



Khimji (Suing as Sellers Representative on Behalf of the Former Shareholders of Fidelity Commercial Bank Ltd) v SBM Bank Holding Limited & another; SBM Holdings Limited & another (Proposed Defendant) (Civil Suit E333 of 2022) [2024] KEHC 9198 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E333 OF 2022
A MABEYA, J
JULY 31, 2024**

BETWEEN

**SULTAN KHIMJI PLAINTIFF
SUING AS SELLERS REPRESENTANTIVE ON BEHALF OF THE FORMER
SHAREHOLDERS OF FIDELITY COMMERCIAL BANK LTD**

AND

**SBM BANK HOLDING LIMITED 1ST DEFENDANT
CENTRAL BANK OF KENYA 2ND DEFENDANT**

AND

**SBM HOLDINGS LIMITED PROPOSED DEFENDANT
SBM AFRICA HOLDINGS LIMITED PROPOSED DEFENDANT**

RULING

1. This ruling determines three applications and a preliminary objection, namely;
 - a. The application dated 10/8/2023 by the 1st defendant,
 - b. The application dated 30/8/2023 by the plaintiff,
 - c. The application dated 27/2/2024 by the plaintiff, and
 - d. The preliminary objections dated 12/10/2023 and 18/3/2024 by the proposed defendants.



2. When the matter came up for hearing on 8/3/2023, the Court directed that the applications will be determined together.

Application dated 10/8/2023.

3. The Motion was made pursuant to sections 3A and 75(1) of the *Civil Procedure Act*, Order 42 rule 6, Order 51 and Order 43 rule 1(2) of the Civil Procedure Rules 2010. It sought orders for stay of proceedings pending hearing and determination of the appeal at the Court of Appeal arising from the ruling of this Court made on 28/7/2023.
4. In support of the application, the 1st defendant relied on the grounds set out on the face of the Motion and the supporting affidavit of George Odete of even date. The 1st defendant contended that by the ruling of 28/7/2023, the Court dismissed its application for stay and striking out the suit. That it however allowed the plaintiff's application for injunction. It contended that, as at the time of the ruling, SBM Africa had not been enjoined as a party and the 1st defendant was informed of the ruling via local dailies.
5. It was contended that since the 1st defendant had not been notified of the ruling, it was unable to orally obtain leave to appeal a right granted under Order 43 of the Civil Procedure Rules. That the application was filed 8 days after the delivery of the ruling. That it was directed to file a defence within 14 days which would mean that the 1st defendant has acquiesced to the jurisdiction of the Court. That in filing the defence, the purpose of the appeal would be defeated. The applicant contended that the appeal was arguable and had a strong chance of success and if the stay sought was not granted, the 1st defendant and SBM Africa would suffer irreparable loss.
6. The plaintiff opposed the application vide a replying affidavit sworn by Sultan Khimji on 30/8/2023. It contended that, in its ruling of 28/7/2023, the Court had observed that due to the complexity and seriousness of the issues in the suit, it was necessary to have the interrogation of the same at the trial. That SBM Bank Holdings Limited was a commercial bank listed in the stock exchange of Mauritius and had several subsidiaries that participated in the transaction.
7. It was contended that stay of proceedings was a fundamental interruption of a party's right to conduct litigation towards the trial. That the 1st defendant was yet to file an appeal in the Court of Appeal and stay of proceedings should not be imposed unless a party demonstrates that the proceedings are frivolous and there was no cause of action. That the 1st defendant had failed to demonstrate how the appeal would be rendered nugatory.
8. The 1st defendant filed a supplementary affidavit dated 26/9/2023 sworn by George Odete. He stated that the 1st defendant had no interest in the proceedings before Court except as a shareholder. That it was further not aware of its subsidiary trying to dispose of its interests in SBM Kenya. That the plaintiff's claim was predicated on the Heads of Terms dated 17/11/2016 and the share purchase agreement dated 17/11/2016 both of which did not involve the 1st defendant.
9. The 1st defendant submitted that the intended appeal was arguable with strong chances of success as it raises issues of significant importance to the banking industry and investors. That the application was filed timeously as only 15 days had lapsed after the ruling was delivered. It was submitted for the 1st defendant that the appeal would be rendered nugatory if the orders sought are not granted.
10. For the plaintiff, it was submitted that the 1st defendant ought to have demonstrated that the appeal raised arguable issues, that it would be rendered nugatory if orders for stay are not granted and that there were exceptional circumstances which would warrant a stay of proceedings. It was further



submitted that the appeal was yet to be filed and that the defendant ought to have demonstrated the substantial harm it would suffer if the application was not allowed.

