



Khimji (Suing as Seller’s Representative on Behalf of the Former Shareholders of the Former Fidelity Commercial Bank Ltd) v SBM Bank Holdings Limited & another (Civil Suit E333 of 2022) [2023] KEHC 20940 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20940 (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 28, 2023

BETWEEN

SULTAN KHIMJI (SUING AS SELLER’S REPRESENTATIVE ON BEHALF OF THE FORMER SHAREHOLDERS OF THE FORMER FIDELITY COMMERCIAL BANK LTD) PLAINTIFF

AND

SBM BANK HOLDINGS LIMITED 1ST DEFENDANT

CENTRAL BANK OF KENYA 2ND DEFENDANT

RULING

1. Before Court are three applications dated 16/9/2022, 29/9/2022 and 30/9/2022 hereinafter referred to as the 1st, 2nd and 3rd application, respectively.
2. The first application dated 16/9/2022 was brought by the 1st defendant. It was brought, inter-alia, under sections 1A, 1B and 3A of the Civil Procedure Act, Section 6(1) and (2) of the Arbitration Act, and Rule 2 of the Arbitration Rules.
3. It sought a stay of these proceeding pending reference of the dispute between the parties to arbitration as per the terms of the Share Purchase Agreement dated 28/3/2017 (“the SPA”). It was supported by the affidavit of George Odete sworn on 16/9/2022.
4. It was contended that pursuant to the SPA between the former shareholders of Fidelity Commercial Bank Limited, SBM Africa Holdings Limited and Fidelity Commercial Bank Limited, the 1st defendant and the former shareholders of Fidelity Commercial Bank Limited (FCBL) who were the sellers



- engaged in a sale and purchase of shares. That the plaintiff was one of the sellers and was appointed as the seller's representatives and the 1st defendant was the buyer.
5. That the SPA contained a valid and binding arbitral clause being Clause 30.1 which provided that disputes arising therefrom would be resolved by consultation upon one party issuing a written request for consultation and if the dispute could not be resolved within 30 days of such request, then any party could refer the dispute to arbitration in accordance to Clause 30.2 to 30.8.
 6. That the reliefs sought by the plaintiff arose out of or were connected with the SPA thus the dispute between the plaintiff and 1st defendant was expressly subject to arbitration. That it had entered appearance under protest vide the memorandum of appearance dated 16/9/2022 and had no intention of filing a substantive defence to the main suit due to the binding arbitral clause. That the proceedings should therefore be stayed.
 7. The 2nd defendant responded to the application vide the amended grounds of opposition dated 4/11/2022. It contended that it was not a party to the SPA. That although the claim against the 2nd defendant was outside the purview of the SPA, nevertheless the dispute ought to have been referred to arbitration.
 8. The plaintiff opposed the application vide the lengthy replying affidavit sworn by Sultan Khimji on 28/10/2022. He averred that the 2nd defendant coerced the shareholders of FCBL to enter into the SPA which was a raw deal for FCBL. That FCBL was grossly undervalued in the take over by SBM as it was a going concern. That the market value for its banking license from the 2nd defendant was not taken into account as well as its current and projected financial operations.
 9. That other than from seeking compensation from SBM and CBK, the plaintiff also sought a declaration that the Heads of Terms between the plaintiff and SBM dated 17/11/2016 and the subsequent SPA were invalid and void and that the former shareholders of FCBL were entitled to compensation for the full value of the Bank as at December 2016.
 10. That the plaintiff's claim was not based only on breach of contract or matters solely within the purview of the SPA, but there were claims for coercion, misrepresentation, fraud, breach of constitutional and statutory duty, unjust enrichment and restitution. That the claim was founded on contract and tort and was beyond the arbitral scope as only the Court was vested with jurisdiction to determine such claims.
 11. That where there is an allegation of fraud, the arbitral jurisdiction could be ousted and the plaintiff had established that there was a coloration between the allegations of fraud made and the prayers which were not in the nature of enforcing the contract but avoiding it.
 12. That in light of the serious allegations of fraud against the defendants, the suit could not be properly adjudicated upon by an arbitrator and it was necessary for the parties to appear in a more appropriate forum. That it was thus in the interest of justice that the application be dismissed and the suit be heard in the Kenyan courts.
 13. The 2nd application was brought by the plaintiff and was dated 29/9/2022. It sought to restrain the defendants from advertising for sale, offering for sale, transferring or receiving any benefit from SBM Bank Kenya Limited. That they be further restrained from taking out dividends or drawings or receiving any loans or monetary transfers.
 14. There were further prayers for the defendants to provide a full list of the Disposal Accounts and Impaired Loans ("the aforesaid accounts") as at December 2016 and related details of accounts



