



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 590 OF 2004

FAZILA SHARIFF TEJPAN..... PLAINTIFF

VERSUS

**FIDELITY COMMERCIALBANK
LTD.....DEFENDANT**

J U D G M E N T

By a plaint filed on 29th October, 2004, Fazila Shariff Tejpar (hereinafter referred to as the plaintiff), brought this suit against the defendant Fidelity Commercial Bank Ltd seeking judgment for Kshs.3,100,000 together with interest at 11% from date of cause of action and further interest at court rates from the date of filing suit. The plaintiff also seeks costs of the suit.

The plaintiff's claim arose from a banker-customer relationship created between the defendant and the plaintiff from the year 2001 pursuant to which the plaintiff maintained a savings account and several fixed deposit accounts with the defendant. Between the year 2001 and April 2003, the plaintiff gave various instructions for the renewal of the fixed deposit accounts. However in breach of the plaintiff's instructions the defendant failed to invest and or account for the following: -

- (i) Kshs.200,000/= which the plaintiff had instructed the defendant on or about 16th December, 2002 to invest in a fixed deposit account.
- (ii) Kshs.900,000/= which the plaintiff had instructed the defendant on or about 13th January, 2003 to invest in a fixed deposit account.
- (iii) Kshs.2,000,000/= which the plaintiff had instructed the defendant on or about 26th April, 2003 to invest in a fixed deposit account.

In its defence filed on the 6th December, 2004, the defendant admitted that the plaintiff was its customer and that she maintained a savings account and various fixed deposit accounts. The defendant contended that it kept and dealt with the plaintiff's fixed deposits as per the plaintiff's instructions. The defendant further denied being indebted to the plaintiff in the sum of Kshs.3.1 million or that the plaintiff gave any specific instructions relating to that money. The defendant maintained that the plaintiff withdrew all the money that it deposited with the defendant and therefore the defendant does not owe it any money. It was further contended that the plaintiff made the withdrawals personally or through her

authorized agents namely Azfar Abbas, Mohamed Shariff and Zarin Shariff. The defendant therefore contended that if the plaintiff lost any money, the loss was due to her own negligence for which the defendant is not liable.

The plaintiff and her mother Zarin Shariff testified in proof of the plaintiff's claim . In short their evidence was as follows: Initially the plaintiff had a savings account and 4 fixed deposit accounts with the defendant. As at 16th December, 2002, the total interest due on the 4 fixed interest accounts was Kshs.250,117/40. By a letter dated 16th December, 2002, the plaintiff gave written instructions to the defendant through its manager one Mr. Abbas to purchase Swiss Francs worth Kshs.28,100/=, deposit Kshs.22,000/= into her savings account, and invest Kshs.200,000/= into a fixed deposit account. The plaintiff received the Swiss Francs, and the amount of Kshs.22,000/= was deposited into her savings account. However, the plaintiff never received any FDR receipt from Mr. Abbas with regard to the sum of Kshs.200,000/= notwithstanding her frequent reminders.

In the meantime, the original four fixed deposit accounts were renewed. On maturity, the plaintiff by a letter dated 13th January, 2003, again gave instructions to the defendant through its manager, Mr. Abbas, to purchase foreign currency worth Kshs.1,036,840/= from FDR 8318 leaving a balance of Kshs.977,506 in that account, of which the plaintiff directed Kshs.77,506/= to be credited to her savings account and the balance of 900,000/= amalgamated with the fixed deposit of Kshs.200,000/= invested on 16th December, 2002. The Plaintiff further directed that the total sum of Kshs.1.1 million be re-invested in a fixed deposit. In addition the other 3 fixed deposit accounts were also to be renewed. The plaintiff confirmed that the three fixed deposit were re-invested as directed. By a letter dated 20.2.03, the plaintiff again instructed Mr. Abbas in writing to credit the interest of Kshs.508,822/= from the three fixed deposit accounts into her current account and renew the three fixed deposit accounts in the sum of Kshs.2 million, 5 million and 5 million respectively. The plaintiff further requested for the receipt in respect of the fixed deposit of Kshs.1.1 million which she had earlier instructed Abbas to invest.

