



**FZA v RB (Civil Suit E001 of 2020) [2025] KEHC 11848 (KLR) (8 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT E001 OF 2020**

**M THANDE, J**

**AUGUST 8, 2025**

**BETWEEN**

**FZA ..... APPLICANT**

**AND**

**RB ..... RESPONDENT**

**JUDGMENT**

1. By an Originating Summons (OS) dated 12.10.2020, the Applicant seeks the following orders against the Respondent:
  1. A declaration that Apartment No.XX situated on land whose description is as follows: Land Survey Plan Number 32554 annexed to a conveyance dated 14th March, 2002 registered in Mombasa Lands Titles Registry as LT 36 folio XX/5 file XXXX and the home situated on a parcel of land situated in Mambrui within the County Council of Malindi in Malindi District of the Republic of Kenya containing by measuring 2,203 hectares thereabouts which is delineated on a deed plan annexed to certificate of Title registered at the Registry of Titles at Mombasa as CR 2XXXX/1 and thereon bordered red and more particularly on land survey plan number 180866 deposited in the survey Records Office in Nairobi, form part of matrimonial property.
  2. A declaration that the Plaintiff be allowed to keep Apartment No.XX situated on land whose description is as follows: - Land Survey Plan number 32554 annexed to a conveyance dated the 14th day of March, 2002 registered in Mombasa Lands Titles Registry as LT 36 folio XX/5 file XXXX and the Defendant to effect transfer of the same to the Plaintiff.
  3. The Plaintiff be allowed to keep the matrimonial home situated on a parcel of land situated in Mambrui within the County Council of Malindi in Malindi District of the Republic of Kenya containing by measuring 2.203Hectares thereabouts which is delineated on a deed plan annexed to Certificate of Title registered at the Registry of Titles at Mombasa as C.R



2XXXX/1 and thereon bordered red and more particularly on Land Survey plan Number 180866 deposited in the survey Records office in Nairobi and the Defendant to effect transfer of the same to the Plaintiff.

4. That the Honourable Court do make further and necessary orders to give effect to the orders above and ensure that justice is done in the matter.
5. That each party to bear its own costs.
2. In her affidavit sworn on even date, the Applicant averred that she and the Respondent solemnized their marriage on 16.7.13, at the Registrar's office in Mombasa. They lived together in their matrimonial home in Mambrui, Malindi until 2014 when they relocated to Italy. The Applicant then stated that due to cruelty and adultery and desertion, she filed Malindi Chief Magistrates Divorce Cause No. 7 of 2020 which is still pending.
3. The Applicant's case is that during the subsistence of the marriage, she contributed to the properties listed in her prayers. However, that the Respondent holds all the title documents pertaining to the properties and her efforts to obtain the same have been fruitless.
4. She further stated that she and their daughter have always resided in the Mambrui home to which she has made improvements over the years. Further that they resided in both Italy and Kenya and the Respondent forbade her from working and paid her monthly upkeep. During the pendency of the marriage, she contributed towards the matrimonial properties by undertaking domestic work, childcare, managing family business and properties, as well as providing companionship and a favourable environment for the Respondent to generate income for the family. She urged that the orders sought be granted.
5. In his replying affidavit sworn on 19.11.2020, the Respondent stated that since he and the Applicant married, they have always resided in his home in Italy since 2014. He stated that he purchased the suit properties claimed by the Applicant prior to their marriage. Villa No. 3 in Mambrui was purchased in 2007, almost 6 years before he married the Applicant. He utilizes the same as a holiday home when in Kenya, hence allegation that the same is a matrimonial property or home is baseless. He stated that he purchased Apartment XX on Parcel No. on Land Portion XXX Malindi, in 2012. He denied that the Applicant made any contribution towards the acquisition of the properties or improvements to the same.
6. The Respondent further stated that at the time of their marriage, they entered into a pre-nuptial agreement on 14.6.13 to the effect that assets, shares and properties acquired in his name prior to their marriage shall remain his property and that the Applicant shall have no claim to the same. As such, the Applicant has no legal claim to the suit properties. Further that he holds the title documents to the suit properties as they are his and are registered in his name.
7. The Respondent further denied forbidding the Applicant from working and asserted that she worked as a call girl which was incompatible to their marriage due to its immoral nature. Due to the nature of this work, the Applicant was always out of the house hence the claim that she was home looking after her daughter is false. The Respondent urged that the OS be dismissed.
8. The Applicant swore a further affidavit in rejoinder on 16.10.24. She averred that the pre-nuptial agreement was manifestly unjust. She claimed that just about 1 month to the solemnization of their marriage, the Respondent told her without elaborating that they needed to visit his lawyers where she was coerced to sign the said agreement. As she was trying to peruse the agreement, she was told it was a standard agreement necessary for the marriage ceremony. She signed the same not knowing what it contained as she fully trusted the Respondent. Subsequently in 2017 after a series of domestic assaults



