



LEGAL ALERT

TRAPPED BY YOUR PRENUP: KENYAN COURTS WON'T SAVE YOU FROM A BAD BARGAIN

Marriage is often perceived as a partnership founded on love and mutual trust. Yet, at the heart of the union lies an undeniable financial investment that parties bring into the relationship. While the romantic ideal of “till death do us part” remains aspirational, the reality of rising divorce and separation rates has made financial planning an important consideration. Prenuptial agreements have therefore emerged as a shield to protect assets and prevent costly disputes that arise after divorce. While prenups are often seen as protective tools to safeguard property and wealth, they can quickly become legal traps. Kenyan courts have made it clear: unfairness of a prenup is not a ground to set it aside. Unless there is clear evidence of fraud, coercion, or manifest injustice, you will be bound to its terms. However, it is crucial to note that upon the death of a spouse, matrimonial property regimes cease to operate, and the estate is administered under the Law of Succession Act. As such, prenuptial agreements have no effect during succession proceedings — the estate devolves according to the testator’s will or intestacy rules.

Prenuptial Agreements in Kenya: The Legal Framework

A prenuptial agreement commonly referred to as a **(prenup)** is defined by the black law dictionary as ‘A legally binding agreement between a couple, stating how the assets would be divided if the marriage fails to last.’ Prenups help in assets protection especially for individuals with significant wealth or family inheritance, preserve business interests from mismanagement in case of marital breakdown while facilitating cross cultural disputes.

Legal framework on prenuptial agreements

The legal background of prenuptial agreements in Kenya lies under the Matrimonial Property Act, 2013. Section 6(3) allows parties in an intended marriage to enter into an agreement before marriage to determine their property rights. Section 6(4) provides the grounds for setting aside the agreement which are when its influenced by fraud, coercion or was manifestly unjust.

Judicial Approach to Enforceability of prenuptial agreements.

The courts in Kenya have treated prenups as any other contract with a legal obligation to the parties and are therefore enforceable as was witnessed in **C Y C v K S Y [2015] eKLR**. In **DNK V GS (2023)eKLR** the court pronounced itself as follows ‘ prenuptial agreements were contractual in nature thus the general law of contract applied and they were enforceable just like any other contract’.

As contracts that represents the parties’ agreement, courts have consistently affirmed that their role is to enforce its terms **not to shield a party from the consequences of unfair bargaining where there is no evidence of fraud, coercion, or undue influence**. This was the position held by the High Court in **DNK v KM [2021] Eklr** where it upheld an Agreement of Division of Matrimonial Assets executed during the subsistence of the marriage. The court cited with approval the Court of Appeal decision in **Pius Kimaiyo Langat Vs. Co-Operative Bank Of Kenya Ltd [2017] eKLR**, where it was held that:-



"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved." Similarly, in **Lti Kisii Safari Inns Ltd & 2 Others Vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & Others [2011] eKLR** the court of appeal emphasized that the court of equity will not protect a person acting out of their own folly or carelessness but against being taken advantage of. This high threshold reinforces the need for parties to seek proper legal advice before signing prenuptial agreements with unfair or one-sided terms. Without it, any future attempt to challenge such agreements is likely to fail as courts are reluctant to rescue parties from bad bargains of their own making. This position was clearly articulated in **National Bank Of Kenya Limited V Pipe Plastic Samkolit (K) Ltd & Another [2011] eKLR**, where the court held: "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." This means that once you sign a prenup, even a harsh one, it is unlikely that a court will release you from its terms unless there is clear proof of fraud, coercion, or terms so oppressive as to shock the conscience of the court.

Grounds for Setting Aside a Prenup

Section 6(4) of the Matrimonial property act Cap 152, states that the court may set aside an agreement which was influenced by fraud, coercion or is manifestly unjust. This provision, read together with section 107 of the Evidence Act places the burden of proof on the party that alleges that fraud, coercion to prove their case. This was evident in **QMAO v DAW (2024)eKLR** where a respondent sought to walk away from a settlement agreement dividing matrimonial property. Despite his claims of coercion and threats of embarrassment at his workplace, the court found that the agreement had been reached after months of discussions, with both parties represented by senior advocates. The respondent, a senior corporate executive, had ample opportunity to review the terms and seek independent advice. The court dismissed his allegations, holding him bound to the agreement he had voluntarily signed. It was clear that without proof of fraud, coercion, or manifest injustice, such agreements are enforceable. Further in **Federation Of Women Lawyers Kenya (Fida) V Attorney General & Another [2018] Eklr**, Mativo J. observed that; -" The section 6 of 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."

Similarly **Muchemi J. Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing As The Chairperson And Treasurer Of Kemagui Electrification Self Help Group) Vs. Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] Eklr** the court stated that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound. Unless they prove fraud, misrepresentation, duress, undue influence or non-est factum. This therefore illustrates that the law assumes when signing an agreement you did so knowingly and willingly. In conclusion, while prenuptial agreements can provide clarity and protection, they also carry significant risks. Before entering into such an agreement, take the time to consult with a lawyer and ensure your rights and interests are fully protected.

Headquarters

P: Mitumi Business Park, 6th Floor
Office No. 605 Muthithi Road
Westlands, Nairobi

W: www.tarraagility.com

E: partners@tarraagility.com

Dubai

P: Office 20, Level 22, Tower 2
Boulevard Plaza, Downtown Dubai.
United Arab Emirates

W: www.tarraagility.com

E: partners@tarraagility.com

Tanzania

P: 1st Floor, Delta House -
Kinondoni Bafra
Dar es salaam

W: www.tarraagility.com

E: partners@tarraagility.com