- recovered in part or in full to-date. The particulars of any recovery costs applied to offset the recovery and the status of the aforesaid accounts and the account owners.
15. The grounds thereof were set out in the affidavit of the plaintiff sworn on 29/10/2022. It was contended that the plaintiff was the seller's representative and was acting on behalf of the former shareholders of FCBL. That they had entered into the SPA with the 1st defendant who subsequently established SBM Bank Kenya Limited using the license and assets of FCBL with the authority of the 2nd defendant.
 16. That the 1st defendant had breached the terms of the SPA which had been entered into under duress and false representations. That the plaintiff's constitutional and legal rights had been violated. That there were sums owed to the former shareholders of FCBL which were to be paid when the accounts were recovered through the operations of SBM Bank.
 17. That there was a grave reasonable and immediate apprehension on the plaintiff's part and the former shareholders that if the orders sought were not granted, the 1st defendant would sell and dispose SBM's assets. That the plaintiff would suffer irreparable harm and had established a prima facie case with a probability of success.
 18. The 2nd defendant responded to that application vide the replying affidavit sworn by Edwin Psoboi Kipsitet on 2/11/2022. It was contended that the 2nd defendant was not a party to the SPA that was the genesis of the dispute. That section 9 of the *Banking Act* did not apply to the transaction between the shareholders of FCBL and the 1st defendant. That since no assets and liabilities of an institution were being transferred, no prior approval of the Cabinet Secretary for National Treasury was required in law.
 19. That under section 13(1) of the *Banking Act*, no person should hold directly or indirectly more than 25% of the share capital of any banking institution. That the 2nd defendant requested the Cabinet Secretary for the National Treasury to approve the transaction and exempt the 1st defendant from section 13, as required by section 53 of the *Banking Act*, because the 1st defendant was acquiring more than 25% share capital of FCBL.
 20. The 2nd defendant denied having coerced the plaintiff and his other fellow shareholders as alleged and that the same was evidenced by Clause 30 of the SPA. That it was late in the day for the plaintiff to complain of a bad bargain having entered into the SPA willingly.
 21. That the requirement for the consent by the 2nd defendant to the sale was acknowledged in clause 4.1.9-4.1.18 (Regulatory Conditions) of the Agreement which acknowledged the 2nd defendant's statutory duty to approve the sale.
 22. That though the 2nd defendant's Governor was not a substantive party to the Head of Terms Agreement, he signed the agreement to acknowledge the terms which the parties had shared with the 2nd defendant to keep it apprised during the transaction. That vide various letters, FCBL updated the 2nd defendant of its status and liquidity position and vide press releases of 22/11/2016, 4/1/2017 and 11/5/2017, the 2nd defendant informed the public of the progress of the acquisition of FCBL by SBM Holdings Limited of Mauritius. In the premises, the application did not meet the conditions for granting the orders of injunction.
 23. The third application was brought by the 2nd defendant and was dated 30/9/2022. It was brought under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15 and Order 51(1) of the Civil Procedure Rules.
 24. The application sought the striking out of the suit against the 2nd defendant.