Notice of Motion dated 30/8/2023

11. The Motion was brought under sections 1A, 1B, 3A and 25(ii) of the *Civil Procedure Act*, Order 1 rule 7, Order 7 rule 5, Order 8 rule 1, Order 10 rule 5, Order 36 rule 1, Order 42 rule 6(2)(b), Order 51 rule 1&4 of the Civil Procedure rules 2010.
12. In this Motion, the plaintiff sought leave to amend the plaint to substitute the 1st defendant with SBM Holdings LTD and add SBM Africa Holding Ltd as the 3rd defendant. It also sought that the 1st defendant do provide security for due performance of the orders of the Court, that is, Kshs. 2.5 billion being the sum claimed in the suit and in default the defendant's defenses be struck out and summary judgment be entered against them accordingly.
13. The application was supported by the grounds set out on the face of it and by the supporting affidavit of SULTAN KHIMJI. He averred that it had occurred to him that SBM Holdings Limited was a commercial bank listed in the stock exchange of Mauritius and that it was the parent company of several subsidiaries including SBM Bank Holdings Limited. That there was an editorial/typographical error in filing the plaint in the use of the name SBM Bank Holdings Ltd instead of SBM Holdings Ltd. That it was necessary to amend the plaint to capture the correct parties who would be directly affected by the orders emanating from the Court.
14. The application was opposed by the 2nd defendant vide grounds of opposition dated 11/10/2023 and a replying affidavit of Edwin Psovoi Kipsitet sworn on 9/10/2023. The 2nd defendant contended that the Court did not have the jurisdiction to hear and determine issues arising from the head of terms signed on 17/11/2016 as the place for arbitration was London.
15. That the Court had directed the defendants to provide a list of disposal accounts and impaired loans as at December 2016. That however, the 2nd defendant could not comply therewith as it did not manage, direct or control disposal accounts as that was the mandate of the banks themselves. That the plaintiff could not seek to amend a plaint and introduce 4 new prayers in the application. That the 2nd defendant had filed a statement of defence which cannot be struck out without a full hearing.
16. In opposition to the application, the 1st defendant filed a replying affidavit sworn on 12/10/2023 by George Odete. It contended that the plaintiff could not purport to join SBM Holdings Limited and SBM Africa Holdings Limited to the order contained in the ruling. That the order for production of documents was made against the 1st defendant SBM Bank Holdings Limited which was not a party to the Share Purchase Agreement ("the SPA") and it cannot therefore produce documents and information that it did not have.
17. In addition, the 1st defendant raised a preliminary objection dated 12/10/2023. It was premised on the grounds that the Court did not have jurisdiction to determine the suit before it. That the plaintiff and the 2nd defendant had by way of Head of Terms dated 17/11/2016 agreed to be governed by English Law.
18. That the dispute herein arose from the SPA dated 28/3/2017 between the plaintiff and the proposed 3rd defendant. That the application for joinder was made over 6 years from the date the cause of action arose and therefore barred by the provisions of section 4(1) of the Limitations of Actions Act.
19. The 2nd defendant submitted that the present dispute could only be determined in England and therefore the jurisdiction of the Court was ousted. That the 2nd defendant's defence raised triable issues



as the 2nd defendant carried out its duties as a regulator and in accordance with Article 231 of *the Constitution*. That the 2nd defendant did not maintain customer accounts of any bank as had been directed by the Court.

20. The 1st defendant submitted that the plaintiff's claim was barred by *Limitation of Actions Act* as the period of limitation commenced from the time of execution of the Heads of Terms and the Share Purchase Agreement. That the joinder application was after the period of limitation. Counsel submitted that the application by the plaintiff to strike out the defendants defence was premature as it could only apply when the defendants have been enjoined to the proceedings.

Application dated 27/2/2024.