in respect of which she lodged a criminal complaint with the police, the Respondent vide an agreement dated 4.4.17 agreed to transfer Apartment XX in exchange of her dropping the complaint. He has however failed to effect the necessary transfer.

9. In his own further affidavit sworn on 8.11.24, the Respondent denied the allegations by the Applicant that she was coerced to sign the prenuptial agreement. He also denied that he agreed to transfer or surrender Apartment XX to the Applicant and that had he intended to do so, he would have done a conveyance instead of implying to do so.
10. I have considered the OS, the response and submissions filed by the parties. The issues that fall for determination are:
  - i. Whether the suit properties are matrimonial property.
  - ii. Whether the Applicant is entitled to the properties.

### **Whether the suit property is matrimonial property**

11. Matrimonial property is defined in Section 6 of the *Matrimonial Property Act* (the Act) as follows:
  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.
  12. For any property to be said to be matrimonial property, it must constitute the matrimonial home or homes of spouses, household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of marriage also constitutes matrimonial property.
  13. The Applicant claims that when she married the Respondent on 16.7.13, they cohabited in their matrimonial home in Mambui until 2014 when they relocated and settled in Italy. The Respondent denied that the villa in Mambui is the parties' matrimonial home and stated that the same is his holiday home which he utilizes when in Kenya and they have lived in Italy since 2014.
  14. Section 2 of the Act defines matrimonial home as follows:

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;
  15. A property qualifies as the matrimonial home of spouses if it is first, owned or leased by one or both of them. Second if the property is occupied or utilized by the spouses as their family home and acquired during the subsistence of the marriage.
  16. I have looked at the exhibited documents. The villa in Mambui is in the name of the Respondent alone. It was acquired before the marriage of the parties. While the Respondent claims that the said villa is a holiday home and not their matrimonial home, he did say that he stays in it when in Kenya. It is therefore inconceivable that when he and the Applicant and their child are in Kenya that they would not occupy the said villa. I accordingly find that the villa in Mambui fits the definition of the matrimonial home of the parties. As such, it constitutes matrimonial property.



17. As regards Apartment XX on Land Portion XXX Malindi, the evidence on record shows that the same is in the name of the Respondent. This property is neither the matrimonial home of the parties nor is it jointly owned by the parties. The same was also not acquired during the subsistence of the marriage. It does not therefore constitute matrimonial property.

