JJM v JLM (Matrimonial Cause E057 of 2021)
[2025] KEHC 15576 (KLR) (Family) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15576 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MATRIMONIAL CAUSE E057 OF 2021

H NAMISI, J

OCTOBER 31, 2025

BETWEEN

JJM ..... APPELLANT

AND

JLM ..... RESPONDENT

JUDGMENT

1. The Applicant and Respondent were married on 27 December 1980. Their union, which span over 4 decades, was blessed with children, who are now adults. The marriage was formally dissolved by a Decree Absolute issued by the Chief Magistrate's Court at Milimani in Divorce Cause No EXXX of 2024 on 29 November 2024.

2. By Originating Summons dated 8 July 2021, the Applicant seeks the following orders:

    i. That it be declared that the properties listed herein with all buildings and developments thereon acquired and developed by the joint funds and efforts of the Applicant and Respondent during their marriage and all registered in the name of the Applicant and/or the Respondent, are owned jointly by the Applicant and the Respondent:

        a. Ngong/Ngong LR. No. XXXX on Calvary Drive, Ngong SubCounty, Kajiado;

        b. Ndalu/Kipchonge Block X (MISANGA) XXXX, Tongaren Sub County, Bungoma;

        c. Ndalu/Kipchonge Block X (MISANGA) 145, Tongaren Sub County, Bungoma

    ii. That an order do issue declaring that the Respondent is accountable to the Applicant in respect of all the income and rental proceeds received from the properties in Ngong aforesaid;

iii. That this Honourable Court be pleased to make such further orders as the interests of justice may require;

iv. That the Respondent be condemned to pay costs of this Application and incidentals thereto.

3. It is pertinent to note a preliminary matter that has narrowed the scope of the dispute. In his submissions, the Applicant formally withdrew his claim over the two properties, Ndalu/Kipchonge Block X (Misanga)/XXXX and Ndalu/Kipchonge Block X (Misanga)/XXX. The reason advanced for this withdrawal is the acknowledgement that the said parcels have since been transferred to and registered in the name of the parties' eldest son, WAM. While this Court accepts the withdrawal and will not make any distributive orders concerning the two properties, the history of their acquisition and their treatment under the Divorce Settlement Agreement remain part of the factual matrix that informs the Court's understanding of the parties' conduct and intentions. The primary property remaining in contention is, therefore, the property known as Ngong/ Ngong L.R. No. XXXX

The Applicant's Case

4. The Applicant relied on his Supporting Affidavit sworn on 8 July 2021, his Supplementary Affidavit sworn on 27 March 2025 and his oral testimony in Court.

5. Regarding the acquisition of the properties, he testified that the property known as Ngong/ Ngong L.R. No. XXXX (the Ngong property) was acquired in 1985 through a mortgage facility he obtained from his then-employer, the Kenya College of Communications Technology (KCCT), now Multimedia University. He stated that he serviced this mortgage from his salary and that the property is registered solely in his name. A Discharge of Charge dated 15 July 2015 was produced to confirm that the loan was fully paid. The Applicant claimed that the two Ndalu properties, comprising of 43-acre farm, were acquired through their joint savings and funds he remitted while working abroad. He further testified that a property known as Apartment B4 at Lenana View Apartments (the Lenana Property) was bought solely by himself with funds he sent to the Respondent from Namibia where he was working. The Applicant produced bank statements from Standard Bank, Namibia, showing various telegraphic transfers to Kenya between 2002 and 2006, as evidence of his financial capacity and contributions.

6. The Divorce and Settlement Agreement (DSA) is a central point to this dispute. The Applicant admitted signing the Agreement on 4 November 2017 in the presence of his son. However, the Applicant contended that he later found the Agreement to be skewed against him. He asserted that on 22 March 2018, he emailed his son, WAM, communicating his decision to totally withdraw his commitment to that Agreement and its cancellation with immediate effect.