25. The grounds for the application were set out on its face and in the supporting affidavit of Kennedy Kaunda Abuga sworn on 30/9/2022. It was contended that the 2nd defendant was not a party to the Share Agreement dated 28/3/2017 which was the subject matter of the suit.
26. That the agreement provided for dispute resolution by way of arbitration and the same was not binding on the 2nd defendant who was not a party to the agreement. That the suit against the 2nd defendant was thus scandalous, vexatious and abuse of the court process.
27. That the 2nd defendant's supervisory and regulatory functions are provided for under the Central Bank Act and the Banking Act and are intended to promote financial stability through maintenance of a well-functioning banking system. That the 2nd defendant's approval of the share purchase is a condition precedent to the acquisition of shares as provided by section 9(5) of the Banking Act. That there was no connection between the SPA and the allegations made against the 2nd defendant.
28. The plaintiff opposed that application vide his replying affidavit of 25/10/2022. He contended that at the material time, he had suffered financial losses following the wave of closure of small banks and thus needed funding from CBK. That CBK brokered a deal with SBM Mauritius to sell FCBL for one US dollar to ensure the latter bought FCBL despite the same being acknowledged to be a small bank.
29. That CBK was involved in the entire process and benefited from the results thereof and breached its statutory duty. That CBK directly influenced the preparation of the Heads of Terms that indicated that SBM would acquire the entire shareholding of Fidelity Bank. That CBK created a hostile environment which made the officials of Fidelity Bank to execute the Head of Terms on the same day which was also signed by the CBK Governor. That there was intense pressure and threats that FCBL would be shut down and denied liquidity support.
30. That CBK protected the interests of SBM in the Heads of Terms and failed to act when SBM negated one of the terms by failing to inject Kshs.1.4 billion into FCBL. That CBK applied regulatory pressure in the negotiations and failed to exercise its mandate to ensure integrity, stability and soundness of banking institutions.
31. That no suit ought to be summarily dismissed unless it appears to be so hopeless and discloses no reasonable cause of action and is weak beyond redemption by amendment. That if a cause of action is shown, the suit ought to be allowed to proceed. That the suit against CBK is not scandalous and there is relevant and evident proof of the allegations made therein. That a reasonable cause of action against CBK was established and it is in the interest of justice that the suit against CBK be maintained and the application dismissed.
32. The parties filed their respective submissions which are on record and have been considered. The Court has also considered the rival contestations.
33. I will begin by determining the first application dated 16/9/2022 as to whether the suit should be stayed and the matter referred to arbitration.
34. Section 6(1) of the Arbitration Act No. 4 of 1995 provides: -

“ A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party



enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

35. Where a party alleges any of the matters in (a) and (b) above and they are proved, the Court will not stay the proceedings and refer the matter to arbitration.

36. This Court has seen the SPA dated 28/3/2017. The same was entered into between the former shareholders of FCBL, SBM Africa Holdings Limited and Fidelity Commercial Bank Limited.

37. Clause 30.1 thereof provides that: -

“in case of any dispute arising out of or in connection with this Agreement (including as to the interpretation, validity, termination or enforceability of this Agreement) between the parties (any such dispute hereinafter referred to as the Dispute), the parties shall use all reasonable efforts by consultation to resolve the Dispute on an amicable basis. Such consultation shall begin immediately after one party has delivered to the other party a written request for such consultation. If such Dispute cannot be settled within thirty (30) days after a request for such consultation is made, then any party may refer the Dispute to arbitration in accordance with the provisions of Clauses 30.2 to 30.8 (both inclusive)”

38. The intention of the parties was clear that should any dispute arising out of or in connection with the SPA would be resolved through arbitration.

39. Arbitration is encouraged in our legal system by virtue of Article 159(2) (c) of *the Constitution* which provides: -

“In exercising Judicial authority courts and Tribunals shall be guided by the following principles –

“alternative forms of dispute resolution including reconciliation, mediation, arbitration ----- shall be promoted.”

40. The court will thus promote other forms of resolution where the circumstances of the case so allows and in particular where the parties have agreed to alternatives modes of dispute resolution.

41. The applicant submitted that all disputes were to be settled first through consultation, and if that failed, the dispute was to be referred to arbitration.

42. It is trite that the duty to prove that the matters in dispute fell within a valid and binding arbitration clause was on the applicant. In *County Government of Kirinyaga v African Banking Corporation Ltd* [2020] eKLR, it was held that: -

“The onus of proving that the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for a stay of proceedings, once this burden has been discharged then the burden shifts to the opposing party to show cause why the effect should not be given to the arbitration clause

...



It is not sufficient for the applicant to state that under clause 26 of the agreement it is stipulated that any and all disputes arising out of or in connection with the agreement including and not limited to a dispute over its validity shall be referred to arbitration. The applicant must specify the dispute and the nature of the dispute.”

