



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2357 OF 1995

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

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

ISAAC MACHARIA GATHUNGU.....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

**R U L I N G**

1. The Application dated 11<sup>th</sup> February 2011 is premised on the provisions of **Section 49** and **Section 73** of the **Law of Succession Act** and it seeks the following Orders;

*i) That an order be issued to compel and/or command the Managing Director, Barclays Bank of Kenya Ltd to furnish to this Honourable Court the deceased's bank statements of the under mentioned accounts from 25<sup>th</sup> July, 1995 to date.*

<b><u>Bank Account No.</u></b>	<b><u>Branch</u></b>
A/C No.3855688	Nakuru
A/C No.1123361	Nakuru
A/C No.1100922	Nakuru
A/C No.1129181	Nakuru
A/C No.6019155	Nakuru
A/C No.2004494	Nairobi

<i>A/C No.3830525</i>	<i>Nakuru</i>
<i>A/C No.3670556</i>	<i>Nakuru</i>
<i>A/C No.7326309</i>	<i>Nakuru</i>
<i>A/C No.6301330</i>	<i>Nyeri</i>
<i>A/C No.3559909</i>	<i>Olkalou</i>
<i>A/C No.1012144</i>	<i>Nakuru</i>

*ii) That an Order do issue compelling Barclays Bank of Kenya Ltd to give particulars of the people who have been operating and/or making withdrawals from some of the deceased's Accounts aforesaid and the source of such authority.*

*iii) The costs of the Application be in the cause.*

*iv) Any other or further Orders the honourable Court may deem fit to grant due to the special circumstances of the matter.*

2. In the grounds in support of the Application and in the Supporting Affidavit sworn on 11<sup>th</sup> February 2011, the Applicant's case is as follows;

3. That a grant of Letters of Administration was made to four persons, being the Applicants and two other and the said grant was partially confirmed on 8<sup>th</sup> June 2009. The partial confirmation was done by consent of all the parties and it was also agreed that the balances of all fixed deposits and bank accounts of the deceased as at July 1995, together with any accruing interest, be shared equally between the deceased's two houses upon liabilities being deducted.

4. Further, that the 3<sup>rd</sup> Respondent who was a Co-Administrator of the estate refused to cooperate with the others and so the distribution of monies held at Barclays Bank in the names of the deceased, stalled. Later, an Order was issued by this Court on 22<sup>nd</sup> November 2010 allowing any three of the four Administrators to sign any document in relation to the estate. That when the Applicants applied for Statements in respect of some of the bank accounts set out above, Barclays Bank (K) Ltd supplied incomplete Statements for three accounts only viz. **No.1129181 – Nakuru, No.6019155 – Nakuru and No.6301330 – Nyeri**. A perusal of the statements showed inter-alia that withdrawals were being made especially in the latter account, long after the deceased had died.

5. Lastly, that whereas other banks where the deceased had accounts have supplied Statements, Barclays Bank (K) Ltd has been reluctant to do so, hence the present Application.

6. In a Replying Affidavit sworn on 30<sup>th</sup> March 2011, David Swao, Legal officer at Barclays Bank (K) Ltd deponed that certain accounts that the Applicants wanted details of did not belong to the deceased neither were they subject matters of the proceedings herein. The Account he stated are; **No.1123361, No.1100922, No.1129181 and No.3670556**.

7. Further, that Account number **6301330** was indeed in the names of the deceased and in it, was a Standing order of Kshs.6,500/- to pay a loan, and it operated until closure in February 2009. All Statements from 5<sup>th</sup> October 1999 up to 26<sup>th</sup> February 2009 in respect of that Account were supplied and copies attached to Mr. Swao's Replying Affidavit.

8. It is also the Bank's position that Accounts numbers **1012144** and **6019155** belonged to the estate of the deceased and were operative.

9. That as regards Statements dating up to the years prior to 1999, the Bank was immediately unable to trace them and needed more time to do so.

10. For his part, the 3<sup>rd</sup> Respondent in his replying Affidavit sworn on 28<sup>th</sup> March 2011 depones that he was assigned the duty of managing the deceased's properties in Nakuru and that on **L. R. No.Nakuru/Municipality/Block 5/117** stands a hotel and the income from it is deposited in the deceased's bank account and the monies for expenditures incurred by the hotel are also withdrawn from the same Account. The same position obtains for the property known as **Nyeri Municipality/Block 1/37** where a commercial building stands.

11. I have taken into account the Further Affidavit sworn by the 2<sup>nd</sup> Applicant on 9<sup>th</sup> May 2011 in answer to the issues raised by the Respondents and the Bank as well as Submissions made and my mind is clear that there is really no issue as regards whether the Bank ought or it ought not to supply Statements. The issue is whether all the Accounts listed in the Application belong to the deceased and Mr. Swao has brought to bear the fact that some do not. Further, there is the issue whether certain withdrawals were made to the deceased's accounts after his demise. That latter issue cannot be addressed until the Statements have been supplied and so at the moment it is moot. Suffice it to say that the explanation by the 3<sup>rd</sup> Respondent as to the Accounts in Nakuru and Nyeri can only be interrogated once all the Statements are before Court.

12. The Bank is obligated to its customer and not third parties and in this case, it has a fiduciary duty to protect that customer while at the same time the obligation to disclose to the Customer the dealings regarding any accounts in the name of the Customer. In this case, the Applicants are not busy bodies but the Administrators of the account holder's estate and by dint of **Section 82** as read with **Section 83** of the **Law of Succession Act**, they are obligated to protect the estate. From Mr. Swao's Affidavit, the Bank is willing to provide the Statements save that it needs time to obtain the Statements prior to 1999. I see no party resisting that explanation and in fact I see no strong opposition to the Application except that the Respondents and the Bank are seeing malice and mala fides on the part of the Applicants. I see no such fact.

13. For my part, I am satisfied that there is merit in the Application and therefore I shall order as follows;

14. Let the Application dated 11<sup>th</sup> February 2011 be granted on the following terms;

*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;*

**Bank Account**

<b><u>No.</u></b>	<b><u>Branch</u></b>
<b>A/C No.3855688</b>	<b>Nakuru</b>
<b>A/C No.1123361</b>	<b>Nakuru</b>
<b>A/C No.1100922</b>	<b>Nakuru</b>
<b>A/C No.1129181</b>	<b>Nakuru</b>
<b>A/C No.6019155</b>	<b>Nakuru</b>
<b>A/C No.2004494</b>	<b>Nairobi</b>
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<b>A/C No.6301330</b>	<b>Nyeri</b>
<b>A/C No.3559909</b>	<b>Olkalou</b>
<b>A/C No.1012144</b>	<b>Nakuru</b>

*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.*

4) *The Application dated 11<sup>th</sup> February 2011 is determined in the above terms.*

5) *Let each party bear its own costs.*

15. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2012.**

**17/2/2012**

**CORAM**

**BEFORE LENAOLA – JUDGE**

**MIRON – COURT CLERK**

**MR. WANGA HOLD BRIEF FOR MR. JIJENY FOR NECESSARY PARTY**

**NO APPEARANCE FOR APPLICANT**

**ORDER**

**RULING DULY DELIVERED.**

**ISAAC LENAOLA**

**JUDGE**