



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 for determination is a Motion dated 7th October 2015. It seeks an order for the committal of Mr. Jeremy Awori to prison for a term of six (6) months or attachment of his assets for disobeying the order made herein on 17th February 2012. The grounds upon which the application is founded are set out on the face of the application, as well as in the affidavit sworn in support thereof by the second applicant, Isaac Macharia Gathangu, on 7th October 2015.

2. According to the applicants, an order had been made herein on 17th February 2012 directing the Barclays Bank of Kenya Limited to provide statements to the applicants for all bank accounts within any of its branches that were in the name of the deceased herein, Wilson Gathungu Macharia. The statements were to be provided within sixty (60) days, and the accounts in question and the branches where they were at were indicated in the order. The bank in an effort to comply with the said order furnished the applicants with statements for some of the accounts the subject of the order, but the applicants argue that the said statements did not conform with the order of 17th February 2012, as some of them were erroneous and others did not cover the required period. The applicants also complain that statements for some of the accounts were not provided at all.

3. Thereafter, the applicants sought full compliance with the said order, but to no avail, whereupon they embarked on having the bank, through its officers, cited for contempt. They obtained leave on 7th May 2013 to commence contempt proceedings against Mr. Awori, in his capacity as Managing Director/Chief Executive Officer of the bank. The applicants filed a substantive application on 21st May 2013, but withdrew the same when they noticed that the order of 17th February 2012 had not been served personally on Mr. Awori.

4. The applicants aver that they were unable to serve Mr. Awori personally with the order of 17th February 2012 on account of his position at the bank, which forced them to come back to court to be allowed to serve him through substituted service. Orders to that effect were made on 24th October 2014. The said order was subsequently served on Mr. Awori on 24th April 2015 as per the order of 24th October 2014. Following that service, the applicants were served with statements in respect of four (4) bank accounts. The applicants contend that the said statements were incomplete and did not cover the required period going by the order of 17th February 2012. It is in that behalf that they argue that the said order has not been complied with, and the applicants aver that they have been unable to complete administration of the estate. They also state that some of the deceased's accounts in the bank have been operational to date but they do not know who has been operating them.

5. The respondent has replied to the application through an affidavit sworn by Waweru Mathenge, an advocate in the bank's legal department, on 3rd November 2015. He acknowledges service of the order of 17th February 2012, but asserts that there was compliance with it. He states that the bank furnished the applicants with the statements that it was able to retrieve, adding that it was unable to provide statements in respect of the rest of the accounts for various reasons. For some, the records have been destroyed upon effluxion of the period which the law allows banks to hold such records, and for others the accounts had been closed as they did not have any funds and the account numbers allocated to other customers. He states that it is on that account that there could be no full compliance with the order in question.

6. The application was argued orally before me on 9th February 2016. Counsel for both sides based their arguments on the affidavits on record, and therefore summarised the cases of the respective parties as founded on the said affidavits.

7. The order that the court made on 17th February 2012 reads as follows:-

'(1). Let Barclays Bank (K) Ltd provide Statements for all Bank Accounts with any of its branches that are in the names of the deceased and which are listed at paragraph 2 of the Application as...

(2). The Bank shall not provide Statements in any of the Bank Accounts above if they are not in the names of the deceased and in filing the Statements it should merely disclose the owners of those Accounts.

(3). The Bank should comply with the above orders within 60 days...'

8. The documents attached to the affidavit drawn in support of the application include letters from the advocates for the respondent and copies of the statements availed by the respondent. On such annexure is copy of a letter dated 20th July 2012, from Messrs. Miller & Company, Advocates for the respondent, forwarding statements to the applicants advocates regarding accounts numbers 027-1123361 (Nakuru), 027-1100922 (Nakuru), 027-1129181 (Nakuru), 027-6019155 (Nakuru), 6301330 (Nyeri) and 1012144 (Olkalau). It was stated in that letter that statements in relation to accounts numbers 027-3855688, 075-2004494, 075-3830525 and 7326309 could not be provided for the said accounts were found to be invalid. There is also copy of a letter dated 23rd June 2015 from Messrs. Miller & Company, Advocates. It provides information on seven (7) of the accounts, and explains that the bank had difficulties retrieving some of the records as some of them were destroyed following expiry of the bank's retention period. Statements were availed for accounts numbers 6301330, 6018155, 1012144 and 3830525. It was explained that accounts numbers 1123361, 1100922 and 1129181 bore the names of other persons, namely Bartholomew Gichuru Chege, Agano Enterprises and Mango Lodge House.

