



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 479 OF 2018**

**IN THE MATTER OF THE ESTATE OF ELIUD SIMON MBILU (DECEASED)**

**RULING**

(1) This matter involves the distribution of the estate of the late **MAJOR GENERAL ELIUD SIMON MBILU** (hereinafter ‘**the Deceased**’) who died intestate on **30<sup>th</sup> April 2017**. The parties vide two consents dated **29<sup>th</sup> September 2010** and **3<sup>rd</sup> November 2020** were able to agree on the distribution of much of the estate. They were however unable to agree regarding the distribution of four (4) properties / assets namely:-

“(a) **Property known as Title Number Mulango/Wikililye/ 440 measuring 1.0 Hectares.**

(b) **Military Sword and Kenya Navy Uniform held at Itoleka Police Station.**

(c) **Household items and personal effects.**

(d) **Property known as Title Number Mulango/Wikililye/286 where the Deceased’s Kitui matrimonial home is built or constructed.”**

(2) The matter was canvassed by way of written submissions. The Petitioner **EUNICE SIMON MBILU** filed her written submissions dated **17<sup>th</sup> March 2021** whilst the Co-Administrator **MARIE KASYOKA MBILU** relied upon the written submissions dated **21<sup>st</sup> April 2021**.

**BACKGROUND**

(3) The Deceased Major General **Eliud Simon Mbilu** got married to one **Avia Kavutha Mbilu** in the year **1958**. Their union was blessed with six (6) children namely-

(i) **Marie Kasyoka Mbilu**

(ii) **Betty Syombombe Mbilu**

(iii) **Peter Kithuka Mbilu**

(iv) **Nancy Mwendu Mbilu**

(v) **Julie Syomiti Mbilu**

(vi) **Esther Mwikali Mbilu**

(4) The 1<sup>st</sup> wife of the Deceased passed away on **31<sup>st</sup> December 2012** thereby pre-deceasing her husband. However when the Deceased retired to his rural home in Kitui in the year **1988**, he had begun to cohabit with the Petitioner who also hailed from the same village. The union between the Petitioner and the Deceased was not blessed with any issue. The Deceased then passed away on **30<sup>th</sup> April 2017**. The names of all the beneficiaries of the estate of the deceased (over which there is no dispute) was duly confirmed by a letter dated **11<sup>th</sup> October 2017** written by the Chief **Wikililye Location, Katulani District, Kitui County**.

(5) Subsequent to the demise of the Deceased on **29<sup>th</sup> April 2019** Letters of Administration Intestate were issued to his 2<sup>nd</sup> wife **Eunice (Petitioner)**. Later by consent of all the parties **Marie Kasyoka Mbilu** was appointed as Co-Administrator to represent the house of the 1<sup>st</sup>

wife.

(6) On **23<sup>rd</sup> July 2020** the Petitioner **Eunice** filed an application seeking Confirmation of the Grant which had been issued to her. Thereafter the parties entered into two consents dated **29<sup>th</sup> September 2020** and consent letter dated **3<sup>rd</sup> November 2020** which contained agreement on how much of the estate of the deceased was to be distributed. However no consensus was reached regarding the following properties / assets:-

**(1) Property known as Title No. Mulango/Wikililye/440 measuring 1.0 hectares.**

**(2) Military Sword and Kenya Navy uniform held at Itokelo Police Station.**

**(3) Household items and personal effects.**

**(4) Property Title No. Mulango/Wikililye/286 where the matrimonial home was built.**

The determination regarding the distribution of the above was left to the Court.

#### **ANALYSIS AND DETERMINATION**

(7) I have carefully considered the submissions filed by both parties in this matter. It is not in dispute that the Deceased died intestate leaving behind two houses. I now propose to deal with each of the pending issues individually.

##### **(i) Title No. Mulango/Wikililye/440**

(8) The Petitioner's position is that the above property does **not** form part of the estate of the Deceased. The Petitioner claims ownership of the said property as it is registered in her name. The Petitioner was however unable to avail to this Court a copy of the Title deed for the said property as she claims that the Title Deed was collected by the Co-Administrator when she and her sisters broke into the matrimonial home. All that the Petitioner is able to exhibit as proof of ownership of the said property is an Agreement for Sale between herself and the Vendor.

(9) The Co-Administrator on her part asserts that **Plot 440** was excised from the ancestral land belonging to the family of the Deceased and was given to the Deceased who in turn pointed it out to his late wife **Avia Kavutha Mbilu** as the parcel of land where she was to build their matrimonial home. The Co-Administrator categorically denies the Petitioner's allegation that she broke into the matrimonial home and took away the Title deed for that parcel of land.

(10) The Co-Administrator further submits that the 1<sup>st</sup> house conceded to the transmission of all that property in **Kitui Town Plot KTI/98/14A/F7** to the Petitioner in return for her relinquishing any claim over **Plot 440**.