Although the plaintiff got the fixed deposit receipt for the Kshs.2 million, 5 million and 5 million, she never received any receipts for the Kshs.1.1 million. The plaintiff continued to renew the fixed deposits on maturity. On 25th April, 2003 on the plaintiff's instructions, Zarin Alibhai Shariff (the plaintiff's mother) delivered three original fixed deposit receipts, two for Kshs.5 million and one for Kshs.2 million to Mr. Abbas for renewal. Mr. Abbas asked Zarin to sign all the three fixed deposit receipts at the back. She did so believing that the signatures were necessary for the renewal of the fixed deposits. She left the receipts with Mr. Abbas. Interests in respect of the fixed deposits were subsequently credited to the plaintiff's account. The plaintiff did not however, receive any original receipt for the renewal of the deposits despite reminders to Mr. Abbas.

The plaintiff continued to follow up the issue of the fixed deposit receipts with Mr. Abbas but he kept on explaining that there was a problem with the printing.

In November, 2003 the plaintiff learnt that Mr. Abbas was no longer working with the defendant. She followed up the issue of her fixed deposit receipts with one Ms. Jiwa an employee of the defendant. The plaintiff was informed that only 2 fixed deposit receipts for Kshs.5 million each were traced in the defendant's records. The fixed deposit of Kshs. 2 million was indicated as having been encashed whilst there was no record of the fixed deposit for Kshs.1.1 million. Both the plaintiff and Zarin denied having received any cash in respect of the fixed deposit for Kshs.2 million.

On 25th November, 2003, the plaintiff withdrew her two fixed deposits in respect of the Kshs.5 million each. However, to date the defendant has failed to pay the plaintiff the fixed deposit amount in respect of the sum of Kshs.2 million and Kshs.1.1 million.

The defendant testified through its legal officer, Mr. Philip Muoka (Muoka). The officer joined the bank in June, 2004 but explained that he investigated the plaintiff's claim against the bank during the course of his work. He produced the account opening documents in respect of the plaintiff's savings account and the fixed deposit accounts. Muoka also identified a bundle of fixed deposit receipts relating

to the plaintiff's fixed deposits. He maintained that according to the bank's record, the fixed deposit accounts were fully operated in accordance with the plaintiff's instructions. With regard to the instructions alleged to have been given by the plaintiff, for the opening of the fixed deposit account for Kshs.200,000/=, Muoka contended that the plaintiff's letter dated 16th December, 2002, was not in the defendant's records and the defendant was therefore not aware of any such instructions. Muoka further explained that the respondent did not have in its record the plaintiff's letter dated 13th January, 2003 and was therefore not aware of plaintiff's instructions for deposit of Kshs.1.1 million. Muoka maintained that there was no fixed deposit account reflected in the respondent's records either for Kshs.200,000/= or Kshs.1.1 million. With regard to the plaintiff's fixed deposit account for Kshs.2 million, Muoka identified a fixed deposit receipt for Kshs.2 million which he maintained was encashed as per the acknowledgement at the back of the original fixed deposit receipt. Under cross-examination, Muoka conceded that Mr. Abbas who was formerly the general manager of the respondent, absconded from his employment. He conceded that Mr. Abbas was charged in a criminal court in absentia. He further conceded that the letters which were missing from their records could have been taken by Mr. Abbas. He also conceded that the money subject of the plaintiff's claim could also have been stolen by Mr. Abbas.