**Whether the Applicant is entitled to have the 2 properties transferred to her**

18. The Applicant prays that both the villa in Mambui and Apartment XX be transferred to her. On his part, the Respondent contends that on account of the pre-nuptial agreement dated 14.6.13, the Applicant has no legal claim to the suit properties.
19. The basis for division of matrimonial property between spouses, is contribution. A party seeking a share in matrimonial property must demonstrate the contribution that such party has made towards the acquisition or development of the said property. However, the situation changes where there exists a pre-nuptial agreement between spouses.
20. Pre-nuptial agreements are provided for in Section 6 of the Act as follows:
- (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 determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
21. The purpose of a pre-nuptial agreement is to determine the property rights of parties intending to enter into marriage. Such agreement outlines how their assets and liabilities will be divided in the event of dissolution of their marriage.
22. In *DNK v GS (Matrimonial Cause 4 of 2022) [2023] KEHC 26048 (KLR) (29 November 2023)* (Judgment), Githinji, J. had this to say on pre-nuptial agreements:

Pre-nuptial agreements are contractual in nature thus the general law of contract applies and they are enforceable just like any other contract. Therefore, they are subject to the court's scrutiny if allegations of fraud, coercion or manifestly unjust are pleaded by a party to the agreement. The Court will however not interfere merely because the terms of the agreement are not balanced and are more favorable to one party than the other.

23. The Applicant contends that the prenuptial agreement was manifestly unjust. She alleged that just about 1 month to the solemnization of their marriage the Respondent told her without elaborating, that they needed to visit his lawyers where she was coerced to sign the said agreement. Further, that as she was trying to peruse the agreement, she was told it was a standard agreement necessary for the marriage ceremony. She signed the same not knowing what it contained as she fully trusted the Respondent.
24. The question before this Court is whether sufficient basis has been laid by the Applicant to set aside the pre-nuptial agreement. Section 6(4) of the Act provides the grounds upon which such agreement may be set aside as follows:

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 determines that the agreement was influenced by fraud, coercion or is manifestly unjust.



25. A party seeking the setting aside of any agreement including a pre-nuptial agreement must prove that the agreement was influenced by fraud, coercion or that the same is manifestly unjust.
26. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR, the Court of Appeal stated:
  38. 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.
27. The same view was expressed in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR, but with a rider as follows:
  35. Was the contract entered into between the parties in this matter conscionable? That is the fourth issue. It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”
  36. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black’s Law Dictionary, 9th Edition, Gardner, Ed.).
28. What I understand the Court of Appeal to be saying is that where it is demonstrated that a contract is unconscionable, unduly harsh, unreasonable and extremely unfair, a court must never be shy to interfere with or refuse to enforce such contract.
29. The exhibited pre-nuptial agreement is dated on 14.6.13. It is a term of the agreement that all assets, shares, immovable and movable property in a party’s name prior to the marriage, shall remain the personal property of that party and the other party shall not lay claim thereon. The agreement further provided that any property acquired by the parties after marriage jointly shall belong to them equally. Additionally, the agreement indicated that the parties shall uphold the terms thereof, the same having been entered to of their own free will and while they were of sound mind and disposition.
30. It is clear from the terms of the pre-nuptial agreement that the rights and obligations of the parties are identical. There is no term that applies to one party that does not apply to the other. An agreement the terms of which apply equally to both parties cannot be said to be manifestly unjust, unconscionable, unfair or oppressive. It is thus not clear to the Court the manner in which the agreement is manifestly unjust and the Applicant has not availed any evidence to support this allegation.
31. On coercion, the Applicant claims that the Respondent without elaborating, took her to his lawyers’ office a month to the marriage and she was coerced her to sign the documents. She claims that as she tried to peruse the agreement, she was told it was a standard agreement necessary for the marriage ceremony. She signed the same not knowing what it contained as she fully trusted the Respondent. First, the Applicant has not given details or name of the said lawyers. She did not say who coerced her to sign the agreement or who prevented her from reading the same. Further the fact that the agreement was entered into about a month before the solemnization of the marriage cannot be evidence



of coercion. Indeed, by their very nature, pre-nuptial agreements are entered into prior to the marriage. This could be done a day before or even on the very day of the marriage.

32. In *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others* [2011] eKLR, the Court of Appeal considered a lopsided contract in which one of the parties was dominant and superior to the other and stated:

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 V 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.