9. Attached to the affidavit in support are various letters from the applicants' advocates, where several issues are raised concerning compliance with the order. One of the concerns raised is that some of the accounts were in the names of the other persons, yet these accounts were being operated by the deceased prior to his demise. The concern is that these accounts are active, and it would appear that the current holders of the accounts could be operating using the balances that were previously on those accounts. The other matter raised is that some of the statements released to the applicants are incomplete in the sense of not covering the period running from the date of the deceased's death to date. The applicants are also concerned about the accounts that the respondent described as invalid, without defining what was meant by that. The last issue is that the bank has not provided the applicants with statements or, at least, any information about accounts numbers 35559909 (Olkalau) and 3670556 (Nairobi). There are also other complaints raised with respect to the accounts.

10. What I have to determine in the application before me is whether the respondent is in contempt of court with respect to the order made on 17th February 2012. In other words, I have to evaluate whether there was disobedience of that order or non-compliance therewith. .

11. The said order required the bank to furnish the applicants with bank statements in respect of several

accounts set out in the order. The order required the bank not to provide bank statements where the accounts were in the names of persons other than the deceased, the requirement being that it should file a statement disclosing only the name of the account holder. The application dated 11th February 2011 was allowed, which meant that the statements ought to have covered the period running from 25th July 1995, when the deceased died, to the date of issue of the statement.

12. It would appear that the bank endeavored to comply with the order by providing statements with respect to some of the accounts and by giving details of the current holders of some of the accounts. It would appear, however, that the bank has not provided any sort of information regarding certain accounts, in terms of either furnishing accounts or indicating whether those accounts are now in the names of other persons.

13. The bank concedes that it has only partially complied with the order. It has explained that it does not have complete records regarding some of the accounts as some of the records were destroyed after expiry of the retention period within which banks may hold certain records. It has also explained the circumstances under which some of the accounts passed to the names of other persons.

14. Has the respondent complied with the order of 17th February 2012? The answer to that question should be that it has largely complied by furnishing the applicants with such information as it was able to provide from its records. The order was made some seventeen (17) or so years after the deceased's death. I find the explanation that records might have been destroyed plausible, and I am inclined to granting the bank the benefit of the doubt on that.

15. From the correspondence attached to the affidavits of the applicants, it is would appear that the applicants are not contented with the information given. They ask questions about what the balances in all the accounts were as at the time of the deceased's death. They are also concerned about withdrawals from some of the accounts after the deceased's death. From the questions asked, it would appear to me that the applicants are calling upon the bank to account. I doubt whether the instant cause is the proper forum for calling upon third parties to account to the estate. The only accounts that can be called for in such a matter as this cause are by the administrators of the estate and survivors of the deceased. Any other account, particularly against third parties, must be sought in separate proceedings. The law has clear provisions in the Civil Procedure Act, Cap 21, Laws of Kenya, and the Civil Procedure Rules, for prosecuting third parties who are bound to account to the estate. In my view, the instant application raises matters that touch on a pure banker-customer issue as between the bank and the estate, which should not be addressed in this probate or succession cause.

16. In the end, I do find that there is no sufficient basis for finding that the bank, the subject of the instant application, disobeyed the order made by the court on 17th February 2012, to warrant the citing of its Chief Executive Officer for contempt of court. I shall accordingly dismiss the application dated 7th October 2015, but without an order as to costs.

17. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE