



# LEGAL ALERT

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

Marriage is often celebrated as a partnership founded on love and mutual trust. Yet at its core, it also involves a significant financial union. Each spouse brings not just emotions, but also property, business interests, and financial liabilities into the relationship. As the romantic ideal of "till death do us part" increasingly clashes with reality, financial planning has become critical especially given the rising rates of divorce and separation. According to the **State of the Judiciary Annual Report 2024**, Kenya's courts were handling **9,315 pending divorce cases**, 86 before the High Court and a staggering 9,229 before the Magistrates' Courts. These numbers reflect the growing trend of marital dissolution and underscore the importance of proactive legal and financial safeguards in modern marriages.

### **Prenuptial Agreements: Managing Risk in Marriage**

One such legal safeguard is the prenuptial agreement or "prenup." A prenup is a contract entered into before marriage, setting out how property and finances will be handled if the marriage ends. According to Black's Law Dictionary, it is "a legally binding agreement between a couple, stating how the assets would be divided if the marriage fails to last."

- In Kenya, prenups are increasingly used to:
- Protect personal or family wealth,
- Safeguard business interests,
- Define asset ownership, and
- Avoid drawn-out disputes during separation or divorce.

But while prenups can offer certainty and protection, they also come with legal risks especially when one party feels shortchanged after the relationship breaks down.

### **The Legal Framework for Prenuptial Agreements in Kenya**

The primary legal basis for prenuptial agreements in Kenya is **Section 6(3) of the Matrimonial Property Act, 2013**, which permits parties intending to marry to enter into an agreement that determines their property rights during and after marriage. Section 6(4) allows courts to set aside such agreements only where they are shown to have been influenced by fraud, coercion, or are **manifestly unjust**. This threshold is intentionally high, reflecting the courts' commitment to upholding freely negotiated agreements. In **DNK v GS [2023] eKLR**, the High Court reaffirmed this principle, holding that prenups are **contractual in nature** and therefore subject to general contract law. Courts will not interfere with an agreement simply because one party made a poor decision.



Similarly, in **DNK v KM [2021] eKLR**, the court upheld a settlement agreement made during marriage, citing the Court of Appeal's decision in **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR**, which emphasized that courts are not in the business of rewriting contracts, unless there is proven **fraud, coercion, or undue influence**. This approach was echoed in **LTJ Kisii Safari Inns Ltd & Others v DEG & Others [2011] eKLR**, where the Court of Appeal stated that equity does not relieve a party from the consequences of their own folly or carelessness, but only from being taken advantage of.

### The High Bar for Challenging a Prenup

Kenyan courts have made it clear: once a prenuptial agreement is signed, it is binding unless the objecting party **proves fraud, coercion, or manifest injustice**.

In **QMAO v DAW [2024] eKLR**, a respondent sought to nullify a settlement agreement, claiming he had been coerced and threatened with workplace embarrassment. However, the court noted that both parties were represented by senior advocates and had negotiated the agreement over several months. The respondent, a senior corporate executive, had ample opportunity to consider the terms. His claims were rejected, and the agreement was enforced. The burden of proof lies squarely with the party alleging impropriety, under **Section 107 of the Evidence Act**. Courts will not accept vague or speculative claims of pressure or unfairness; they require **clear, convincing evidence** of wrongdoing. In **Federation of Women Lawyers (FIDA-Kenya) v Attorney General & Another [2018] eKLR**, the High Court upheld the enforceability of prenuptial agreements under Section 6, reiterating that only fraud, coercion or manifest injustice could invalidate such a contract. The principle was also reiterated in **Joel Phenehas Nyaga & Another v Aloysius Nyaga Kanyua & Another [2020] eKLR**, where the court held that once a contract is signed—absent proof of fraud, misrepresentation, or duress—the parties are bound by its terms.

### A Word of Caution: The Courts Will Not Save You from a Bad Bargain

The prevailing judicial philosophy is clear: a harsh or one-sided prenup is not inherently invalid. In the landmark case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, the Court held:

"It is ordinarily no part of equity's function to allow a party to escape from a bad bargain... unless coercion, fraud or undue influence are pleaded and proved." This underscores the importance of obtaining legal advice before signing any marital agreement. A prenup may seem reasonable at the time, but its consequences can last a lifetime and courts are unlikely to offer relief unless there is clear evidence of injustice.

### Death and Prenups: When Succession Law Takes Over

It is also important to remember that **prenuptial agreements have no legal effect upon the death of a spouse**. Upon death, **matrimonial property regimes dissolve**, and the deceased's estate is governed by the **Law of Succession Act (Cap. 160)**.

Whether or not a prenuptial agreement exists, succession is determined by:

- The deceased's **will**, or
- The rules of **intestacy**, where no will exists.

Therefore, while a prenup may protect assets during a lifetime or in case of divorce, it does not determine how an estate is distributed after death.



## Conclusion: Get Legal Advice, Before You Sign a Prenuptial agreement

Prenuptial agreements can offer clarity and protection. They are useful tools for asset management and risk reduction, especially in second marriages, high-net-worth unions, or where one party enters with significant assets or family business interests.

However, they are not bulletproof shields nor flexible safety nets. Once signed, the courts will hold you to your word. That's why it is essential to approach prenups with the seriousness they deserve. Before signing a prenup in Kenya, consult an experienced lawyer. A well-drafted agreement can protect your interests; a poorly considered one can trap you in an unfair bargain with no legal way out.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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