43. The Court has considered the application and its supporting affidavit. The applicant did not state that the claim by the plaintiff was a dispute that was contemplated in the SPA for reference to arbitration. The 1st defendant attempted to rectify this by identifying the issue and rejecting the claim of invalidity of the agreement vide its written submissions. It is however trite that submissions are not pleadings and the 1st defendant is bound to its supporting affidavit. Parties cannot amend their pleadings by way of submissions.
44. On the other hand, the plaintiff's case was that the agreement was invalid due to various reasons including misrepresentations, deceit, coercion, undue influence, duress, abuse of regulatory position and fraud. The 1st defendant/applicant did not respond to the claim on invalidity of the contract and the claim remained uncontested. Not only did the 1st defendant fail to identify the nature of the dispute, it also failed to prove that the dispute fell within the arbitration clause and thus the burden of proof remained undischarged.
45. In the circumstances, the issue of validity of the contract, in view of the allegations of coercion, misrepresentation, deceit, abuse of regulatory position and fraud, falls for determination by this Court. Granting of stay orders is discretionary and in circumstances where the applicant failed to discharge its burden, the Court is not inclined to exercise such discretion and allow a stay.
46. Further, the 1st defendant was itself guilty of failing to abide by Clause 30.1 which it now sought to rely on. There was no proof that the 1st defendant nor the plaintiff had initiated consultation before even referring the dispute to arbitration.
47. This further reinforces the earlier finding that the 1st defendant failed to prove that there was a dispute or even the nature of the dispute such that it would be premature to refer the matter to arbitration. There was nothing to show that there was a dispute arising out of or connected to the agreement such that Clause 30.1 would apply.
48. The plaintiff also raised the issue that the suit was non-arbitrable due to the nature of the claims raised in the plaint including fraud. In *Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & another* [2020] eKLR, it was held that: -

“... where the parties have entered into an arbitration clause, none of the parties will be permitted to commence an action in Court unless they bring themselves within two exceptions:

- a) Where they demonstrate that the arbitration agreement is null and void, inoperative or otherwise incapable of being performed. This would be the case, for example, where there are grounds for rescinding the arbitration agreement qua contract.
- b) Where the subject matter of the controversy is not covered by the arbitration agreement. Stated differently, parties to an arbitration agreement are not required to go to arbitration when the specific subject matter of the controversy is non-arbitrable.



...

First, where a party plausibly pleads fraud and the fraud relates to a right in rem (as opposed to a right in persona), then the matter is non-arbitrable. See *Laiser Communications Limited & 5 others v Safaricom Limited* [2016] eKLR and *Telkom Kenya Ltd vs Kam Consult Ltd* [2001] 2 EA 574.

Second, even where the matter of fraud relates to a dispute in persona but involves a serious or complex question of fraud, then arbitration is similarly ousted as an appropriate forum for the dispute. See *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR citing with approval *A. Ayyasamy v A. Paramasivam & Ors* Civil Appeal No. 8245 – 8246 of 2016 and *Booz Allen & Hamilla Inc –vs- SBI Home Finance Limited and others* 2011 5 SCC 532.

Third, the Court does not oust the arbitration jurisdiction merely on the allegation of fraud: it is upon a party seeking to oust jurisdiction on the ground of fraud to sufficiently demonstrate the nature of the alleged fraud and the circumstances which not only inoculates against pre-textual pleading but also provides prima facie evidence of the alleged fraud. See *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR.

... It is not enough to pepper a Pleat or Statement of Defence with allegations of fraud in the hope that that the allegations will stick long enough to oust the arbitration jurisdiction. In making a determination whether the allegations of fraud are merely sprinkled on the pleadings as a jurisdictional hook or whether they disclose sufficiently plausible claims of fraud to warrant the ousting of arbitration on public policy grounds, the Court primarily looks at two aspects of the pleadings.

First, the Court looks at the fit between the allegations made and the prayers in the Pleat. Where the prayers sought are in the nature of remedies for a breach of contract as opposed to its rescission due to the alleged fraud, a Court is more likely to conclude that the allegations of fraud are pre-textual and strategic and insufficient to oust arbitration jurisdiction. On the other hand, where structurally the pleading shows a close fit between the allegations of fraud made and the prayers which are not in the nature of enforcing the contract but avoiding it, the Court is more likely to oust arbitration jurisdiction and hold that the dispute must be litigated in Court.

The second aspect of the pleadings that the Court looks at is the prima facie plausibility of allegations and whether they reveal a true dispute based on deliberate misstatements of material fact knowingly made in order to deceive the party alleging the fraud. The nature of the allegations including the details disclosed helps the Court make a determination whether the allegations are merely pre-textual and also whether the alleged fraud is complex or serious enough to oust arbitration jurisdiction.”