7. Regarding the Lenana property, the Applicant admitted that he sold the property in 2018. He justified this action by stating that after their differences escalated, the Respondent asked him to move out of the Ndalu home, leaving him with nowhere to go. The Applicant explained his use of the very DSA he now repudiates as the basis for the sale of the Lenana property. He claimed that the net proceeds from the sale were approximately Kshs 8 million, which he used to purchase and develop his current residence in Nakuru.

8. The Applicant argued that the agreement was invalid because he rescinded it through a notice sent to their son, who was a witness and beneficiary. With the DSA thus invalidated, the Applicant urged the Court to proceed with the distribution of the one remaining property in dispute, the Ngong property. The Applicant submitted that the distribution should be guided by the principle of proven contribution, as authoritatively laid down by the Court of Appeal in Echaria v Echaria, Civil Appeal

No. 75 of 2001 eKLR. He argued that the Applicant had demonstrated substantial direct financial contribution through the acquisition and servicing of the mortgage, entitling him to a greater share.

The Respondent's Case

9. The Respondent opposes the Summons through her Replying Affidavit sworn on 12 March 2025. The central pillar of her defence is that the question of the distribution of all properties acquired during the marriage was conclusively and finally determined by the parties themselves when they executed the Divorce and Settlement Agreement on 4 November 2017. She contends that this agreement is a valid and binding contract, which both parties have acted upon, and she urges this Court to adopt and enforce its terms as the final mode of distribution.

10. The Respondent testified that the Applicant initiated and negotiated the DSA with their adult children, effectively shutting her out of the process. The Respondent was aware that he later emailed their son purporting to rescind it, but she was never formally notified. She maintained that the Agreement is a valid and binding documents, particularly since the Applicant relied on it to sell the Lenana property. The Respondent stated that she did not expect any proceeds from that sale because the DSA allocated that property to the Applicant, and she respected that provision. The Respondent produced the DSA, the Sale Agreement for the Lenana property showing a sale of Ksh 12 million, and loan documents from Faulu Bank and Harambee SACCO as part of her evidence.

11. On the issue of acquisition of the properties, the Applicant presented a different narrative. She testified that the Ndalu property was paid for in 1993 from the proceeds of a motor vehicle which she had bought and sold upon her recall from her diplomatic posting in Dar es Salaam, Tanzania. Regarding the Ngong property, the Applicant stated that it was a joint venture, and while the Applicant secured the mortgage, she made significant contributions. The Respondent testified that she financed the construction of the perimeter wall, drainage and stairs, and later, while serving as a diplomat in Namibia, she financed tiling and other modernizations, remitting money to the Applicant in good faith. The Applicant produced a loan application to Harambee SACCO for Kshs 550,000/- for renovations as evidence of her improvements.

12. Concerning the Lenana property, the Respondent averred that the Applicant had purchased a property in Namibia while he was staying with her. Under Namibian law, this was communal property. She testified that upon its sale, the Applicant brought the proceeds of Kshs 7.2 million to her, which she used to purchase the Lenana property. The Respondent further stated that the total purchase price was Kshs 9.5 million, and she bridged the gap by taking a loan of Kshs 1.5 million from Faulu Bank, for which the Ngong property title was used as security.

13. The Respondent's submissions were anchored on the sanctity of the DSA. She argued that the agreement is a post-nuptial agreement, which, though not explicitly mentioned in the *Matrimonial Property Act*, is enforceable under the general law of contract. The Respondent cited the decision in DNK -vs- KM [2021] eKLR in support of this proposition. The Respondent contended that for a court to set aside such an agreement, the Applicant must plead and prove vitiating factors such as fraud, coercion, or that the agreement is manifestly unjust, as held in the case of National Bank of Kenya Limited vs Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR. The Respondent submitted that the Applicant had failed to meet this threshold, his complaint being that the bargain was skewed.

