a document which he voluntarily signed. Accordingly I find that the Settlement Agreement binds the respondent.

95. Indeed Clause 4, (d) of the Agreement which is headed ‘Property Settlement’ provides at Sub-clause (d) and (e) as follows

(d) Each party hereby irrevocably waives any and all interest that they may have in any other property that the other party may have and or acquire.

(e) The parties intend that their property division, as provided in this Agreement shall be final and irrevocable” [Own emphasis]

96. Similarly Paragraph 5 of the Settlement Agreement which is titled ‘Miscellaneous’ provides as follows under clause (c).

“(c) That the parties confirm that this Agreement constitutes a full settlement of any claims against each other including property, financial and maintenance and that no party will make any further claim against the other before, during or after separation.”

97. The above clauses reinforce the binding nature of the Settlement Agreement.

## **Conclusion**

98. Based on the foregoing I find that the only property which can be dealt with as matrimonial property in this matter is the Signature Property. I further find that the parties themselves after receiving legal counsel came to an agreement as to how this Signature Property was to be divided in event of a divorce.

99. The Settlement Agreement dated August 27, 2019 was entered into and executed voluntarily by both parties. I find no valid grounds to repudiate and/or set aside the same.

100. Finally I direct that Apartment DXX Signature Residence on LR No 209/xxx shall be divided in accordance with Paragraph 4 of the said Settlement Agreement dated August 27, 2019.

101. This being a family matter each side will meet their own costs.

**DATED IN NYERI THIS 13<sup>TH</sup> DAY OF MAY, 2024**

.....  
**MAUREEN A. ODERO**

**JUDGE**