49. In the present case, the plaintiff pleaded that the plaintiff’s claim was not only based on breach of contract, or matters solely within the purview of the SPA, but that there were claims for coercion, misrepresentation, fraud, breach of constitutional and statutory duty, unjust enrichment and restitution.
50. I have carefully considered the pleat dated 31/8/2022. The same is very elaborate on the accusation of fraud leveled against both defendants alongside other claims of misrepresentation, undue influence, coercion, duress and abuse of regulatory powers. The pleat particularizes the fraudulent misrepresentation complained of as well as coercion, misrepresentation and fraud. The pleat also



particularizes the deceit and discrimination complained of as well as particulars of unjust enrichment, constitutional breach and statutory breach.

51. In the prayers, as a consequence of the alleged fraud and other claims, the plaintiff seeks inter alia a declaration that the Heads of Terms between the plaintiff and defendants dated 17/11/2016 and the subsequent SPA be declared null and void and the plaintiff be compensated for the full value of FCBL as of December 2016.
52. The plaint also seeks for compensation by way of restitution for the full market value of Fidelity Community Bank as at December 2016 at Kshs. 2.5 billion, restitution for full profits arising from the sale of Fidelity Bank Ltd to the 1st defendant, and general and aggravated damages for unjust enrichment, discrimination, breach of statutory duties and infringement of the plaintiff's property and constitutional rights.
53. From the foregoing, it is clear that it has been demonstrated that there is a close fit between the allegations made and the prayers sought in the plaint. The plaintiff in essence seeks to avoid the contract and be restituted to his original position. The allegations indeed reveal a real dispute between the plaintiff and the defendants as it claims that there were deliberate misrepresentations knowingly made to coerce him to enter into a raw deal. The nature of the allegations vis a vis the prayers made oust the jurisdiction of arbitration as the alleged fraud is complex and serious.
54. The finding thus is that this Court declines to exercise its discretion and grant orders for stay of proceedings by virtue of Section 6(1) (b) of the *Arbitration Act*. The 1st defendant's application is unmerited and the same is hereby dismissed.
55. The next application for determination is the one dated 30/9/2022 by the 2nd defendant. It sought to strike out the suit against the 2nd defendant on grounds that the 2nd defendant was not a party to the SPA which is the subject matter of the suit.
56. That the SPA provided for dispute resolution by way of arbitration and the same was not binding on the 2nd defendant as it was not a party thereto. That the suit against the 2nd defendant was thus scandalous, vexatious and abuse of the court process.
57. Order 2 Rule 15 of the Civil Procedure Rules provides that: -
 - b) it is scandalous, frivolous or vexatious; or
 - d) it is otherwise an abuse of the process of the court, ...”
58. In *D.T. Dobie & Company (Kenya) Ltd. vs. Muchina* (1982) eKLR, it was held: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
59. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. In its plaint dated 31/8/2022, the plaintiff made various allegations against the 2nd defendant.



60. It was contended that the 2nd defendant was involved in the entire process of negotiations before the SPA was entered into, that it benefited from the results thereof and that it breached its statutory duty. That the 2nd defendant directly influenced the preparation of the Heads of Terms that indicated that SBM would acquire the entire shareholding of FCBL. That the 2nd defendant created a hostile environment which led to a hurried execution of the Head of Terms by the officials of FCBL and signed by the CBK Governor.
61. The 2nd defendant was also accused of coercing and pressuring the plaintiff to enter into a raw deal with the 1st defendant at the expense of the shareholders of FCBL. And finally, that it intimidated the plaintiff to a point of feeling that there was no other option but to enter into the contract.
62. The plaintiff also claimed that the 2nd defendant breached the Constitution by applying discriminatory treatment, depriving the shareholders of FCBL of their property, failing to accord the plaintiff access to justice among others.
63. In my view, those are very serious allegations against the 2nd defendant. It must be recalled that there are allegations that the value of FCBL was in excess of Kshs. 2.5 billion as at December, 2016 but the shareholders thereof were pressured to release it for only US \$1.
64. In the circumstances, it cannot be said that the suit against the 2nd defendant is scandalous, frivolous or vexatious. There is nothing scandalous or vexatious in the face of those serious allegations. The SPA may have contained a clause that the SPA was entered into willingly, but in light of the allegations levied against the defendants, the same can only be proved or disproved through tested evidence and not peremptorily on affidavit evidence.
65. Though the 2nd defendant was not a party to the SPA, it has been accused of influencing the final terms therein and abusing its statutory mandate in the process of the 1st defendant's acquisition of the FCBL.
66. Whether or not those allegations are true is a matter to be determined at the hearing of the suit. Though the 2nd defendant also claimed that the arbitration clause was not binding upon it, I have already held that the matter is not arbitrable but for determination by this Court.
67. The upshot is that the application dated 30/9/2022 is without merit and is hereby dismissed.
68. The final application for determination is the one dated 29/9/2022 for injunction. It sought to restrain the defendants from advertising for sale, offering for sale or dealing with the shares or ownership of SBM Bank Kenya Limited. It also sought discovery of various documents.
69. The principles applicable are well known as settled in *Giella vs Cassman Brown & Company Limited* (1973) E A 358. These are that an applicant must establish a prima facie case with a probability of success, he must demonstrate that unless the injunction is granted, he will suffer damage that cannot be compensated by an award of damages, and that if the court is in doubt, it will determine the matter on a balance of convenience.
70. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] eKLR, observed that: -