14. The Respondent relied on the doctrine of estoppel by conduct in submitting that the Applicant cannot be allowed to approbate and reprobate. By his own admission, the Applicant used the DSA to his advantage to sell the Lenana property and pocket the proceeds. Having thus accepted the benefits of the agreement, he is now estopped from challenging its validity in order to escape its perceived burdens.

The Respondent relied on the Court of Appeal decision in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR.

15. In the alternative, the Respondent submitted that should the Court find the DSA to be invalid, then it must, in fairness, include the Applicant's property in Nakuru to the pool of matrimonial assets available for distribution. This is because the Nakuru property was acquired using proceeds from the sale of the Lenana property, a matrimonial asset, and, therefore, is traceable. The Respondent cited the case of JMV v FMC [2018] eKLR .

Analysis & Determination

16. I have carefully considered the pleadings, the evidence adduced by both parties and their respective submissions. The following issues lend themselves for determination:

    i. Whether the Divorce and Settlement Agreement dated 4 November 2017 is a valid and enforceable contract governing the distribution of the parties' properties;

    ii. If not, what constitutes the matrimonial property available for distribution, and the division of the properties between the parties.

    iii. Who shall bear costs of the suit?

17. The resolution of disputes concerning matrimonial property is a sphere governed by a clear constitutional and statutory framework, illuminated by binding judicial precedent.

18. The foundational principle is found in Article 45(3) of *The Constitution*, which provides 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. This constitutional guarantee of equality between spouses is the bedrock upon which the entire legislative framework is built.

19. The primary statute is the *Matrimonial Property Act*, in which several provisions are of cardinal importance.

20. Section 2 of the Act provides an expansive definition of "contribution" to mean both monetary and non-monetary contributions. It explicitly includes (a) domestic work and management of the matrimonial home; (b) child care; (c) companionship; (d) management of family business or property; and (e) farm work. This definition is a legislative recognition that the marital partnership is not merely a commercial enterprise but a union of shared responsibilities, where the value of domestic and caregiving work is legally equivalent to financial input.

21. Section 6 defines "matrimonial property" as the matrimonial home(s), household goods, and any other property jointly owned and acquired during the marriage. Crucially, it excludes property acquired or inherited before the marriage, as well as trust property.

22. Section 7 is the operative provision for distribution. It states

> " Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

23. This provision anchors the division of property firmly to the principle of contribution.

24. Section 14 establishes two critical rebuttable presumptions regarding property acquired during the marriage. Section 14(a) presumes that property acquired in the name of one spouse is held in trust for

the other. Section 14(b) presumes that where property is acquired in the joint names of the spouses, their beneficial interests are equal.

25. The interpretation of this framework has been authoritatively settled by the Supreme Court in the landmark case of JOO -vs- MBO KESC 4 (KLR), in which the apex Court clarified several principles that are binding on this Court. The Court held that Article 45(3) of *The Constitution* guarantees equality of rights, but this does not translate to an automatic 50:50 division of matrimonial property. The division must be based on each party's proven contribution. The Court emphasized that contribution must be interpreted broadly, giving significant and tangible weight to the non-monetary contributions listed in section 2 of the Act. The ultimate duty of the Court, therefore, is not to apply a rigid mathematical formula but to undertake a holistic and conscientious assessment of the parties' entire marital relationship to arrive at a fair and equitable distribution on a case-by-case basis.

(i) The Validity of the Divorce and Settlement Agreement

26. The Act, in section 6(3), explicitly provides for pre-nuptial agreement. It is silent on post-nuptial or separation agreement entered into during the marriage or in contemplation of divorce. However, this legislative silence does not create a vacuum, nor does it render such agreement unenforceable. As correctly submitted by the Respondent, the Courts have held that such agreements are contracts sui generis and are enforceable under the general principles of the law of contract. This position was well articulated in the case of DNK v KM [2021] KEHC 868 (KLR), where the Court stated thus:

> "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."

