



Khimji (Suing as the Sellers' Representatives on Behalf of the Former Shareholders of Fidelity Commercial Bank Limited) v SBM Holdings Limited & another (Civil Suit E333 of 2022) [2025] KEHC 2037 (KLR) (Commercial and Tax) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E333 OF 2022
F GIKONYO, J
FEBRUARY 20, 2025**

BETWEEN

**SULTAN KHIMJI PLAINTIFF
SUING AS THE SELLERS' REPRESENTATIVES ON BEHALF OF THE FORMER
SHAREHOLDERS OF FIDELITY COMMERCIAL BANK LIMITED**

AND

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

RULING

Review rather than appeal

1. The 1st Defendant/ Applicant, SBM Holdings Limited (SBM Holdings) filed a chamber summons dated 16th September 2024 under Section 6(1) and (2) of the *Arbitration Act*, 1995 and Rules 2 and 8 of the Arbitration Rules, 1997 seeking an order for stay of the proceedings pending the final determination of the arbitration proceedings already commenced between the 1st Defendant and the Plaintiff in LCIA Arbitration Number 246196, Case Name: SBM Holdings Ltd v Sultan Khimji.
2. The application is supported by affidavits sworn by the 1st Defendant's company secretary, Dayawantee Ram-jug Chumun on 13th September 2024 and 18th December 2024 and Chiraag Ramesh Shah on 17th December 2024.
3. The application is also supported by the 2nd Defendant through a replying affidavit sworn by its senior manager, Bank Supervision Department, Edwin Psoboi Kipsitet on 9th October 2024.



4. The background to the application is that through a Ruling of 31st July 2024, the Court partially allowed the Plaintiff's application dated 30th August 2023 and granted leave to amend the Plaint to join SBM Holdings Limited in place of SBM Bank Holdings Limited as the 1st Defendant. Subsequently, SBM Holdings Limited was joined through the Plaint amended on 4th September 2024.
5. The dispute between the parties stems from a Head of Terms entered into on 17th November 2016 between the parties in respect to the acquisition of shares of Fidelity Commercial Bank Limited. The Head of Terms contained an outline of the proposed transaction and envisioned a further agreement to effect the sale.
6. The Plaintiff seeks a declaration that the Head of Terms are invalid, null, void and of no legal effect; that the former shareholders of Fidelity Commercial Bank Limited are entitled to compensation for the value of the Bank as at December 2016; an injunction to restrain the 1st Defendant from dealing with the shares and ownership of SBM Bank Kenya Limited without paying full compensation to the Plaintiff and compensation of Kshs. 2.5 Billion, being the alleged full market value of the Bank as at December 2016.

Grounds

7. The application is based on the grounds that the Head of Terms provided that any issues arising would be governed by English law and all disputes which could not be resolved amicably would be resolved by arbitration under the London Court of International Arbitration (LCIA) Rules. It also stipulated that the place of arbitration shall be London, England.
8. The Court delivered a ruling on 28th July 2023 in respect of an application dated 16th September 2022 by SBM Bank Holdings Limited seeking to refer this dispute to arbitration. However, SBM Holdings was not a party to these proceedings and were not heard before the delivery of the ruling.
9. The application dated 16th September 2022 did not refer to the Head of Terms and was based on the ground that the Share Purchase Agreement dated 28th March 2017 had a valid and binding arbitration clause.
10. SBM Holdings was informed of an order made on 8th March 2024, that it be notified of the proceedings and be given a limited right to respond to the Joinder application dated 30th August 2023 and the application dated 27th February 2024. It then submitted a Request for Arbitration (RFA) on 17th March 2024 against the Plaintiff (acting in his own capacity and as Seller's representative on behalf of the former shareholders of Fidelity Commercial Bank Limited) pursuant to Article 1 of the LCIA arbitration rules for the breach of the arbitration agreement and the Head of Terms.
11. SBM Holdings instituted claim number CL-20230000895 before the High Court of England seeking, among others, an order that the Plaintiff be restrained from joining it in these proceedings because any dispute should be referred to the LCIA.
12. On 22nd March 2024, the High Court of England granted a final anti-suit injunction against the Plaintiff holding that the dispute was for resolution through arbitration under English law. There was no appeal by the Plaintiff against that decision and that under the doctrine of comity, this Court should stay these proceedings pending the determination of the LCIA proceedings.

Response

13. In opposing the application, the Plaintiff filed a preliminary objection (PO) dated 26th September 2024, that this Court is functus officio having regard to the ruling of 28th July 2023 and 31st July 2024



where the Court already declined to stay proceedings pending referral of the dispute to arbitration and affirmed its jurisdiction to handle the proceedings.