“... these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied



that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

71. On prima facie, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. See *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
72. In the present case, the plaintiff contended that the 1st defendant had breached the terms of the SPA which had been entered into under duress and false representations. That in the process, the plaintiff's constitutional and legal rights had been violated.
73. That there were monies owed to the plaintiff and former shareholders of the Bank which were to be paid when disposal accounts and impaired loans, which were previously under FCBL, were recovered through the operations of SBM Bank. That the same had not been paid.
74. The claims raised in the plaint may be convoluted but are serious in nature. The allegations are that in the circumstances under which the SPA was entered, the plaintiff and the former shareholders of FCBL were unable to make proper judgment. That they were coerced into entering into the SPA which made them part with FCBL for a song. In the view of this Court, the matters pleaded by the plaintiff cannot be said to be flimsy, they are serious triable issues which require interrogation at a trial.
75. Whether or not the contract was entered into willfully or by misrepresentations, duress and or coercion is a matter to be decided at the hearing of the suit. There is evidence that the asset base of FCBL was at least substantial as at December, 2016. For the same to be sold a short period later as a sum of US\$ 1 is curious. It is probable that there were sums payable later on to complement the said US\$1 for the said sale and purchase, but it is pleaded that the same was never paid. No accounts have been provided to show whether the Disposal Accounts and Impaired Loans yielded anything payable to the plaintiff and his colleague shareholders. At least I am satisfied that the plaintiff has established a prima facie case with a probability of success.
76. On irreparable loss and damage, it is not in dispute that the 1st defendant is a foreign company. The only assets it has in this country is the SBM Bank, the shares of which are alleged to have been purchased from the plaintiff and company. If the 1st defendant off-loads those shares or decided to have them encumbered and the plaintiffs are ultimately successful in their suit, they will have nowhere to seek remedy.
77. The Court is alive to the importance of direct foreign investment, which the alleged deal seem to have been, but such investment should not be tainted with any irregularity. The sector of finance may be very sensitive but where a party is able to establish, as the plaintiff has, that his/its rights have been violated, I think it is incumbent upon a court of law to ensure that such a party is not without a remedy.
78. In the present case, I am satisfied that were the apprehension by the plaintiff materializes and the 1st defendant disposes off its shares and leaves the jurisdiction, the plaintiff would suffer irreparable loss and damage.
79. From the above, it is evident that the balance of convenience tilts towards maintaining the status quo pending the determination of the suit. No prejudice whatsoever will be suffered by the defendants.
80. Accordingly, I find the application dated 29/9/2022 to be merited and I allow the same.



81. In the end, the Court makes the following orders: -

- a. The application dated 16/9/2022 is without merit and is hereby dismissed with costs to the plaintiff.
- b. The application dated 30/9/2022 is without merit and is hereby dismissed with costs to the plaintiff.
- c. The application dated 29/9/2022 is meritorious and is hereby allowed in terms of prayer nos. 3, 5 and 6 of the Motion with costs.
- d. The defendants to file and serve their respective defences within 14 days of the date hereof.
- e. The matter be listed before the Deputy Registrar for pre-trial directions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