21. The application was brought under Article 22(1), 23(1), 48, 50, 159(1), 160(3) of *the Constitution* of Kenya 2010, order 40 rule 1 of the Civil Procedure Rules. It sought orders to the effect that the Court do give orders reaffirming its jurisdiction on this matter. That orders be granted directing Sbm Holdings Ltd and SBM Africa Holdings Ltd to withdraw cases filed by them outside Kenya within 30 days failure of which they be held in contempt. That the firm of Oraro & Co advocates be prohibited from participating in the proceedings outside the country and in default they be held in contempt. Finally, the 1st defendant be held liable to pay costs of the application and legal costs arising from seeking advice and pursuing proceedings in Mauritius and the United Kingdom.
22. The application was supported by the affidavit of Sultan Khimji sworn on 27/2/2024. He contended that SBM Holdings Ltd applied to the High Court of England and Wales and sought injunctive orders against the plaintiff which were granted. That there were serious consequences in the penal notice in the event he disobeyed the said orders.
23. That on 6/2/2024, SBM Africa Holdings Ltd made an application at the Supreme Court of Mauritius prohibiting him from acting in his own capacity and as the authorized representative of the shareholders of Fidelity Bank Limited and injunctive orders were granted. That the protection orders are important as they will affirm the plaintiff's right to proceed with the proceedings herein without being hindered by the antisuit injunctions in the United Kingdom and Mauritius.
24. The 2nd defendant opposed the application vide a replying affidavit of Edwin Psoboi Kipsitet sworn on 7/3/2024. It was averred that the 2nd defendant was not a substantive party to the Head of Terms Agreement but it however signed off the agreement by acknowledging the terms which the parties had shared in a bid to keep it apprised of the transaction. That the place of dispute resolution as agreed by the parties was prescribed on the mandatory terms.
25. The 1st defendant on its part opposed the application vide a replying affidavit sworn of Kevin Kimani sworn on 8/3/2024. He deponed that the 1st defendant was granted an interim injunction pending the hearing of the substantive application on anti-suit injunction. That when the plaintiff appeared, he sought for an adjournment for him to be able to get legal representation and the same was granted for a period of one year. At that material time, the Court observed that the injunctive orders were still in force.
26. It was the 1st defendant's position that the plaintiff could not state that his right to access to justice was being impeded since he had demonstrated his intention of participating in the proceedings before the English Court. That the actions of the proposed defendants sought to direct the plaintiff to pursue the reliefs he seeks herein in the correct forum.
27. The proposed 3rd defendant raised a preliminary objection dated 18/3/2024 to the applications dated 30/8/2023 and 27/2/2024. It was premised on the grounds that the 3rd defendant did not submit to



the jurisdiction of the Court as it was not a party to the proceedings. That the Court lacks jurisdiction to hear and determine the matter.

Analysis

28. I have considered the pleadings before Court, the submissions on record and the authorities relied on by Learned Counsel. The issues that arise for determination are: -
- a. Whether the 3 Preliminary Objections are sustainable.
 - b. Whether the 1st defendant has made out a case for stay of proceedings pending appeal.
 - c. Whether the plaintiff should be granted leave to amend the plaint
 - d. Whether the defendant should deposit security equivalent to the sum claimed of Kshs.2.5 million.
 - e. Whether the plaintiff has made out a case for grant of the orders sought in the motion dated 27th February 2024.

Whether the 3 preliminary objections dated 12/10/2023 and 18/3/2024 are sustainable

29. In *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696, a preliminary objection was defined as consisting of a point of law which is pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It is in the nature of what used to be a demurrer and is usually raised on the assumption that all the facts pleaded by the other side are correct.
30. In the preliminary objections, the 1st and 3rd proposed defendants challenged the Court's jurisdiction on the ground that the applicable law was the English law and that all disputes were to be determined by arbitration and that the application had been caught by limitation.
31. On the issue of jurisdiction, this Court had addressed the same in its ruling delivered on 28/7/2023. It does not matter that the proposed defendants were not parties as at the time the said ruling was made. The issue had been dealt with finality. It is the Court of Appeal to consider the same.
32. In that ruling, the Court made a finding that the plaintiff's claim as against the defendants was not a dispute contemplated in the agreement. Rather, his claim challenges the said agreements for being a misrepresentation marred with deceit, coercion undue influence, duress and abuse of the regulation position as well as fraud. It is on this basis that this Court directed that pertinent issues that challenge conduct of the defendants in the execution of the documents fall under the purview of this Court.
33. On the issue of limitation, I will deal with the issue when considering whether the plaint should be amended.

Whether the 1st defendant has made out a case for stay of proceedings pending appeal

34. The jurisdiction of the Court in an application for stay of proceedings is derived from Order 42 rule 6 of the Civil Procedure Rules and the inherent jurisdiction under Section 3A of the *Civil Procedure Act*.
35. In *Re Global Tours & Travel Ltd HCWC No. 43 of 2000*, the court observed as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay



of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

36. The application before court impugns the ruling of this Court of 28/7/2023 wherein the Court dismissed the 1st defendant’s application for stay of proceedings pending referral to arbitration. Being aggrieved by that decision, the 1st defendant has preferred an appeal at the Court of Appeal. Its contention is that the application was filed timeously without delay and the appeal would be rendered nugatory if the orders for stay of proceedings are not granted.
37. Taking all the factors into account, an order of stay of proceedings ought to be given sparingly so as not to interfere with the right of a litigant to prosecute its case. In the present case, the 1st defendant’s position is that the suit is to be determined while there is an arbitral clause found in the contract executed by the parties.
38. An order for stay of proceedings should be granted sparingly as it impacts on a party’s right to a fair hearing. The discretionary power of the court should be invoked upon satisfaction that there is sufficient cause to stay the proceedings. When a stay of proceedings is ordered, it leads to case backlog which impacts negatively on the right to access to justice.

