



**JTM v RGA (Civil Case 43 of 2016) [2022] KEHC 15385 (KLR)
(Family) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE 43 OF 2016
AO MUCHELULE, J
NOVEMBER 17, 2022
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN’S PROPERTY ACT,
AND
IN THE MATTER OF DISSOLUTION OF MARRIAGE UNDER THE MARRIAGE ACT, 2014
BETWEEN
JTM APPLICANT
AND
RGA RESPONDENT**

RULING

1. Order 12 rule 7 of the [Civil Procedure Rules](#) provides as follows:-
“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
2. The applicant J T M has applied through the notice of motion dated May 18, 2021 that the exparte order made by this court on May 13, 2021 allowing the respondent’s application dated February 23, 2021 be set aside so that she be allowed to defend it. She is saying through the supporting affidavit of her counsel that they knew the matter was coming for hearing. However, come the date and time there was a power blackout in the chambers of her advocate. He could not log in. By the time he could log in



the application by the respondent had been allowed. The fact that there was blackout in the chambers has not been challenged. The advocate on the other side says that he should have been contacted by phone. The advocate for the applicant states that by the time he contacted his colleague, the matter had been heard.

3. It is material that the application to set aside was filed four days following the date the matter was heard *ex parte*. There was no delay in bringing the application. I have stated in the foregoing that the explanation for non-attendance was not challenged. It is a reasonable explanation.
4. The applicant had a notice of preliminary objection to the application that was heard *ex parte*. He was challenging the jurisdiction of the court to determine the application.
5. Lastly, the nature of the dispute between the parties is as follows. The applicant and the respondent got married on December 18, 1990 and got 3 children. The marriage was subsequently dissolved. Between them were matrimonial properties that were the subject of the division of property cause that the respondent filed before this court against the respondent. The dispute was referred to Court Annexed Mediation which led to a Settlement Agreement that they signed and which was adopted on June 27, 2019 as the order of the court. In the application dated February 23, 2021, and allowed *ex parte* on July 13, 2021, the respondent sought a declaration that the Settlement Agreement be deemed to be a partial settlement and the dispute be referred back to the mediator to finalise the same. It is the respondent's response that the dispute had been finally settled, and that there was nothing more left to be referred to mediation. That is why her defence to the application, as contained in the notice of preliminary objection, was that there being a consent judgment based on the Settlement Agreement that had concluded the dispute, this court was *functus officio*. I have gone to great extent to give this history so as to show that the applicant had a defence to the application that raised triable issues which should be heard.
6. Under the provision cited above, the court has a wide discretion to set aside any *ex parte* order, ruling or judgment. When it orders the setting aside, it should concern itself with the justice of the matter, bearing in mind that justice is best served when a dispute is heard and determined on merits (*Philip Chemwolo & Another – V- Augustine Kubende* [1982-88]KAR 103).
7. I allow the application, and set aside the orders of July 13, 2021. The application dated February 23, 2021 is reinstated for hearing. The same shall be heard together with the notice of preliminary objection dated March 22, 2021. The respondent shall within 21 days file and serve written submissions which shall be responded to within 21 days. The matter shall be mentioned on March 16, 2023 to take a ruling date.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

A.O. MUCHELULE
JUDGE