(11) Ownership of a parcel of land in Kenya can only be conclusively proved by the Title Deed. Where no Title Deed is exhibited the Court cannot conclusively determine who is the true owner of the property. The Petitioner seeks to rely on a Sale Agreement (Annexure **EM3** to her Further Affidavit which is not dated). That Sale Agreement indicates that the Vendor one **DAVID MALONZA MBUVI** agreed to sell to **Eunice Simon Mbilu** (the Petitioner herein) the '**Unsurveyed Residential Plot No. 2 Zone 0 Kitui Municipality**' at a purchase price of **Kshs. 2,100,000/-**. The Agreement relates to an Unsurveyed Plot but the Petitioner claims that the property known as **Mulango/Wikililye/440** had a Title Deed. Further the Agreement indicates that the full purchase price was paid to the Vendor upon execution of the Agreement, but the Petitioner has availed no proof e.g bank records, copies of cheques etc to prove that she did indeed pay the full purchase price. In short the existence of a Sale Agreement does not provide proof firstly that the sale was completed or secondly that the property in question as actual fact transferred to the purchaser.

(12) The Co-Administrator on her part asserts that **Plot 440** which belonged to the Deceased forms part of his estate and prays that the same devolve to the 1<sup>st</sup> house to the exclusion of the Co-Administrator.

(13) Without the Title Deed, this Court cannot decide one way or another. I find it very curious that neither party sought the assistance of the Court seeking orders to compel the **Land Registrar, Kitui** to avail the records of this piece of land. It would seem that they both had something to hide. In the circumstances I decline to make a determination on the issue of **Title Number Mulango/Wikililye/440** and instead direct that Summons issue to the **Chief Land Registrar, Kitui** to avail in Court records pertaining to ownership of **Title Number Mulango/Wikililye/440**.

##### **(ii) Household Goods and Personal Effects**

##### **(iii) Military Sword and Kenya Navy Uniform**

(14) Items (ii) and (iii) will be dealt with together as they jointly constitute the personal effects of the Deceased. The Deceased herein was pre-deceased by his 1<sup>st</sup> wife **Avia Kavutha Mbilu**. At the time of his death therefore the Deceased was survived by his 2<sup>nd</sup> wife **Eunice Simon Mbilu** as well as his **six (6) children** from the 1<sup>st</sup> house.

(15) In her written submissions the Co-Administrator has dwelt at length on the undesirability of the relationship between the Petitioner and the Deceased and has even suggested that the relationship (marriage) was unlawful as it was repugnant to culture. However the Co-Administrator took no legal steps to have that marriage annulled and indeed concedes that the Co-Administrator was a **wife** to the Deceased.

The fact remains that this is the woman whom the Deceased opted to live with after the death of his 1<sup>st</sup> wife and it has not been denied that she was a wife to the Deceased. To date there has been no legal annulment of the union between the Deceased and his 2<sup>nd</sup> wife. Indeed the Petitioner was granted Letters of Administration in respect of the estate of the Deceased **together with** the Co-Administrator. I therefore find and hold that for the purposes of Succession the Petitioner **Eunice Simon Mbilu** was a wife to the Deceased.

(16) The Petitioner submits that as the surviving wife of the deceased she is entitled under **Section 35** of the **Succession Act** to the personal effects of the Deceased. On the other hand the Co-Administrator submits that in light of the fact that these household items were acquired **before** the Deceased married the Petitioner (she even claims that the same were acquired **before** the Co-Administrator was even born), the said household items ought to be distributed to the Co-Administrator and her siblings.

(17) Regarding the Military Uniform and Sword the Co-Administrator submits that the items are of sentimental and emotional value to the children of the Deceased who lived with him and watched their father rise up in the ranks of the Military. That the children ought to be given the said items to enable them set up a Mausoleum in remembrance of their father.

(18) **Section 35** of the **Law of Succession Act** provides as follows:-

**“35. Where intestate has left one surviving spouse and child or children-**

**(1) Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-**

**(a) the personal and household effects of the Deceased absolutely; and**

**(b) a life interest in the whole residue of the net intestate estate; provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.” [own emphasis]**

(19) **Section 40** of the same **Act** provides for the distribution of household and personal effects where a Deceased is polygamous as follows:-

**“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**

**(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.”**

(20) The Petitioner herein was a wife to the Deceased for the purposes of **Section 29** and **40** of the **Act**. In arriving at the appropriate mode of distribution the Court should take into account **Sections 35, 38 and 40** of the **Act**. **Sections 35(5)** and **38** emphasize that there should be equality in the distribution of the personal effects of the Deceased. Accordingly I find that the surviving spouse **Eunice Simon Mbilu** is entitled to a **life interest** in the Deceased’s personal and household effects.