In his submission, counsel for the plaintiff submitted that the defendant has never accounted for plaintiff's fixed deposit for Kshs.2 million. The court was urged to reject the evidence of the defence that the fixed deposit receipts were encashed on 25th April, 2003 as it is clear that interest continued to be credited to the fixed deposit account long after the alleged encashment. With regard to the amount of Kshs.1.1 million, it was submitted that there was sufficient documentary evidence confirming that there was a fixed deposit account which the defendant was instructed to invest in the sum of Kshs.200,000 which was later amalgamated with the sums of kshs.900,000/= to be invested as a fixed deposit for Kshs.1.1 million.

Counsel for the defendant on his part, maintained that the plaintiff's instructions for investments of Kshs.1.1 million in a fixed deposit were not given to the defendant but to Mr. Abbas since the plaintiff's letter was addressed to Mr. Abbas and did not have any received stamp of the defendant. It was submitted that the defendant was not aware of those instructions. With regard to the fixed deposit for Kshs.2 million, which was to be renewed on 26th April, 2003 but appears to have been encashed, it was submitted that the original FDR receipt having been surrendered to the defendant with a valid signature at the back, the written instructions were to cash the fixed deposit. The court was therefore urged to go by the written document which could not be contradicted by the plaintiff's oral evidence. The court was urged to find that the plaintiff was grossly negligent in the way she handled the fixed deposit receipts as she over-trusted Mr. Abbas and relied on him personally to conduct her business. It was further submitted that the plaintiff was negligent in leaving signed fixed deposit receipts with Mr. Abbas. The court was therefore urged to dismiss the plaintiff's claim or in the alternative find that she contributed substantially to her loss and apportion liability accordingly.

A statement of issues was filed by the parties on the 15th January, 2005 from which ten issues were listed as follows:

- 1.(a) Whether as at 16th December, 2002 interest on the deposits set out in paragraph 4 of the plaint amounted to Shs.250,117/40?
- (b) Whether on the written request and order of the plaintiff the defendant agreed to account for the said interest as set out in paragraphs 5(a), (b) and (c) of the plaint?
2. Whether the said deposit receipts pleaded in paragraph 4 of the plaint were renewed for a period of 32 days as particularized in paragraph 6 of the plaint?
- 3.(a) Whether as at January, 2003 the value of FDR 8318 in the sum of Shs.2,000,000/= stood at Shs.2,014,346/= inclusive of accrued interest as pleaded in paragraph 7(a) of the plaint?
- (b) Whether on or about 13th January, 2003 at the request and order of the plaintiff in writing, the

defendant agreed to account for the said FDR 8318 in the sum of Shs.2,014,346/= as pleaded in paragraphs 7(b)(i) and (ii) of the plaint?

4. Whether in breach of the plaintiff's request or order, the defendant failed to/or refused to invest the two sums of Shs.200,000/- and Shs.900,000/= in a fixed deposit or to issue FDRs of the said amounts individually or in the amalgamated aggregate sum of Shs.1,100,000/=

5(a) Whether as at February, 2003 FDR 8319 in the sum of Shs.2,100,000/= stood at Shs.2,135,652/= inclusive of accrued interest in the sum of Shs.135,652/=?

(b) Whether consequent to the plaintiff's written request or order on 20th February, 2003 the defendant agreed to account for the said sum of Shs.2,135,652/= as pleaded in paragraph 9(a)(i) and (ii) of the plaint.?

(c) Whether the sum of Shs.2,000,000/= was at the request of the plaintiff renewed successfully to FDR 8783 and 9014 at the interest of 11% per annum as pleaded in paragraph 9(b)?

(d) Whether the defendant has with effect from 26th April, 2003 failed to account to the plaintiff the said sum of Shs.2,000,000/= or to invest it in a fixed deposit or to issue renewed FDR therefore?

6. Is the plaintiff entitled to claim Shs.3,100,000/= together with interest at the rate of 11% per annum until payment as particularized in paragraph 10(i), (ii) and (iii) of the plaint?

7. Did the plaintiff withdraw all the money that was deposited with the defendant and consequently whether the defendant does not owe the plaintiff any money as pleaded in paragraphs 6 and 7 of the defence?

