



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 2357 OF 1995**

**TITUS WAITHAKA GATHUNGU.....1<sup>ST</sup> APPLICANT**

**ISAAC MACHARIA THUNGU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BETH MUGURE GATHUNGU.....1<sup>ST</sup> RESPONDENT**

**JACKSON MAINA GATHUNGU.....2<sup>ND</sup> RESPONDENT**

**JAMES MUCHIRI GATHUNGU.....3<sup>RD</sup> RESPONDENT**

**BARCLAYS BANK OF KENYA LTD.....NECESSARY PARTY**

**RULING**

1. The application before court for determination is a summons dated 14<sup>th</sup> August 2013 and taken out under Rules 49 and 73 of the Probate and Administration Rules and all other enabling provisions of law. The applicants seek in the main orders that the order of this court made on 17<sup>th</sup> February 2012 and a Notice of Penal Consequences in respect thereof be served on Mr. Jeremy Awori, the Managing Director of Barclays Bank of Kenya Ltd, (the bank) by serving the same upon the Company Secretary of the bank, and that in the alternative, the said order and the Notice of Penal Consequences be served on Mr. Jeremy Awori by affixing copies thereof on the door to his office at Barclays Plaza, Nairobi.

2. The application is supported by the grounds on the face of the summons and in the affidavit of Isaac Macharia Gathungu, the 2<sup>nd</sup> applicant herein, sworn on 14<sup>th</sup> August, 2013.

3. The deponent of the said affidavit has made several averments, salient among them being that their advocates had on 6<sup>th</sup> March 2013 tried to serve the said order and notice of penal consequences on Mr. Awori, but were denied access to him, instead the bank's secretary accepted service on his behalf; that it is virtually impossible to effect the said order on Mr. Awori personally in view of the position he holds and it was for that reason that service was effected on the legal officer and the company secretary respectively; that the bank is deliberately refusing to comply with the order of 17<sup>th</sup> February 2012 which indicates an intention on its part to hinder the ends of justice and Mr. Awori, being the Managing Director of the Bank, is therefore in contempt of a court order for failing to ensure due compliance with the order aforesaid. It is further averred that failure by the bank to comply with the said order of 17<sup>th</sup> February 2012 has made it impossible to conclude this matter which has been long outstanding and the applicants have no other means of enforcing the said order apart from filing contempt proceedings against the said Mr. Awori.

4. The application is opposed by the Necessary Party who filed grounds of objection on 20<sup>th</sup> September 2013. It is argued that the application is incompetent, bad in law, fatally defective and the same should be struck out; that there is no evidence that the process server made sufficient attempts to effect service of the court order upon the Managing Director of the Necessary Party to warrant the grant of the orders sought; that the process server did not employ due diligence to effect service upon the director of the Necessary Party, and that it is inconceivable that the Managing Director of the Bank can refuse or evade service of a court order. It is further averred that the applicants have been dilatory in the bringing of this application as the subject court order was made way back on 17<sup>th</sup> April 2012 and that the annexures clearly shows that the bank has complied with the said order.

5. When the matter came up for hearing on 19<sup>th</sup> May 2014, Mr. Mubea appeared for the applicants, Mr. Oyalo for the respondents, while Miss Otieno for the Necessary Party.

6. The application was filed against the background that on 17<sup>th</sup> February 2012 this court made orders *inter alia*, that the Bank do provide to the applicants statements for all bank accounts within any of its branches that are in the name of the late Wilson Gathungu Macharia within sixty (60) days and which statements are in respect of account numbers:-

a. Bank Account No.	Branch
b. A/c No. [particulars withheld]	Nakuru
c. A/c No. [particulars withheld]	Nakuru
d. A/c No. [particulars withheld]	Nakuru
e. A/c No. [particulars withheld]	Nakuru
f. A/c No. [particulars withheld]	Nakuru
g. A/c No. [particulars withheld]	Nairobi
h. A/cNo. [particulars withheld]	Nakuru
i. A/c No. [particulars withheld]	Nakuru
j. A/c No. [particulars withheld]	Nakuru
k. A/c No. [particulars withheld]	Nyeri
l. A/c No. [particulars withheld]	Olkalou
m. A/c No. [particulars withheld]	Nakuru.

7. It is the Applicants' case that their advocates on 6<sup>th</sup> March 2013 tried to serve the said order and notice of penal consequences on Mr. Awori, but were denied access to him, and instead the bank's secretary accepted service on his behalf; that it is virtually impossible to effect the said order on Mr. Awori personally in view of the position he holds hence the reason that service was effected on the legal officer and the company secretary respectively.

8. The Applicants' position as enumerated in the affidavit is that despite the attempts to serve the said Managing Director, their attempts have borne no fruits as they have been denied access to him. Obviously, it is the said denial of access that has prompted the applicants to make the instant application.

9. It is well settled that in circumstances where personal service is not possible as a result of conscious evasion by the sought to be served, the applicant can apply for substituted service. The orders of the court made on the 17<sup>th</sup> February 2012 are still valid and given the fact that the Necessary Party herein is a corporation, it would help a great deal if the order was served through its Managing Director being the "seniormost" officer of the Bank. The corporation can only be punished through its principal officers.

10. In view of the foregoing, I find that the applicants' application for substituted service is merited and it would serve the end of justice if the said application is allowed. Accordingly, the application is allowed in terms of prayer 2. The applicants shall have the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> DAY OF October, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Waiganjo advocate for the applicants.**

**In the presence of Ms. Kibera advocate for the respondent.**

**In the presence of Ms. Odera advocate for the necessary party.**