



**RGHS v GT (Matrimonial Cause E018 of 2023)
[2025] KEHC 802 (KLR) (Family) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E018 OF 2023
SN RIECHI, J
JANUARY 23, 2025**

BETWEEN

RGHS APPLICANT

AND

GT RESPONDENT

RULING

1. The parties herein were married and they solemnized their marriage in 1987 at the Registrar of marriage in Ethiopia. Unfortunately their marriage broke down due irreconcilable differences and the parties divorced vide Divorce Cause No.E465 of 2022. A Decree Nisi Absolute was issued on 25th November 2022 as evidenced by a copy of the Decree Nisi Absolute attached to the application.
2. From the evidence on during the subsistence of their marriage the parties acquired several properties known as Maisonette No.3 on L.R. No.xxxxx in Nairobi and Villa at [Particulars withheld] Estate House No.xxxx,Addis Ababa District/City District 20/xxx,a hotel building with 48 rooms in Adama City [Particulars withheld] and unfinished building.
3. Following the divorce, RGHS the applicant herein filed a matrimonial cause number E018 OF 2023 before this court for division of the matrimonial properties. The matter was set down on 29th May 2024 for hearing and after hearing of applicant’s case the parties agreed to settle the matter by way of consent.
4. Consequently, the respondent Dr.Getachew Tessema has filed this instant application dated 4th July 2024 pursuant to order 45,51 of the Civil Procedure Rules, Section 1A,3A of the Civil Procedure Act and the respondent seeks the following orders;
 1. That the consent judgement entered herein on 29th May 2024 be set aside.
 2. That the matter be set down for hearing on priority basis.



3. That costs of this application be provided for.
5. The application is premised on the following grounds;
 1. That the matter was set down for hearing on 29th May 2024.
 2. That after hearing the applicant's case the parties agreed to settle the matter by consent.
 3. That the Respondent instructed the counsel on record that he is willing to have the property shared in the ration of 60:40.
 4. That pursuant to the instructions the parties recorded the consent which is currently before the court. That upon follow up with the respondent to give effect to the consent the respondent has stated that he does not remember agreeing to the proceedings of that day including the consent due to the medication he was taking for his health problems.
 5. The Respondent has subsequently stated that had if he was in the right state of mind he would not have agreed to record the consent.
 6. That the Respondent's medical reports are before the court and the court should therefore in the interest of justice set aside the consent and set down the case for hearing on a priority basis.
 7. Unless the Respondent's prayers are granted, the Respondent stands to suffer irreparable harm and loss.
6. The application is further supported by supporting affidavit of the respondent in which he reiterated grounds of the application. He averred he has attached the medical reports from his doctors in Austria as proof of the myriad of health challenges he has been going through.
7. The respondent averred that he has been on medication and he continue to take different medications to treat the ailments as evidenced by the annexed and marked TG 2 a sample prescription of the drugs.
8. The respondent averred that on 29th May 2024, he attended court and prior to his attendance in court he had taken medications to check on hi blood pressure and stress levels which have been high since the applicant started the proceedings soon after the death of their son. He stated that on the 29th May 2024, while attending court, he did not fully comprehend the nature of the proceedings in which he gave a suggestion that he would be willing to settle the matter by giving the applicant a 40% share of his property. He stated that If he had not taken the anti-stress and blood pressure medication he would not have agreed to the settlement as he has always stated in all his filings in court that he bought the property.
9. The respondent stated that he would like the court to set aside the consent and allow the case to be heard on its merits.
10. The Claimant/ applicant RGHS opposed the application and filed a replying affidavit sworn on 1st November 2024. She briefly stated that a Consent Order cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion and no fraud or collusion has been alleged or proved by the respondent . The claimant stated , the respondent has not met the legal threshold to set aside the Consent for the following reasons. She averred that on 29th May 2024 when they entered into the consent, the respondent was present and actively participated in the proceedings and even gave the Court an elaborate history of his life. That there was no indication whatsoever that he was suffering from any inability to comprehend the matter before the Court.