8. Was the plaintiff's money lost through the plaintiff's negligence as particularized under paragraph 8 of the defence?

9. Is There any suit pending and have there been any previous proceedings in any Court between the plain tiff and the defendant over the same matter as herein?

10. Costs and interest thereon.

From the evidence which was adduced before me, it is clear that there was no dispute that the plaintiff was a customer of the defendant. It was further not disputed that as at December, 2002 the plaintiff had four fixed deposits as per FDR Nos.7833, 7840, 7841 and 7842 for Kshs.2 million; 2.1 million; 5.1 million; and 5.1 million respectively. From the fixed/call receipt worksheets, reproduced at pages 5 and 6 of the plaintiff's bundle of documents, it is apparent that the four fixed deposit accounts were due for maturity and as at 16th, December, 2002, the net interest due on these accounts were Kshs.35,862.30, Kshs.36,579.70, Kshs.88,837.70 and Kshs.88.837.70 respectively. These were documents generated within the defendant's system and I therefore have no doubt that the interest due on the plaintiff's four deposit accounts as at 16th December, 2002 amounted to a total of Kshs.250,117.40.

It was the plaintiff's evidence that she gave written instructions to the defendant through Mr. Abbas regarding how the interest of Kshs.250,117.40 was to be expended. The plaintiff has produced a copy of a letter dated 16th December, 2002, addressed to Mr. Abbas as manager of the defendant. Although the defendant denied having received this letter, it is evident that Mr. Abbas was employed by the defendant as a manager and that in giving the instructions contained in the letter dated 16th December, 2002, the plaintiff was dealing with Mr. Abbas not in his personal capacity but in his capacity as a senior manager of the defendant who was in a position to carry out her instructions.

Indeed, the plaintiff's instructions were partially complied with as there is evidence of Kshs.22,000/= having been credited to the plaintiff's savings account. The plaintiff also testified that she did receive the

foreign currency as requested. I therefore find that the plaintiff gave clear instructions as to how the sum of Kshs.250,117.40 was to be expended and this included investments of a sum of Kshs.200,000/= in a fixed deposit account. I am satisfied that the plaintiff gave the written instructions to Mr. Abbas in his capacity as servant and agent of the defendant. Mr. Abbas was therefore never an agent of the plaintiff.

Moreover, the defendant cannot rely on its failure to trace the original letter in their records as the plaintiff was not responsible for the defendant's management of their correspondence. Nor can the defendant claim that there was no received stamp of the defendant on the plaintiff's letter. The letter produced was only a copy retained by the plaintiff. It is the original letter delivered to the defendant which would ordinarily be received and stamped by the defendant. Without the original letter, there is no evidence that there was no received stamp on the letter. I find that the defendant was under an obligation to invest the sum of Kshs.200,000/= in accordance with the plaintiff's instructions

With regard to the renewal of the four fixed deposit receipts i.e. FDRs 7833, 7840, 7841, 7842, it is clear from copies of the fixed deposit receipts produced on pages 8 and 9 of the plaintiff's bundle of exhibits, that the defendant renewed the fixed deposits for 32 days and issued new fixed deposits receipts FDRs 8318, 8319, 8321, and 8320 respectively.

