



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 10 OF 2008

MARGARET WANJIRU MBURU.....1ST
PLAINTIFF

ANTHONY GACHIGI.....2ND
PLAINTIFF

JOSEPH GACHIGI ZAMBETAKIS.....3RD
PLAINTIFF

PETER GACHIGI NJOGU.....4TH
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....
.....DEFENDANT

RULING

On 22nd October 2010 I entered judgment for the Applicants requiring the Defendant -

- (a) to declare the rate of interest on fixed deposit account, the current and the amount thereof.**
- (b) that the total interest accrued be distributed among the plaintiffs and other beneficiaries on pro rata basis.**
- (c) that the costs be borne by the Defendant.**

In a Notice of Motion dated and filed on 19th January 2011, the Applicants sought two orders -

- (1) that the court do declare the interest applicable on Account No. 045-200-580-539 and the fixed deposit shall be the court rates of 12% p.m.**
- (2) that the costs of the application be borne by the Respondents.**

The Motion was supported by the Affidavit of Margaret Wanjiru Mburu sworn on 19th January 2011 and the grounds on the face of the motion.

According to the Affidavit of Service of one Dismus Musama a Process Server of the Court,

sworn and filed on 4th May 2011, he served the Motion upon a Mr. Mose, a legal officer of the Defendant Company who accepted service by signing and stamping on the face of the copy of the Motion, on 17th day of February 2011.

The Motion herein is premised upon the provisions of Section 1A and 3A of the Civil Procedure Act which say -

"S.1A - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1),

(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court.

Section 1B(1) provides that for the purpose of furthering the overriding objective specified in Section 1A, the court's duty is to handle all matters prescribed before it for the purposes of attaining inter alia, the just determination of proceedings, the efficient disposal of the business of the court, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

Lastly, Section 3A of the Civil Procedure Act reiterates the court's inherent power under Section 60 of the former Constitution, and Section 165(3)(a) of the Constitution of the Second Republic to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The Defendant herein is in breach of its statutory duty, enshrined in Section 1A(3) of the Civil Procedure Act to assist the court to further overriding objectives of the Act by declining to participate in the process of the court. The Defendant refused, despite service, to enter appearance or otherwise take part in the Applicants Nakuru High Court Civil Case No. 10 of 2008, the subject of this court's judgment of 22nd October 2010. The Defendant also declined to participate in the Applicant's Motion of 19th January 2011, the subject of this Ruling.

It is not proper for a leading bank to refuse to participate in, and thereby, decline to assist the court at arriving at a more just and expeditious determination of a dispute governed under the Act and claim ignorance upon execution later. It is bad for the Bank, and it is bad for the parties, and it is bad for the courts which needlessly take the flak later.

The power to determine interest payable is donated to the court by Section 26 of the Civil Procedure Act. It reads -

26. " Where and in so far as a decree is (or payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged in such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per annum."

The motion for the court to declare interest rate applicable did not specify the period from which the interest was to run. The Supporting Affidavit of Margaret Wanjiru Mburu is equally silent on the period. Mr. Githui learned counsel for the applicants suggested in his submissions that interest rate ran for

the period 2000 to 2007. I am not sure what the basis of this submission, but I guess, it is the period between the death of the matriarch, Rahab Wanjiru Evans, (6-02-2000), and the date of her Judgment defining both the beneficiaries and distribution of the date (27-07-2007).

Counsel submitted that as there were two accounts, the rate declared should apply to both accounts. According to the judgment of 20th July 2007, there was only one fixed deposit account, and as I observed in my judgment of 22nd October 2010, it is the "**custom of all banks to pay interest on funds, however small, put in a fixed deposit. It is the cost of money, and that the Defendant owes an explanation to the Plaintiffs.**"

No such explanation has been forthcoming from the Defendant, hence the orders of 22nd October 2010 directing the Defendant to declare the rate of interest "**in the deposit account, the current account and the amount thereof.**" Again, the Defendant has offered no explanation, hence the current Motion the subject of this Ruling.

The age old custom of Banks, according to Halbury's Laws of England 4th Edn. Vol. 3 paragraph 22 is to pay interest only on fixed deposit as rates usually determined by the respective banks. There is no custom or usage to pay interest on call funds - that is funds payable on demand over the counter, or cheque accounts. That the authors of Halsbury's Law of England, explain, is because chequing accounts have floating balances, upon which unless there is agreement to maintain a minimum balance, no interest is payable. There was no material before the court of any such account with regard to the current Account No. 045-200-580-539 for Ksh 6,493,950/= as of the time of the death of the matriarch. I am therefore unable to declare that any interest was payable on that sum.

However, it is acknowledged I think even by the Defendant that the sum of Ksh 20,000,000/= was in a fixed deposit account, and no doubt as observed early those were long term funds, upon which banks paid interest. The Defendant has failed to disclose the interest payable then. Counsel for the Applicant suggested a rate of 12% the court rate. It is not clear when this rate became effective, as the Civil Procedure Act (*Cap. 21, Laws of Kenya, Revised Edn. 2007*), still refers to a court rate of 6% p.a.

In the circumstances I would declare that the fixed deposit sum of Kshs 20,000,000/= bore interest at 6% per annum from the date of 6th February 2000 (*the death of the matriarch*), and 10th July 2007, I further declare in terms of Section 26 of the Act, that such accrued interest shall accrue further interest @ 6% from the date of the judgment (10-07-2007) to the date hereof, at the said rate of 6%, and from the date hereof until payment in full.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 3rd day of June 2011

M. J. ANYARA EMUKULE
JUDGE