



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2357 OF 1995**

**IN THE MATTER OF THE ESTATE OF WILSON GATHUNGU MACHARIA (DECEASED)**

**RULING**

1. The application herein, dated 15<sup>th</sup> December 2006, for confirmation of the grant the subject of these proceedings, was partially compromised by consent of the parties, recorded on 8<sup>th</sup> June 2009 before Rawal J. The compromise left pending the issue of the distribution of moneys held in joint bank accounts in the joint names of the deceased and his late wife, Julia Njeri Gathungu. Both the application and the terms of the consent left that issue for determination by the court on basis of submissions to be made by the parties.

2. The parties thereafter reached agreement on certain accounts, and recorded a further consent on 31<sup>st</sup> October 2017 on the sharing of the money held in certain accounts. Clause 5 of the consent was framed as follows –

‘Regarding the moneys held in A/C No. 300-0000-105 (formerly accounts numbers 4/40115, 4/70408 and 4/703300) at HFCK, Nyeri, and A/Cs held at Standard Chartered Bank, Nyeri Branch and also at NIC Bank Fixed Deposit in the joint names of the deceased and his late wife in the second house in trust of their three children in the second house to be disposed of by way of written submissions.’

3. The parties complied with the consent regarding filing of written submissions to dispose of the issue of the joint accounts. The applicants’ submissions are dated 23<sup>rd</sup> November 2017 and were filed herein on 30<sup>th</sup> November 2017. The respondents’ submissions are dated 7<sup>th</sup> March 2018 and were filed herein on even date. I have read through them and noted the arguments made in them, including the authorities that the parties have cited.

4. The applicants’ case is that the funds held in the said joint bank accounts did not form part of the estate of the deceased. They cite the principle of survivorship, which holds that the same ought to pass to the surviving account-holder. They invite me to follow the law on survivorship with respect to joint tenancies. Of the two cases they have cited I believe the Australian case of *Russell vs. Scott* (1936) 55 CLR 440, is closer home.

5. The respondent’s case is that the principle of survivorship does not apply. They suggest that the deceased should have perhaps nominated a beneficiary of the accounts, which he did not and, therefore, the money ought to go to the estate. They cite the United States of America case in *Sims vs. Peoples Bank and Trust Co.* 519 So. 2d 512 (1988), to make the point that it would appear that survivorship would only apply where the joint account-holder provides for it in the relevant bank forms, so that where there is no endorsement that survivorship applies it would not be applied.

6. It is not in dispute that the said accounts were jointly held by the deceased and his late wife. The accounts with HFCK were expressed to have been held by the two in trust for their children: Isaac Macharia, Miriam and Titus Waithaka. The accounts at NIC Bank and the Standard Chartered Bank were not in trust.

7. The holding of any asset jointly by two or more persons presupposes common ownership thereof in indeterminate shares, unless there is evidence to the contrary. Upon the demise of any one of the joint owners the property then passes to the surviving joint holder. Depending on the circumstances of the opening of the joint account the issue of a resulting trust may be raised. Such as where there were pre-existing accounts held in the name of the deceased into which he then introduced another as a joint account-holder. That appears to have been the case in *Sims vs. Peoples Bank and Trust Co.* (supra).

8. In this case, the parties have not placed before me any facts that may shed light on the circumstances under which the accounts were opened so that I can determine whether or not a resulting trust existed in favour of the estate. The presumption then that I have to make is that the parties intended that the funds in the joint accounts at NIC Bank and the Standard Chartered Bank passed to whomever of the two survived the other.

9. Regarding the money held in trust for the children in the second house, the issue no doubt clearer. The ultimate beneficiaries of the funds held in that trust account were mentioned. It would not have mattered, as between the deceased and his late wife, who died first or who survived the other, the funds would directly pass to their children, who are the beneficiaries named in the trust account.

10. In the end, I find that the funds held in the joints accounts operated by the deceased and the late Julia Njeri Gathungu in NIC Bank and the Standard Chartered Bank passed to the said Julia Njeri Gathungu upon her survival of the deceased herein and that the same passed to her estate following her demise. The said funds therefore do not form part of the estate of the deceased. The moneys in the trust account operated by the deceased and the late Julia Njeri Gathungu ought to pass directly to the named beneficiaries without going through the succession process. The funds the subject of the trust do not form part of the estate of the deceased.

**DATED and SIGNED at NAIROBI this 14<sup>TH</sup> DAY OF JUNE, 2018.**

**W. MUSYOKA**

**JUDGE**