



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sidian Bank Ltd v Shah & 3 others (Commercial Appeal E112 of 2021)  
[2025] KEHC 5858 (KLR) (Commercial and Tax) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E112 OF 2021**

**NW SIFUNA, J**

**MAY 9, 2025**

**BETWEEN**

**SIDIAN BANK LTD ..... APPELLANT**

**AND**

**NILAN GULABCHAND SHAH ..... 1<sup>ST</sup> RESPONDENT**

**MATRA GETLINK LTD ..... 2<sup>ND</sup> RESPONDENT**

**ZACHARY MUTHURI KITHAKA THAMBU ..... 3<sup>RD</sup> RESPONDENT**

**THOMAS MONG'ARE ONDIEKI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This Ruling determines three applications. Through the first application dated 26<sup>th</sup> November 2021, the appellant is seeking a stay of execution against the ruling and order of the Chief Magistrate's Court in Milimani CMCC No. 2703 of 2021 pending appeal. The application is supported by the affidavit sworn by the appellant's credit manager, Emma Ooro on 26<sup>th</sup> November 2021. The application is opposed through a replying affidavit sworn by the plaintiff on 14<sup>th</sup> December 2021.
2. Through the second and third applications dated 11<sup>th</sup> and 17<sup>th</sup> January 2022, the 1<sup>st</sup> Respondent seeks orders to preserve the subject matter and to cite the appellant for contempt of court. Opposing the applications, the Appellant filed a Replying Affidavit and Further Affidavit sworn by its senior legal officer, Stella Kendi on 25<sup>th</sup> February 2022.
3. The Appellant and the 1<sup>st</sup> respondent filed written submissions dated 11<sup>th</sup> March 2022 and 7<sup>th</sup> March 2022, respectively.



## Analysis and Determination

4. I have considered all the pleadings, evidence and submissions. I will refer to them as necessary in the analysis. The Appellant seeks an order for stay of execution of the ruling and order of the Chief Magistrate's Court in Milimani CMCC No. 2703 Of 2021, which order is reproduced in part herebelow:

“ ...

2. That the fixed deposit of Kshs. 2,200,000/= is frozen for a period of (3) three months from the date of this ruling as the defendants organize for an alternative security and upon lapse of the stated period the amount shall be available for the Plaintiff's use.”

5. The Appellant contended that the orders issued discharged the 1<sup>st</sup> Respondent from a contract of guarantee through which the 1<sup>st</sup> Respondent had guaranteed a loan facility to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent. The amount guaranteed was Ksh 2,000,000=, whose collateral was a fixed deposit of Ksh 2,000,000=- in the 1<sup>st</sup> Respondent's name in his account domiciled at the Appellant. According to the Appellant, the impugned order was issued despite the Appellant proving that the loan remained outstanding in the sum of Ksh 2,035,027/64 from the 2<sup>nd</sup> and 4<sup>th</sup> Respondent. Which the 1<sup>st</sup> Respondent had not paid despite the guarantee.
6. The Appellant submitted that it has met the threshold for an order for a stay as it has filed a Memorandum of Appeal within time. It also submitted that unless a stay is granted, the fixed deposit will dissipate upon demand by the 1<sup>st</sup> Respondent causing it substantial loss. It added that it has an arguable appeal and that it is willing to provide security as ordered by the court.
7. The 1<sup>st</sup> Respondent, contrarily, submitted that the Application for a stay has been overtaken by events. It again submitted that the application was filed before the Appellant complied with the orders of the trial court requiring it to first pursue the principal debtor as required by the law of guarantee.
8. The 1<sup>st</sup> Respondent highlighted that while the principal debtor had variously engaged the Appellant with the intention of complying with the orders of the court, the appellant has been solely interested in pursuing the 1<sup>st</sup> Respondent because the money is readily available and held by the bank.
9. Thus, the 1<sup>st</sup> Respondent contended that the Application was not filed in good faith and was only a ploy for the Appellant to utilize the money held in fixed deposit and to frustrate him. The Appellant submitted that it has met the threshold for the grant of a stay pending appeal. The 1<sup>st</sup> Respondent argued that the order is not capable of being stayed.
10. The Appellant further submitted that the Appeal has not been rendered nugatory as submitted by the 1<sup>st</sup> Respondent considering that he has not filed a Cross-Appeal in which he would feel prejudiced. It also submitted that the appeal is not hinged on the Application of the funds but rather on the need to correct the apparent error of the trial court.
11. Has the applications for stay and for preservation have been overtaken by events? My view is that, flowing from the above, the preliminary issue for determination is whether the two applications for stay and for preservation of the subject matter have been overtaken by events.



12. I note that the funds were utilized by the Appellant to offset the loan on 12<sup>th</sup> January 2022 at 12.14PM. The reason being that the order of 16<sup>th</sup> December 2021 was an unconditional stay of execution order which had not been varied or set aside. The order of 16<sup>th</sup> December 2021 was to the effect that:
- “...an order of stay of execution be and is hereby issued staying the ruling and order of 29<sup>th</sup> October 2021 by the Chief Magistrate in Milimani CMCC 2703 of 2021, Nilan Gulabchand Shah v. Matra Getlink & others and Sidian Bank Limited up to 8<sup>th</sup> February 2022.”
13. From my reading of the above vis a vis the order of 29<sup>th</sup> October 2021, I am of the view that the freezing order was meant to lapse within three months of the ruling. However, the court on 16<sup>th</sup> December 2021, the court granted a stay of the freezing order up to 8<sup>th</sup> February 2022. The appellant utilized the funds to offset the loan on 12<sup>th</sup> January 2022, before the stay orders lapsed on 8<sup>th</sup> February 2022.
14. Therefore, the applications dated 26<sup>th</sup> November 2021 and 11<sup>th</sup> January 2022 are overtaken by events.
15. On whether the 1<sup>st</sup> Respondent has met the threshold for orders to cite the Appellant for contempt, it is also apparent that the stay of the freezing order through the court orders of 16<sup>th</sup> December 2021 meant that by utilizing the funds to offset the loan, the 1<sup>st</sup> respondent was not in contempt of court. Thus, the Application dated 17<sup>th</sup> January 2022 lacks merit.

#### **Final Disposal**

16. For the reasons I have already stated in this ruling, I find no merit in the applications dated 26<sup>th</sup> November 2021 and the ones dated 1<sup>th</sup> and 17<sup>th</sup> January 2022. Hence hereby dismiss them accordingly. There shall be no order as to the costs of the Applications.

**DATED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF MAY 2025.**

**PROF (DR) NIXON SIFUNA**

**JUDGE**