Similarly, with regard to the plaintiff's directions to the defendant contained in her letter dated 13th January, 2003, I have no doubt that those instructions were given to Mr. Abbas in his capacity as a servant and chief manager of the defendant. The defendant was therefore obliged to comply with those instructions. Indeed the FDR No.8318 in the sum of Kshs.2 million having been renewed, stood at Kshs.2,014,346/= inclusive of interest, as at 14th January, 2003. In her letter of 13th January, 2003 the plaintiff's instructions regarding this fixed deposit were clear. The statement of account regarding plaintiff's savings account produced at page 1 of the plaintiffs Bundle of documents clearly reflects a credit of Kshs.77,500 on 20th January 2003. This is equivalent to the balance of the amount due on FDR 8318 after taking into account the amount for the purchase of the foreign currency and the amount to be amalgamated to the fixed deposit of Kshs.200,000/=. It lends credence to the plaintiff's evidence that she received foreign currency worth Kshs.1,036,840/=. The defendant therefore ought to have amalgamated the balance of Kshs.900,000/= together with the earlier fixed deposit of Kshs.200,000/= and invested the total of Kshs.1.1 million in a fixed deposit account as directed by the plaintiff. Nevertheless, the defendant was unable to show this court how FDR 8318 was expended. I find that the defendant failed to comply with the plaintiff's instructions and is to that extent liable to the plaintiff for the sum of Kshs.1.1 million.

As regards the FDR 8487 and FDR 8488, it is not disputed that these fixed deposits were subsequently renewed and interest credited to the plaintiff's account. The original fixed deposit receipts were amongst the receipts handed over by the plaintiff's mother to Mr. Abbas for renewal. These two receipts were subsequently traced in the defendant's records and the plaintiff has already been paid in respect of the two Fixed deposits. The bone of contention is in respect of FDR No. 8486. According to the plaintiff's written instructions given vide a letter dated 20th February, 2003 addressed to Mr. Azfar Abbas, the FDR 8486 was to be renewed for Kshs.2 million. At page 16 and 17 of plaintiff's Bundle of documents are copies of FDR 8783 and 9014 which confirm that the fixed deposit for Kshs.2million was renewed in accordance with plaintiff's instructions. FDR 9014 was in fact one of the 3 receipts surrendered by the plaintiff's mother to Mr Abbas. Plaintiff's mother explained that she signed at the back of all the receipts as requested by Mr Abbas for purpose of renewal. She denied encashing FDR 9014 or any of the other fixed deposits. I am inclined to believe the plaintiff's evidence that the fixed deposit for Kshs.2 million was not encashed by her or her mother. The fact that the handwriting indicating the encashment at the back of the receipt was not that of the plaintiff or her mother but that of Mr. Abbas appears to confirm the plaintiffs contention that they did not encash the fixed deposit. Secondly the fact that interest in respect of this fixed deposit was still being credited to the plaintiff's account long after the alleged encashment is further evidence in support of the plaintiff's position that FDR 9014 had not been encashed. It is also consistent with the plaintiff's persistent demands for the original fixed deposit receipts as evidenced by letters dated 30th April, 2003, 4th September, 2003, 3rd October 2003 and 14th November 2003.

It is apparent that Mr Abbas was placed in a trustworthy position by the defendant. The plaintiff as a customer had no reason to doubt the integrity of such a highly placed officer of the defendant. Whilst the plaintiff as a customer was not expected to surrender the original fixed deposit receipts without receiving payment, the plaintiff has already explained the circumstances in which the receipt was surrendered to Mr Abbas. In my considered view, the plaintiff dealt very professionally with Mr Abbas during the ordinary course of his duties as an officer of the defendant. The plaintiff also kept clear records of instructions given to him. I am satisfied that the plaintiff was not guilty of any negligence. To the contrary, it is the defendant who failed in its duty of care to the plaintiff by entrusting her accounts to an officer who was not trustworthy and by failing to put in place appropriate checks and balances or supervisory mechanisms. The fact that charges were laid against Mr Abbas confirms that the defendant was negligent in failing to take note of fraudulent transactions involving its customer's accounts until after the customer complained.

I find that the plaintiff has proved that the defendant has failed to account to her for the sum of Kshs.3.1 million which is due to her. I reject the defence and find the defendant liable to the plaintiff for that sum. Accordingly I enter judgment in favour of the plaintiff as prayed in the plaint.

Orders accordingly

Dated and delivered this 6th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Sehmi for the plaintiff

Miss Gulenywa H/B Gitonga for the defendant