



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 10 OF 2008**

**MARGARET WANJIRU MBURU.....1<sup>ST</sup> PLAINTIFF**  
**ANTHONY GACHIGI.....2<sup>ND</sup> PLAINTIFF**  
**JOSEPH GACHIGI ZAMBETAKIS.....3<sup>RD</sup> PLAINTIFF**  
**PETER GACHIGI NJOGU.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

This is not a common case. So it is necessary to give some antecedents to it. The suit is derived from Nakuru High Court Succession Cause No. 96 of 2000 in which the court Hon. Mr. Justice Kimaru delivered his judgment on 7<sup>th</sup> July 2007, distributing the entire estate to the beneficiaries among whom were the Plaintiffs. Among the assets which were being distributed were sums of money deposited into accounts, a current account, and a fixed deposit account.

The fixed deposit account carried a sum of Kshs 20,000,000/= while the sum in the current account was Ksh 6,493,950/=. The Plaintiffs claim that when the Defendant paid out to the beneficiaries, it never paid out the interest accrued.

With this state of affairs, the Plaintiff's Advocates wrote a letter dated 27<sup>th</sup> November 2007 seeking a clarification as to why interest on the deposit of nearly Kshs 26 million which lay in the bank for almost 7 years was not accounted for at the time of distribution of the estate.

I said in the beginning of this judgment that this was not a common case. In rather unusual manner and despite the fact that the letter was directed for the attention of a particular officer in the Defendant Bank's Nakuru Branch, it elicited absolutely no response from the Bank's Branch in Nakuru. In the circumstances, the Plaintiffs instituted suit, by a Plaint dated 5<sup>th</sup> February 2008 and filed on 11<sup>th</sup> February 2008, the Plaintiffs prayed for-

(a) *an order that the Defendant does declare the rate of interest in the fixed account, the current account and the amount thereof;*

(b) *an order that the total interest accrued be distributed among the Plaintiffs on pro rata basis;*

(c) costs of the suit.

According to the Affidavit of Service sworn on 28<sup>th</sup> April 2008 by one Faustus Ahinga Muluma, of Faalum General Agencies, P. O. Box 11410, Nairobi, an authorized process server, he served a copy of the summons together with a copy of the plaint upon a Mr. Mose, the Legal Officer at the Defendant's Kencom House Offices, 8<sup>th</sup> Floor, Legal Section, on 28<sup>th</sup> April 2008 at around 12.25 p.m. Despite accepting service of summons to Enter Appearance, and stamping it with the green stamp of the Bank - ("*KCB Legal Department 28 Apr. 2008*"), the Defendant Bank neither entered an appearance, nor thereafter filed any defence.

Exactly a month later following service of summons to Enter Appearance, the Plaintiffs' Advocates, by a notice dated 26<sup>th</sup> May 2008 and filed on 27<sup>th</sup> May 2008, requested for judgment against the Defendant for failing to file a Memorandum of Appearance and defence within the prescribed period. Judgment was duly entered and the matter was fixed for formal proof on several questions, but did not take off until the 24<sup>th</sup> June 2010 when the matter was heard before me.

The sole witness was one Margaret Wanjiru Mburu, the 1<sup>st</sup> Plaintiff. Her evidence was simple and I have already outlined most of it in my opening passages of this judgment. The sum of Kshs 26,493,950/= excluding interest accrued thereon was distributed in accordance with the judgment of Hon. Mr. Justice Kimaru delivered on 10<sup>th</sup> day of July 2007. In the judgment a copy of which was produced to court by the witness at p. 17, paragraph (xiii), the Hon. Judge said -

*(xiii)"The cash currently held in the fixed deposit account and the current account at Kenya Commercial Bank, Nakuru Branch. The total amount is Kshs 26,493,950/=, excluding interest that could have accumulated.*

*The said amount shall be distributed as follows ..."*

I would imagine that the prestige of management of a bank the size of the Defendant Bank would demand sight of both the judgment and the orders thereunder before distributing any cent or shilling of the money in deposit and current accounts respectively. The Defendant Bank would therefore have had notice as per the judgment, of the outstanding question of interest. It would therefore have answered the clarification sought in the Plaintiffs' Advocates letter of 27<sup>th</sup> November 2007. It is strange that it did not respond to it. It is still stranger that it refused to take part in the suit by entering an appearance and filing a defence. I will not for the moment entertain any idea that the Affidavit of Service was contrived and therefore false.

But whatever the cause of the failure to take part in, or to defend the suit one thing is clear, it is the practice of all banks to pay interest on funds, however small, put in a fixed deposit. It is the cost of money.

In the premises therefore the Defendant owe an explanation to the Plaintiffs.

For those reasons, I am satisfied that the Plaintiffs have proved their case on the balance of probability, and I accordingly grant the orders prayed for including costs of this suit against the Defendant.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 22<sup>nd</sup> day of October 2010**

**M. J. ANYARA EMUKULE**  
**JUDGE**