



**RGA v JTM (Civil Suit 43 of 2016) [2024] KEHC 12384 (KLR)  
(Family) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT 43 OF 2016  
HK CHEMITEI, J  
OCTOBER 17, 2024  
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY  
AND  
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN’S PROPERTY  
AND  
IN THE MATTER OF DISSOLUTION OF MARRIAGE UNDER THE MARRIAGE ACT 2014  
BETWEEN  
RGA ..... APPLICANT  
AND  
JTM ..... RESPONDENT**

**RULING**

1. This ruling relates to the Notice of Motion dated 23<sup>rd</sup> February, 2021 and amended on 24<sup>th</sup> February, 2023; filed by the Applicant, RGA seeking for orders that:-
  - (a) The implementation of clauses 5 and 6 of the mediation agreement forwarded to court by the mediator and on 27. 6. 2019 adopted as orders Nos. 5 and 6 of this court be stayed pending the hearing and determination of this application.
  - (b) It be declared that the mediation agreement reached on the 17<sup>th</sup> day of June, 2019 and filed in court on the 1<sup>st</sup> day of July, 2019, amounts to a partial settlement with respect to Langata Plot No. 24xxx and that it is not conclusive.
  - (c) The matter be referred back for further and/or additional mediation to conclusively set out the details of the trust contemplated in order No. 5 issued herein on 16<sup>th</sup> October, 2020.



- (d) In the alternative clause No. 5 and 6 of the mediation agreements which are orders Nos. 5 and 6 of the orders of the court issued on 16<sup>th</sup> October, 2020 be set aside forthwith.
  - (d) In the further alternative, the mediation agreement be declared a nullity as the mediator acted without jurisdiction.
  - (e) The costs of this application be in the cause.
2. The application is supported by affidavit sworn by RGA on 23<sup>rd</sup> February, 2021. He avers inter alia that his marriage with the Respondent was dissolved vide Divorce Cause No. 107/2015 and he filed the instant suit on division of property acquired during the pendency of their marriage.
  3. The instant suit was thereafter referred to mediation which resulted in the mediation settlement agreement dated 17<sup>th</sup> June, 2019 which was adopted as an order of the court on 27<sup>th</sup> June, 2019. The mediation settlement agreement addressed all the properties save for the Lang'ata Plot No. L. R. No. 24xxx which was inter alia to be transferred to a trust for the benefit of their children. The trust is yet to be done/completed and this is the subject of the instant application.
  4. The application is opposed vide notice of preliminary objection dated 22<sup>nd</sup> March, 2021 filed by the Respondent, JTM . It is based on the grounds that:-
    - (a) The mediation settlement agreement dated 17<sup>th</sup> June, 2019 was a consent agreement executed by all the parties and their respective counsel.
    - (b) The same was adopted as a consent order by this court on 17<sup>th</sup> June, 2019, hence becoming the final judgment of this Court.
    - (c) This court is therefore functus officio and cannot interfere and/or review the consent and/or judgment.
  5. The Applicant has filed a document titled, "Background," dated 4<sup>th</sup> December, 2023 and which gives a summary of the matter at hand.
  6. The Respondent has filed written submissions dated 23<sup>rd</sup> February, 2023. She has placed reliance on NKM VS SMM & Another Nairobi H. C. C. NO. 21 OF 2015 where the court relied on Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd (1982) KLR 485 where its was stated as follows: "The marking by a Court of a Consent Order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the Order either personally or through their Advocates and when made such an Order is not lightly to be set aside or varied save by consent or one or the other recognized ground."

### **Analysis and Determination**

7. I have carefully considered the application the responses thereto and what is pertinent in this matter is the issue of Trust instrument which was agreed by the parties that it was to be done immediately.
8. Clause four of the mediation settlement on the issue of Trust states in part.

“That the property in Langata plot number L R 24xxx will be transferred to TRUST for the benefit of the 3 children..... The Trust process will be commenced immediately by G N Thiongo advocates and the parties have agreed to pay their counsel respectively for the Trust.”



9. As at the time of filing the application herein there was no evidence that a Trust had been prepared and registered. That was one of the key components of settlement.
10. It cannot therefore be true that since the matter was settled by consent the court was now functus officio as suggested in the preliminary objection above. The court only becomes functus officio once all the terms of the consent are settled and or complied with.
11. The Respondent has not denied this fact. The issue therefore of the Langata house was premised on the successful preparation and registration of the Trust deed.
12. In the absence of the fulfillment of this clause it is reasonable therefore to conclude that what the Applicant is praying for is true and valid. In addition, it appears that for the Respondent to access the Langata property the Trust deed had to be finalized.
13. Clause 5 of the mediation settlement agreement dated 17<sup>th</sup> June, 2019 states as follows:

“If a dispute arises out of or relating to this agreement or the claim, the Parties agree to re – submit the matter to Mediation prior to restoring to other modes of Dispute Resolution. The Mediator appointed Mr. Aasif Karim of P.O. Box 57386 – 00200, Nairobi.”
14. I think it is safer therefore to hold that this matter ought to be referred to the same mediator who is expected to make his report now that there is still an outstanding dispute regarding the Trust. The mediator if not available or unwilling should notify the parties who shall thereafter move the court.
15. Needless to state that the mediator ought to open the matter and complete the unfinished business.
16. In the premises prayer three (3) of the application herein is allowed and the matter be mentioned before the Mediation Registrar within the next 14 days from the date herein to ensure execution of this order.
17. Costs shall be in the cause.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**H K CHEMITEI**

**JUDGE**