11. The claimant averred that the Applicant was legally represented and when the matter was called out, his counsel indicated that he was ready to proceed with and the Consent was recorded, the Court asked the Applicant whether he was in agreement and he confirmed the same.
12. The claimant stated that no medical evidence has been presented to prove that he suffered from lack of comprehension. It is claimant's case that the medical reports that the respondent has attached are general tests that the Applicant undertook ranging from years 2021 to 2023. The Court will note that none of those reports show that the Applicant may be suffering from lack of comprehension.
13. This court issued directions that the application be canvassed by way of written submission. The claimant/respondent did not file submissions and the applicant/respondent filed written submissions dated 18th November 2024 through the firm of Kang'ethe Waitere & Co. Advocates.
14. Counsel Kang'ethe briefly submitted on whether the applicant has met the legal threshold to set aside the consent order entered on 29th May 2024.
15. Counsel submitted that a party can seek to set aside a consent order or vary a consent due to lack of understanding the nature and effect of the order. It was submitted that issues such as mental incapacity, misinformation, or other cognitive Courts will typically assess whether the person was able to fully comprehend the terms of the consent order, and whether they were capable of giving informed consent. Counsel relied on the decision In Hirani V. Kassam [1952] 19 EACA 131
16. It was submitted that to impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court. It was further submitted that it is noteworthy that among the adduced documents is GT 23 which is a psychological consultation report, which discloses that the Respondent suffers from major depression and Post-traumatic stress disorder. From the aforementioned assessment, it is consequential that the Respondent's mental state and free will was adversely affected.
17. It was respondent's submissions that even on the day of the hearing the Respondent was heavily medicated and not into the right frame of mind. This disclosure is greatly vitiating to the consent order. It was submitted that the Respondent's mental incapacity provides a good ground for varying or rescinding the consent order.
18. From the application, rival affidavits and written submissions the main issue for determination is whether this court should set aside the consent entered on 29th May 2024.
19. When the respondent's suit came up for hearing before this court on 29th May 2024, the parties recorded a consent compromising the suit on the following terms;
By consent: -
 1. That the parties' matrimonial home being Maisonette No. 3 on L.R. No. 1870/11/340 (I.R. No. 66087/2) located on General Mathenge Drive Westlands Nairobi county, hereafter the property, be shared as follows;
 - a. 40% to the Applicant, RGHS ; and
 - b. 60% to the Respondent, GT.
 2. That the parties to obtain a joint valuation to determine the value of the property.



3. That the Respondent to indicate to the Applicant within 21 days whether he wishes to buy out her share of the property failing which the property will be placed in the market for sale to the highest bidder with ability to complete the transaction.
4. That parties to agree on the terms of division of the household goods directly or through mediation by their respective lawyers.
5. That both parties undertake not to frustrate the performance of this Consent.
6. That the matter will be mentioned in Court on 24th June 2024 at 2.30 pm for further directions.

Given under my hand and seal of the Honorable Court at Nairobi this 29th day of May, 2024.

20. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.
21. In the case of, Brook Bond Liebig (T) Ltd –vs- Mallya [1975] E. A 266 it was stated that;

The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –vs- Kassam [1952] 19 E. A.C.A 131, where the following passage from, Seton on Judgments and orders, 7th Edn. Vol. I, p 124 was approved:

“prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court....or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension.”

22. Applying the foregoing principles to this case, the question that I need to answer is whether the respondent has established valid grounds that would justify the setting aside of the consent judgment/order entered herein on 29th May 2024 . Has the respondent who is applicant herein established that there was fraud or collusion or mistake or misapprehension or ignorance of material facts or any other reason that would justify the setting aside of an agreement in relation to the consent judgment/order that was entered by the court herein on the material date.
23. The respondent has submitted that the above consent should be set aside on grounds that his mental state and free will was adversely affected at time of recording the consent. The respondent has attached several copies of medical report to support his allegation.
24. The claimant on her part has stated that the respondent was represent by his Advocate in court and he was also present in court when the consent was recorded.
25. It is not in dispute that the respondent was present in court with his advocate when the consent judgment was entered herein on 29th May,2024. It is also not in dispute that, the respondent’s said advocate consented to the said judgment.
26. The respondent’s contention is that he does not remember agreeing to the proceedings of that day including the consent due to the medication he was taking for his health problem. The burden was



upon the defendant to prove that the consent judgment herein was entered without his knowledge or approval. I am of the view that the defendant has failed to discharge this burden. The respondent has not placed any material before the court from which the court can conclude that the said consent judgment was entered without the respondent's knowledge or approval.

27. In the circumstances, I am not satisfied that the respondent has given any valid ground that would justify the setting aside of the consent judgment entered herein on 29th May 2024. The application is hereby dismissed.

Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY 2025

S N RIECHI

JUDGE