14. The Plaintiff also filed a replying affidavit sworn on 4th December 2024 and a further affidavit sworn on 20th December 2024. His main depositions were that after the execution of the Head of Terms, he and SBM Africa Holdings, a subsidiary of SBM Holdings, executed a Share Purchase Agreement dated 28th March 2017; that both the Head of Terms and the SPA are interconnected; that in both rulings of 28th July 2023 and 31st July 2024, the Court considered the Head of Terms and the proposition that the Governing law was the law of England; that SBM Holdings as the holding company of SBM Africa Holdings was aware of the SPA and these proceedings and the determinations by Court and that the Court's rulings of 28th July 2023 and 31st July 2024 have not been challenged either by review or appeal.
15. The Plaintiff also deposed that the arbitral proceedings in London are an afterthought as they were initiated by the 1st Defendant on 17th March 2024, subsequent to the commencement of these proceedings through the Plaint dated 31st August 2022 subsequently amended on 4th September 2022; that the 1st Defendant has not demonstrated sufficient cause for a stay of proceedings which ought to be sparingly given.
16. The Plaintiff further deposed that he has not submitted to the jurisdiction of the arbitral tribunal as he has raised an objection challenging its jurisdiction to hear and resolve the claim before it.

Submissions

17. The Plaintiff and the 1st Defendant filed written submissions dated 5th December 2024 and 24th January 2025 respectively.
18. The Plaintiff submitted that the Court is functus officio as the Court vide the Ruling and Order delivered on 28th July 2023 considered an application filed by SBM Bank Holdings Limited, a subsidiary of the 1st Defendant, seeking stay of the instant proceedings, pending referral of the dispute to arbitration. He also submitted that the said application, as the instant one, was brought pursuant to the provisions of Section 6 of the *Arbitration Act*.
19. The Plaintiff asserted that the Court addressed its mind to this issue whether the dispute should be this Court observed that the issue of validity of the contract, in view of the allegations of coercion, misrepresentation, deceit, abuse of regulatory position and fraud, fell for determination by this Court. The Court declined to exercise its discretion and did not grant orders for stay of proceedings by virtue of Section 6 (1) (b) of the *Arbitration Act*, upon finding that the dispute between the parties is not arbitrable.
20. In support, the Plaintiff relied on the Supreme Court of Kenya in Odinga *v Independent Electoral & Boundaries Commission & 3 others, Petition 5, 3 & 4 of 2013* (Consolidated) (2013) eKLR and the Court of Appeal's decision in Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited), the Environment and Land Court's decision in Mbugua & 3 others v Turi Gardens Limited,
21. The Plaintiff disputed the 1st Defendant's contention that it has not been heard on its objection to the present proceedings being instituted contrary to the Head of Terms entered into on 17th November 2016. He pointed out that the 1st Defendant earlier challenged the Court's jurisdiction based on the Head of Terms through a Preliminary Objection dated 18th March 2024, considered in the Ruling of 31st July 2024.



22. The Plaintiff highlighted that vide the initial Plaintiff dated 31st August 2022, the Plaintiff sought to invalidate the Head of Terms and Share Purchase Agreement on grounds of misrepresentations, deceit, coercion, undue influence, duress, abuse of regulatory position and fraud.
23. The Plaintiff highlighted that he has raised an objection to the subject arbitral proceedings, and the arbitral tribunal is yet to render a decision on whether it has jurisdiction. He submitted that the Judgement of the High Court in England by Mr. Justice Butcher dated 22nd March 2024 is not automatically recognizable and enforceable in Kenya. He also submitted that the same is inconsistent and or contravenes the Constitution and is therefore void to the extent of the inconsistency and invalid.
24. The Plaintiff further submitted that 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. It thus argued that the 1st Defendant has not demonstrated that there is a dispute between it and the Plaintiff and that such dispute is capable of being determined through arbitration to warrant stay of the instant proceedings pending final determination of the arbitral proceedings commenced in London.
25. On its part, the 1st Defendant conceded that an adjudicator should exercise powers only once in relation to the same matter. It however submitted that in the circumstances, the Court is not functus officio as SBM Holdings was not a party prior to the Ruling of 31st July 2024. It also submitted that it is applying to refer the dispute to arbitration based on the terms of the Heads of Terms, which is the only agreement between the Plaintiff and SBM Holdings. The Application is not based on the terms of the SPA. That thus, it would be a miscarriage of justice if the Court declines to hear SBM Holdings' application based on a previous decision that was delivered when SBM Holdings was not a party to the proceedings and which considered an agreement that SBM Holdings is not a party to.
26. The 1st Defendant asserted that SBM Holdings is not a party to the SPA, it cannot be affected by a finding made by this court in respect of the SPA and such a decision cannot be enforced against SBM Holdings even though, as alleged by the plaintiff, SBM Holdings is the parent company of SBM Africa. SBM Holdings has not been heard on the question of whether the claim made against it in the amended plaint should be stayed pending the LCIA Arbitration, it would be a violation of its right to a fair hearing to decline to consider the Application on its merits based on the functus officio doctrine. It relied on the Court of Appeal's decision in Agriculture Finance Corporation v Lengetia Limited [1985] KLR 765 to the effect that a contract cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue to make him liable upon it.
27. The 1st Defendant contended that no final decision has been made by this Court on whether the claim against SBM Holdings, which has only been recently joined to these proceedings, should be stayed pending the LCIA Arbitration. It also contended that it is not asking this Court to re-engage with the findings of the Court on Clause 30.1 of the SPA.

Analysis and Determination

28. I have considered the application, the PO, the parties' respective affidavits, submissions and authorities cited. The issues for determination are:-
 1. Whether the PO is merited.
 2. Whether the Applicant has made out a case for stay of these proceedings pending determination of the arbitration proceedings in LCIA Arbitration No. 246196: SBM Holdings Limited vs Sultan Khimji.



29. The PO raised by the Plaintiff can be condensed and rephrased into two grounds: -
1. That this Court lacks the jurisdiction to consider the 1st Defendant's application for stay of proceedings pending arbitration as it is functus officio having already determined that issue through the Rulings of 28th July 2023 and 31st July 2024.
 2. That the 1st Defendant's application is incompetent, bad in law and an abuse of the court process.
30. A preliminary objection consists of a point of law which has been 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 argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696
31. From my reading of the PO, it speaks to factual matter requiring evaluation of evidence. And, matters forming the PO cannot found a proper PO in the sense of the law. The matters so canvassed are taken to be in reply to the application herein. They shall be so considered.
32. The next issue is whether the Applicant has made out a case for stay of these proceedings pending determination of the arbitration proceedings in LCIA Arbitration No. 246196: *SBM Holdings Limited vs Sultan Khimji*. The Plaintiff asserted that the Court is functus officio as it has already considered an earlier application for stay of the proceedings and pronounced that the dispute is no suitable for resolution through arbitration due to the nature of his claim challenging validity of the agreement based on alleged fraud and misrepresentation.
33. On the other hand, the 1st Defendant argued that the Court is not functus officio as SBM Holdings was not a party to the suit prior to the ruling of 31st July 2024. It also argued that the present application based on the Head of Terms, between SBM Holdings and the Plaintiff is distinguishable from the previous application for stay of proceedings and referral of the suit to arbitration based on the Share Purchase Agreement (SPA) which it is not a party to. It further contended that it would be a miscarriage of justice if the Court declines to hear SBM Holdings' application based on a previous decision that was delivered when SBM Holdings was not a party to the proceedings and which considered an agreement that SBM Holdings is not a party to.
34. The court notes that, in the ruling of 28th July 2023, the Court considered an earlier application for stay of proceedings dated 16th September 2022 by the 1st Defendant, SBM Bank Holdings Limited at the time, and noted that: -
- “ 51. In the prayers, as a consequence of the alleged fraud and other claims, the plaintiff seeks inter alia a declaration that the Head of Terms between the plaintiff and the 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 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) of the *Arbitration Act*. The 1st defendant's application is unmerited and the same is hereby dismissed."

35. Whereas, SBM Holdings has argued that the instant application is distinguishable from the earlier application for stay, I do note that the substance of the application by SBM Holdings Bank Ltd is not different. According to SBM Holdings, the distinguishing factor is that the earlier application was based on an arbitration clause contained in the SPA which it is not a party, while the present application is based on arbitral proceedings initiated under the Head of Terms Agreement.

36. However, I do note that the 1st Defendant conceded that the Head of Terms between it and the Plaintiff was a precursor to the SPA entered into between the Plaintiff and SBM Africa. The latter is said to be a subsidiary company of the 1st defendant bring to immediate relevance a discussion on the status and relationship of a holding and subsidiary companies.

37. A subsidiary company, typically formed by a holding or parent company as a limited company, is an independent legal entity; enjoying full benefit of a separate corporate personality from those who compose it- a principle formulated in *Salomon vs. Salomon*.

38. A subsidiary company may be wholly or partially controlled by the parent or holding company which is really a matter of shareholding and not subsuming the corporate personality of the subsidiary company in the holding company. Any such obfuscation is astray.

39. Therefore, a subsidiary company is an independent legal entity in law.

40. It appears that, in this case, SBM Holdings, is litigating under the title of its subsidiary, making arguments of *res judicata* more robust. Similarly, the ghost of the SPA still stalks their path in these proceedings. Be that as it may, it is also doubtful that SBM Holdings was unaware of the earlier application for stay.

41. Of greater and more pointed value is that, the record shows that SBM Holdings raised a PO dated 18th March 2024 challenging the Court's jurisdiction on the ground that under the Head of Terms, the applicable law was the English law and that all disputes were to be determined by arbitration. In the Ruling of 31st July 2024, the Court considered the argument by the 1st Defendant's and held that: -

" 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. [Underlining mine]

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."
42. Therefore, the issues that; SBM Holdings was not heard on this issue; or whether the issue is res judicata; should be seen within the frame created from the fact that, the Court already determined: -
- a. '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.'
- b. '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.'
43. As was rightly observed by the good judge, the correct judicial intervention upon these pronouncements would be an appeal, rather than a fresh application for stay of proceedings.
44. As such, the 1st Defendant's application for stay of proceedings is not merited. It is dismissed- and given the nature of the proceedings- with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 20TH DAY OF FEBRUARY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Kanjama/Ms. Obure for Plaintiff

Ondieki for 1st defendant

Chege for 2nd defendant

CA- Kinyua