(21) Regarding the Military uniform and Sword it is not in dispute that the Petitioner came into the life of the Deceased upon his retirement from his Military career. As such it was the 1<sup>st</sup> wife and her children who lived with the Deceased during the period of his active Military Service and who watched him progress to the level of **Major General**. I am in agreement that the Military Paraphernalia are of great sentimental value to the children of the 1<sup>st</sup> house and will provide them with a suitable way to remember their father. Therefore I direct that the Military Sword and Kenya Navy Uniform held at **Itoleka Police Station** be released to the Co-Administrator as representative of the 1<sup>st</sup> house.

**(iv) Title Number Mulango/Wikililye/286**

(22) The Petitioner’s position was that this was the property upon which the Deceased constructed his matrimonial home. The Petitioner submits that she is entitled to the matrimonial home as this is where she lived with the Deceased for **twenty one (21) years** prior to his demise.

(23) On her part the Co-Administrator asserts that this piece of land forms part of the ancestral land and claims that the Title of said parcel of land is registered in the name of **Kithuku Ndunda**, the father of the Deceased. Therefore the position of the Co-Administrator is that **Title Number Mulango/Wikililye/286 does not** form part of the estate of the Deceased.

(24) However it is not denied that the Deceased had constructed his matrimonial home on the said parcel of land. In her undated Further Affidavit the Petitioner averred as follows:-

**“7. Our matrimonial home is located at the ancestral land which land was apportioned to all the children of the Deceased’s father. As is tradition under Kamba Customary Law, the Deceased had constructed our matrimonial home in his portion of the ancestral land following the said apportionment. In the premises the matrimonial home built in the ancestral land forms part of the Deceased assets.” [own emphasis]**

(25) Section 2 of the Matrimonial Property Act defines a “matrimonial home” as-

“Any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.”

(26) In the case of **In RE ESTATE OF S.K.G (DECEASED) [2018]eKLR**, the Court stated as follows:-

“Indeed a Matrimonial Property has such significant sentimental value that is unique to the occupier or owner and the last thing any occupant would imagine of is moving out of a house he or she has lived in for several years or throughout his or her life time to start a new life elsewhere and in a new environment. Fortunately, in this case, parties are in agreement that the widow should retain her matrimonial home.”

(27) In the case of **RE ESTATE OF JOHN MUSAMBAYI KATUMANGA (DECEASED) [2014]eKLR** the Judge stated as follows:-

“As mentioned earlier the Deceased was survived by a spouse. She describes herself as a housewife who was wholly dependent on her late husband. Under Part V, a surviving spouse is entitled absolutely to the Deceased spouse’s chattels and a life interest in the remainder. The surviving spouse, particularly the widow, is regarded as having the greatest stake in the estate. Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things. The dependency is usually higher on the part of the wife. In the traditional step-up the wife takes care of the home and the children, while the husband is out looking for resources for the family’s sustenance. Often the women are housewives or persons holding lowly jobs, which afford them time to be close to their homes and family. It is in recognition of this arrangement that the law of marriage imposes a duty on husbands to provide for and maintain their wives. This duty remains even after death, but this time the burden is on the estate. It is because of it that the surviving spouse takes the household goods and enjoys a life interest in the capital assets.

Ideally, an estate ought not to be distributed during life interest. Life interest and minority are on the same face of the coin, they result in a continuing trust which ends with the termination of life interest or minority. This would mean that the surviving spouses and minor children occupy a special place in the succession arrangement. They are vulnerable and need protection, and therefore they deserve special attention during distribution.” [own emphasis]

(28) It is established by case law and is trite that the matrimonial home will devolve to the surviving spouse. In the case of **ELIZABETH WANJIRU NJONJO RUBIA –VS- BRIAN MWAITURIA [2019]eKLR** the Court of Appeal held that a widow who spent all her married life with the Deceased living in the matrimonial property and contributed towards its construction was entitled to a life interest in said property. There is no evidence the Petitioner contributed towards construction of the matrimonial home. However the Petitioner lived with the Deceased in this property for **21 years**. In the circumstances I find that the Petitioner is entitled to a life interest in the property known as **Title Number Mulango/Wikililye/286**. Upon her death or remarriage the property will revert to the Co-Administrator and her siblings.

(29) Finally I make the following orders:-

(1) **The household items and personal effects of the deceased shall vest in the Petitioner.**

(2) **The Military Sword and Kenya Navy uniform held at Itoleka Police Station shall devolve to the Co-Administrator Marie Kasyoka Mbilu as Trustee for all her siblings.**

(3) **Title No. Mulango/Wikililye/283 upon which the matrimonial home stands shall devolve to the Petitioner Eunice Mbilu Simon during life interest and upon her death or re-marriage the same shall devolve to the Co-Administrator as Trustee for all her siblings.**

(4) **Summons to issue to the Registrar of Lands Kitui County to avail in Court the ownership documents for Title No. Mulango/Wikililye/440.**

(5) **Each party shall bear its own costs.**

DATED IN NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE, 2021.

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MAUREEN A. ODERO

**JUDGE**