Whether the plaintiff should be granted leave to amend the plaint

39. Section 100 of the [Civil Procedure Act](#) and Order 8 rule 3 of the Civil Procedure Rules, 2010, gives the court discretion to allow parties to amend pleadings.
40. Order 8 Rule 3 provides: -
 - “ 1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
 - 2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
 - 3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 - 4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the



capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

- 5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

41. The plaintiff has moved the court seeking to amend the plaint to substitute the 1st defendant with SBM Holdings LTD and add SBM Africa Holdings Ltd as the 3rd defendant in the suit. The plaintiff’s case was that the use of the name SBM Bank Holdings Ltd as opposed to SBM Holdings Ltd was an editorial/ typographical error.

42. In *KK Lodgit Limited v Geminia Insurance Company Ltd & Another* (2021) eKLR, it was held that: -

“..... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party’s case.”

43. In the proposed amendment, the plaintiff intends to add two parties. He explained that there was an error in the name of the 1st proposed defendant. In my view, the use of the name SBM Holdings Ltd and SBM Bank Holdings Ltd can be problematic. One may use one name for the other. I think the amendment falls squarely under Order 8 Rule 3 sub-rules 2 and 3 of the Civil Procedure Rules.

44. As regards the proposed 3rd defendant, there was no satisfactory explanation why it had not been joined from the commencement of the suit. It is trite that an amendment when allowed dates back to the date of the action. Joining the 3rd proposed defendant in my view would prejudice it as it may not avail itself the accrued right of the defence of limitation.

45. Accordingly, the objection limitation raised succeeds as it relates to the proposed 3rd defendant. However, as regards the 1st proposed defendant, I reject the objection and allow the application for amendment against it.

Whether the defendant should deposit security equivalent to the sum claimed of Kshs.2.5 million.

46. The plaintiff sought orders for security in the sum of Kshs 2.5 billion. The plaintiff was apprehensive that SBM was likely to sell SBM Kenya and exit the Kenyan banking industry. The general rule is that security is normally required from the party who is resident outside the jurisdiction of the court.

47. In view of the proceedings before the Court, the plaintiff has not demonstrated why the defendants should deposit the security. There is no evidence that the defendants dispose of their assets in Kenya. I find that the plaintiff’s apprehension is not enough to invoke the Courts draconian discretion to order the giving of security.

Whether the plaintiff has made out a case for grant of the orders sought in the Motion dated 27/2/2024.

48. In the application dated 27/2/2024, the plaintiff sought 14 orders. The plaintiff wants the Court’s direction with respect to the parallel proceedings in Kenya, against those filed by the defendants in the United Kingdom and Mauritius. According to the plaintiff, two injunctive orders for anti-suit were



granted by the said courts and the same would have penal consequences if the plaintiff failed to adhere to them. In this regard, the plaintiff wants the Court's affirmation of its jurisdiction. The plaintiff further wants the Court to order the defendants to withdraw the cases filed in Mauritius and United Kingdom and bar their advocates from participating in proceedings in the United Kingdom.

49. The Kenya courts have always recognized the supremacy of our Constitution as well as our laws within our borders. Being the guardians of *the Constitution*, it is of paramount importance to ensure that the provisions contained therein are interpreted and enforced in favour of the constituents of the country.
50. Article 165(3) (a) of *the Constitution* sets out clearly the jurisdiction of the High Court as follows:
- (3) Subject to clause (5), the High Court shall have —
- (a) unlimited original jurisdiction in criminal and civil matters;
51. Further, Article 48 recognizes the right to access to justice for all and article 50 guarantees the right to a fair hearing. The plaintiff has a right under *the Constitution* to present its case in a court of competent jurisdiction. This Court has already held that it has the requisite jurisdiction to hear and determine the matter before it.
52. In the same breath, the defendants have the right to pursue remedies they deem fit under any contractual relations they may have entered inter-se. Their act of invoking the jurisdiction of other courts outside Kenya and seek to hamstring the plaintiff's constitutional rights within Kenya won't do. Those courts cannot purport to exercise their jurisdiction over what happens in Kenya. To the extent that they purport to injunct the plaintiff from proceeding with these proceedings, it is an exercise in futility. These proceedings will proceed to the full extent permitted by law.
53. Accordingly, I make the following orders: -
- a. The preliminary objection by the 1st proposed defendant fails.
 - b. The Preliminary objection by the 3rd Proposed Defendant succeeds.
 - c. The application dated 30/8/2023 succeeds only to the extent of amendment of the plaint and only in respect of the 1st proposed defendant.
 - d. The application dated 10/8/2023 is disallowed.
 - e. The application dated 27/2/2024 is partially allowed in terms of prayer Nos. 4, 5, 6 and 10 in respect of the proposed 1st defendant.
 - f. Parties to bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE

