



**JRK v SK (Matrimonial Cause 2 of 2018)
[2022] KEHC 16815 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 2 OF 2018**

RB NGETICH, J

DECEMBER 20, 2022

IN THE MARRIED WOMEN PROPERTY ACT (1882) SECTION 17

-AND-

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

JRK APPLICANT

AND

SK RESPONDENT

JUDGMENT

1. The applicant filed an originating summons dated March 29, 2018 seeking distribution of matrimonial property known as xxxx. The applicant’s contention is that the marriage between her and the respondent was annulled in Divorce Cause Docket xxxx in America, and the matrimonial property was divided into equal shares between the parties. She proposes to have the matrimonial property valued, sold and equally shared between the parties.
2. The originating summons is supported by the annexed affidavit of JRK sworn on March 29, 2018 in which she reiterates the averments of the summons.
3. In response, the respondent filed a replying affidavit sworn on October 16, 2018. She averred that there is no matrimonial property known as xxxx as he acquired the parcel single-handedly and sold the same in the year 2006.
4. Further that the marriage was dissolved in Nakuru CMCC xxxx on August 2, 2017. He urged this court to dismiss this matter.
5. The background of this case is that, the parties herein were married in the year 1995. They were blessed with one issue. During the subsistence of the marriage, the respondent first relocated to the USA



where he was residing before the applicant joined him. They have both acquired USA citizenship. The applicant and the respondent are currently separated and the matrimonial property in the USA was shared equally between them as per the orders in Divorce Cause Docket xxxx in America. The applicant seeks to have the matrimonial property in Kenya valued, sold and the proceeds shared equally amongst them.

6. This cause was filed on April 9, 2018; the matter was part heard before Justice Ndungu. The applicant had testified and before the respondent could adduce his evidence, the file went missing and on November 27, 2019, this court directed that the file be reconstructed.

Applicant's case

7. On February 4, 2020. The applicant stated that the property known as xxxx is developed with one residential house and 6 rental rooms. She proposed half the property be distributed to the child while the rest be divided among them. She denies the property was sold and if the same was sold, she did not give any consent for the sale of the matrimonial property.
8. During cross-examination, she stated that she has not conducted any search on the property.

Respondent's case

9. The respondent did not adduce evidence but choose to rely on the documents filed.
10. Directions were taken on February 5, 2020 that parties do file written submissions. Both parties complied.

Applicant's submissions

11. Counsel for the applicant filed submissions on February 18, 2020 and submitted that xxxx forms part of the matrimonial property as it was acquired during the subsistence of the marriage in the year 2006 and the same registered in the name of the respondent; that the marriage was conducted in the year 1995.
12. Counsel for the applicant submitted that the applicant and the respondent acquired the property jointly. Counsel submitted that the applicant moved into a mud house in the plot which was the matrimonial home and the applicant improved the house to make it habitable and they lived there before she relocated to the USA in January 2008.
13. Counsel further submitted that the property has been registered and cited the case of *Njoroge vs Ngari (1985) KLR 480* where the court held as follows:-

' if the matrimonial property is registered in the name of that one person but the other spouse made a contribution towards its acquisition, then each spouse has proprietary interests in that property.'
14. Counsel also cited section 93 (2) of the *Land Registration Act* in support of her overriding interests in the matrimonial home and urged this court to value the matrimonial home and have the same be shared equally between the applicant and the respondent after a certain provision has been made out to the daughter.



Respondent's submissions

15. Counsel filed submissions on May 21, 2020 and submitted that the respondent in his defence relied on the replying affidavit on record which was duly signed by the respondent and thus constituted proper evidence before the court.
16. Counsel for the respondent submitted that the applicant failed to raise the issue of the respondent relying on the replying affidavit is an afterthought as the same was not raised during the hearing.
17. Counsel further submitted that the applicant has not adduced evidence showing any contribution towards the acquisition of the property and the property does not therefore form part of matrimonial property.
18. And further submitted that the respondent is entitled to own land as per article 40 of the Constitution of Kenya and that the property has changed hands and no longer belong to the respondent; and urged this court to dismiss the originating summons and award costs to the respondent.

Analysis for determination

19. There was a delay in concluding this matter occasioned by disappearances of the original file and thereafter the applicant's failure to provide the originating summons and the response in the reconstructed file which may have been contributed by death of the applicant's counsel.
20. The issue for determination is whether the property known as xxxx forms part of matrimonial property and if so, the mode of distribution between the applicant and respondent.
21. The applicant has not attached any document as proof of the registered owner of the property.
22. It is not disputed that the marriage between parties herein was dissolved and the property in the USA has been distributed between the parties.
23. In respect to the property herein, the respondent argued that the property does not form part of matrimonial property and the same has changed hands as the same was sold. Besides the said averments by the respondent, there was a witness statement by James Ngaruiya Kanyori dated February 13, 2019, stating the plot was sold to Filisia Emali Nyakundi. This witness was not called by the defence to adduce evidence before the court neither have the parties adduced a search certificate to ascertain the current owner of the suit property.
24. Notably, the applicant did not adduce any documentary evidence on the ownership of the property. At the bare minimum, the applicant would have placed before this court a copy of a search certificate to ascertain the correct position of the property before the court pronounces judgment.
25. It is trite law that he who asserts must prove. Section 107 of the Evidence Act stipulates: -
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
26. The applicant has failed to discharge her burden of proof. He who alleges must prove. Unfortunately, the applicant made no effort to demonstrate that the respondent own the property herein. The court cannot issue orders in a vacuum.



27. There is no proof that the property is available for distribution nor is there prove of any contribution by the parties. From the foregoing, I see no merit in the application herein.

28. Final orders : -

1. Application dated March 29, 2018 is hereby dismissed
2. Each party to bear their costs.

Judgment dated, signed and delivered virtually

THIS 20TH DAY OF DECEMBER 2022

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RACHEL NGETICH

JUDGE

In the presence of :

Martin - Court Assistant

Ms Mwangi holding brief for Kisila for Applicant

No appearance for Respondent