33. A careful look at the pre-nuptial agreement indicates that the Respondent’s signature was witnessed by one Grace Kalama. The Applicant’s signature was witnessed by Wangari Mwangi, an Advocate. To my mind, the Applicant clearly entered into the contract with independent legal advice. In the premises, this case does not warrant the Court’s intervention to correct an alleged injustice, more so because it has not been demonstrated that the terms of the agreement were unfair to the Applicant. The claim that the pre-nuptial agreement was manifestly unjust or the she was coerced into signing the same is not supported by evidence. Notably, when the Applicant filed the originating summons herein she did not invoke the provisions of Section 6(4) of the Act to seek the setting aside of the agreement on the grounds she now claims to be manifestly unjust and which she claims she was coerced to sign. The claim is clearly an afterthought. In the premises, no basis has been laid for the setting aside of the pre-nuptial agreement.

34. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act*:

1. Whoever desires any court to give judgment as to any legal right 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.

35. The Applicant was obligated to place before this Court, cogent evidence to support her claim. She did not however place any evidence to demonstrate that she was coerced to sign the pre-nuptial agreement and her very vague allegations are of no probative value. I therefore find and hold that the Applicant failed to discharge the burden of proof placed upon her by law.



36. I now turn to the agreement dated 4.4.17 by which the Applicant claims the Respondent agreed to transfer Apartment XX to her in exchange of her dropping the complaint made against him for a series of domestic assaults.

37. I have looked at the said agreement. Clause 2 provides in part as follows:

The house in Malindi, Kenya owned exclusively by Mr. Bresciani, will be donated by the latter to Mrs. Ali by 31<sup>st</sup> March 2018.

38. The agreement does not indicate the specific property of the Respondent in Malindi that was to be transferred to the Applicant. It is thus not clear why the Applicant states that it is Apartment XX that was to be transferred.

39. Further, and even more critical the agreement was not executed in accordance with the law. Section 3(3) of the [Law of Contract Act](#) provides as follows:

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
  - i. is in writing;
  - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

40. The law requires that for a suit to be brought on a contract for disposition of an interest in land, 3 conditions must be met. First, the contract must be in writing, second, it must be signed by all the parties thereto and third, the signature of each party must be attested by a witness who is present when the contract is signed.

41. The agreement dated 4.4.17 was reduced in writing and signed by both the Applicant and the Respondent. The first two conditions were thus met. The third condition was however not met as the parties' signatures were not attested by any witnesses. The conditions in Section 3(3)(b) of the [Law of Contract Act](#) are conjunctive and not disjunctive. They must all be met. In the present circumstances, the Applicant is by dint of the said provision, barred from claiming an interest in Apartment XX in this suit, based on an agreement that contravenes the express provisions of the law.

42. A similar view was expressed in *Silverbird Kenya Limited v Junction Limited & 3 Others* [2013] eKLR, where Mutungi, J. stated:

Section 3(3) of the [Law of contract Act](#) is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the [Law of Contract Act](#), the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya.

43. In light of the foregoing, the claim by the Applicant that the Respondent had agreed to transfer Apartment XX to her based on the agreement dated 4.4.17 is rejected.



44. The properties claimed by the Applicant were acquired by the Respondent before the parties' marriage. The exhibited lease in respect of the villa on Land Reference Numbers 780 and 781, Mambui shows that it was registered in favour of the Respondent on 26.1.07 while that in respect of Apartment XX on Land Portion XXX Malindi was registered in favour of the Respondent on 28.11.02. These properties were acquired 6 and 2 years respectively, before the marriage. Accordingly, in terms of the provisions of the pre-nuptial agreement, the same remain the personal property of the Respondent and the Applicant is barred from laying claim on the same.
45. In the end, and in view of the foregoing, the Court finds that the Originating Summons herein dated 12.10.2020 lacks merit and the same is dismissed. The circumstances herein do not call for an award of costs.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 8<sup>TH</sup> DAY OF AUGUST 2025**

**M. THANDE**

**JUDGE**

