



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.263 OF 2009**

**RONGAI GENERAL COMMODITIES LTD.....1<sup>ST</sup> PLAINTIFF**

**SIMON MAINA GACHIE.....2<sup>ND</sup> PLAINTIFF**

**MONICA WANGUI NGANGA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**EQUATORIAL COMMERCIAL BANK LTD.....DEFENDANT**

**R U L I N G**

The Plaintiffs filed application dated 16<sup>th</sup> July 2018. Prayers 1, 2, 3, 4 and 6 were spent at the time of arguing the application. What remained were prayer 5 and 7. The Plaintiff sought interest on funds in fixed deposit account at commercial rate, which is now statutory 9% p.a.

In response the Respondent filed Replying Affidavit application dated 24<sup>th</sup> October 2018 which sought to review judgment delivered on 4<sup>th</sup> April 2018.

Counsel for the Defendant argued that upon perusal of bank documents they found that Kshs. 3.2M that the Court ordered to be refunded to the Plaintiff had been utilized at the request of the Plaintiff. The Respondent attached a letter dated 22<sup>nd</sup> March 2006 addressed to the bank by the Plaintiff instructing transfer of money in fixed deposit account to its current account. Documents showing being fixed in April 2005 and debit on 7<sup>th</sup> April 2006. Respondent state that the 3.5 million was paid in 2 trenches of 2,444,467 and 1,550,757. Counsel submitted that it is in that account that the Respondent has not availed the amount as doing so will amount to unjust enrichment to the Plaintiff. She urged Court to review its own decree specifically on refund of deposit.

Counsel for the Defendant confirmed that the Defendant returned the title deed to the Plaintiff as per the Courts order. She prayed for the Plaintiffs application to be disallowed.

Counsel for the Plaintiff opposed the Defendants application and relied on Replying Affidavit sworn by the Plaintiff on 5<sup>th</sup> October 2018. She averred that the fixed deposit refund they asked for was a specific 2.3M and 1M separately.

Counsel for the Plaintiff submitted that all the documents were before Court and there is nothing to review. He argued that documents JW3, JW4 and JW5 had been produced and evidence is now being given in another way to justify this application. He added that in evidence the Defendant said they declined to release the deposit, as it was part of security; further the witness said he did not know how much interest was paid on fixed deposit.

Counsel argued that this is an attempt by the current Legal Officer to frustrate payment of the deposit. He said that the documents they are relying on are for Spire Bank yet there was no Spire Bank in 2004. He said that judgment has been given and we cannot now rely on Affidavit evidence.

Counsel submitted that there is no prayer to reopen suit and that on a balance of probabilities; the Court finding is the right one.

I have considered rival arguments herein. I have also perused documents attached to Affidavits filed. The letter dated 22<sup>nd</sup> March 2006, which is marked JW3 requests, the bank to offset the fixed deposit account inclusive of interest against the loan and the balance credited to their current account. In the letter, the Plaintiff applied for afresh overdraft of 3 Million and a letter of credit revolving facility of 3 Million.

Similar request is made in the letter dated 28<sup>th</sup> March 2006. Bank statement confirm that money was paid out from fixed deposit account on 7<sup>th</sup> April 2006. the payment was done after the requests. Plaintiff say the statement is on letter head of spire bank which was not in existence at the time: however there is no doubt that from pleading the bank changed names from southern credit bank to spire bank and if printing of statement was done after the change it had to be done in the name the bank was using at the time of printing. The two letters requesting for funds are on Plaintiffs letter head and signed.

From the foregoing there is prove that the deposit was paid out. Paying it out again would be enriching the Plaintiff unjustly.

From the foregoing I find that there is sufficient reason to review my order for refund of fixed deposit. My finding is that there is sufficient proof that the fixed deposit was paid out as per JW5. I therefore set aside the order for payment of deposit. It follows therefore that the application for payment of interest on deposit is dismissed.

**FINAL ORDER**

1. Order 2 in the Judgment delivered on 18<sup>th</sup> day of April 2018 is set aside.
2. Prayer 5 and 7 of Plaintiff's application dated 16<sup>th</sup> July, 2018 are dismissed.
3. Each party to bear own costs in respect of the two applications.

**Ruling Delivered, Dated and Signed at Nairobi this 13<sup>th</sup> day of December, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

Naomi: **COURT ASSISTANT**

Kingara: **COUNSEL FOR PLAINTIFF**

Ms Karani: **COUNSEL FOR DEFENDANT**