27. This Court concurs with that reasoning. It is in the public interest to encourage parties to amicably settle their own affairs, and where they do so freely and voluntarily, the Court should be slow to interfere.

28. The Applicant's primary challenge to the DSA is that he rescinded it. However, his conduct subsequent to the signing of the Agreement erects a formidable equitable barrier to this claim. The doctrine of estoppel by conduct, encapsulated in the maxim qui approbat non reprobat (one who approbates cannot reprobate), is a fundamental principle of justice. It provides that a person cannot accept and reject the same instrument; one cannot blow hot and cold. A party cannot take a benefit under an instrument and then turn around to say it is invalid to avoid a corresponding obligation or disadvantage.

29. The Applicant's own testimony was the most compelling evidence against him. He admitted that he used the DSA to effect the sale of the Lenana property. The Sale Agreement dated 16 May 2018, which he executed, explicitly states at Clause 1:

> " The Vendor vide the agreement for sale dated 2 August 2012 between the Company on the one part and the Vendor and JLM on the other part and further pursuant to the divorce settlement agreement signed on 4 November 2017 between the Vendor on the one part and JLM on the other part is the beneficial and exclusive bonafide owner of the property."

30. This Clause is an unequivocal affirmation of the DSA. The Applicant held out the DSA to a third-party purchaser as the legal basis for his authority to sell the property, which was initially in joint names, as the sole beneficial owner. He proceeded to receive the full purchase price of Kshs. 12 million and utilized it for his exclusive benefit to acquire a new home in Nakuru. This is a clear and substantial benefit derived directly from the DSA. His act of using the agreement constitutes approbation.

31. The Applicant now comes before this Court asking it to declare the very same agreement null and void (reprobation) so that he can lay claim to the Ngong property, which the DSA allocated to the Respondent. This is a classic case of a party seeking to have his cake and eat it, too. Equity will not permit such an unconscionable posture.

32. In Serah Njeri Mwobi v John Kimani Njoroge [2013] KECA 501 (KLR), the Court of Appeal held:

> " The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person...
>
> It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."

33. The Applicant's actions of using the DSA speaks louder than his subsequent words of rescission. He, by his conduct, affirmed the agreement and is now estopped from challenging its validity.

34. Furthermore, the Court finds the Applicant's purported rescission to be legally ineffectual. The Applicant claims to have rescinded the agreement by sending an email to his son on 22 march 2018. A contract creates rights and obligations between the contracting parties. Any variation, termination or rescission must be communicated between the parties themselves. Communication to a third party, even one as close as a son who was a witness, does not constitute valid notice of rescission to the Respondent.

35. More fundamentally, a party cannot unilaterally rescind a contract simply because they have had a change of heart or feel the terms are "skewed." Rescission is a remedy available only on specific legal grounds, such as fraud, misrepresentation, duress, or undue influence. The Applicant has neither pleaded nor led any evidence to prove any of these vitiating factors. His state of mind at the time of signing, where he "just wanted to go away", does not amount to coercion or duress in law. A court of law cannot rewrite contracts between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. The Applicant failed to discharge this burden.

36. For these reasons, the Court finds that the Divorce and Settlement Agreement dated 4 November 2017 is a valid, binding and enforceable contract between the parties. This finding, in effect, is dispositive of the entire suit.

37. According, I make the following orders:

    i. The Originating Summons dated 8 July 2021 is found to be without merit and is hereby dismissed;

    ii. The Divorce and Settlement Agreement dated 4 November 2017 between the Applicant and the Respondent is hereby declared to be a valid, binding and enforceable contract;

    iii. The distribution of all properties acquired during the marriage, including but not limited to Ngong/ Ngong LR XXXX, shall be governed exclusively by the terms of the said Divorce and Settlement Agreement;

    iv. This being a family matter, each party shall bear their own costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Applicant : Mr. Mwendwa

For Respondent: N/A

Court Assistant: Lucy Mwangi