



REPUBLIC OF KENYA



**KENYA LAW**  
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**Solfitra Limited & another v Mutahi; SBM Bank Kenya (Formerly Fdelity Comercial Bank)  
(Guarantor) (Civil Appeal 112 of 2010) [2025] KEHC 8071 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8071 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 112 OF 2010**

**RC RUTTO, J**

**JUNE 5, 2025**

**BETWEEN**

**SOLFITRA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JAMES TOLE MWASARU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID MUTAHI ..... RESPONDENT**

**AND**

**SBM BANK KENYA (FORMERLY FDELITY COMERCIAL  
BANK) ..... GUARANTOR**

**RULING**

1. Before this Court for determination is a Summons Application dated 12<sup>th</sup> June 2023, under Order 22 Rule 1; Order 42 Rules 6 and 7 of the Civil Procedure Rules, as well as Sections 1A, 3A, and 63(e) of the *Civil Procedure Act*. The Applicants seek an order directing the release to the Respondents of all monies held by the Guarantor Bank under Bank Guarantee Form FCB/9/149/07 in the sum of Kshs.940,785.59/=. The said amounts were deposited as security for an appeal by the Appellants and are sought in full or partial satisfaction of the decree and certificate of costs issued by this Honourable Court on 22<sup>nd</sup> April 2016 in the amount of Kshs.691,510/=:, together with interest at court rates from the date of the decree until payment in full.
2. The application, is supported by the affidavit sworn by Maanzo Dennis, and on grounds that: the Applicants obtained judgment in Milimani CMCC No. 1040 of 2003, which the Appellants appealed in Milimani HCCA No. 257 of 2007. The appeal was subsequently transferred to Machakos and renumbered HCCA No. 112 of 2010. Through their insurer, APA Insurance Limited, the Appellants furnished two irrevocable bank guarantees totaling Kshs.940,785.59 as security for the appeal. The



said guarantees were issued by Fidelity Commercial Bank, now succeeded by SBM Bank Kenya (the Guarantor).

3. Pursuant to the judgment on appeal delivered on 24<sup>th</sup> November 2015, the appeal was partially allowed, and a decree and certificate of costs in the sum of Kshs.691,510/= were issued by this Honourable Court on 22<sup>nd</sup> April 2016. Interest has since accrued on the decretal amount, totaling Kshs.587,783.50/= as at 22<sup>nd</sup> May 2023. Accordingly, the total judgment debt now stands at Kshs.1,279,293.50/=, which exceeds the guaranteed sum. The deponent avers that although correspondence was sent to the Guarantor Bank seeking enforcement of the guarantees, no response was received. The present application is therefore brought to compel the Guarantor to release the guaranteed amount in partial satisfaction of the judgment debt.
4. The Application was opposed by the Guarantor Bank through a Replying Affidavit sworn by Kevin Kimani, who denied that the Bank had received any correspondence or notice in connection with the alleged claim. The deponent further averred that the documents presented as bank guarantees, dated 27<sup>th</sup> April 2007 and 29<sup>th</sup> June 2007, and purportedly issued by Fidelity Commercial Bank, were neither issued nor acknowledged by the Guarantor. It was the Guarantor's position that the authenticity of the said guarantees could not be ascertained, that it was not the author thereof, and therefore could not be bound by the terms of contracts to which it was not a party.
5. The Application was canvassed by way of written submissions. The Applicants filed their submissions dated 15<sup>th</sup> November 2024, while the Guarantor's submissions were filed on 31<sup>st</sup> January 2025.

### **Applicants' Submissions**

6. The Applicants began their submissions by providing a brief background of the dispute and thereafter addressed a single issue for determination: whether there exists a valid irrevocable bank guarantee worth Kshs.940,785.59 furnished as security for the appeal.
7. The Applicants submitted that, in light of the Guarantor's denial of the authenticity of the bank guarantees, it was necessary to examine the wording of the guarantees in detail. They contended that the bank guarantees were issued by the Guarantor pursuant to a consent dated 14<sup>th</sup> August 2007, filed on 12<sup>th</sup> September 2007, and subsequently adopted as an order of the Court. The said consent, according to the Applicants, required the Appellants to furnish the Court with an irrevocable bank guarantee within 21 days from the date of its adoption. They submitted that the furnishing of the guarantees was instrumental in securing orders of stay pending appeal, which in turn were meant to ensure the due performance of the decree or order as may ultimately be binding upon the Guarantor.
8. The Applicants argued that the guarantees should be interpreted as a whole, in line with standard principles of contractual interpretation, with emphasis on their plain and ordinary meaning. They contended that the language used in the guarantees clearly indicated that they were unconditional on-demand guarantees, under which the Guarantor undertook to pay upon demand, without the need for further justification or inquiry. To support this position, the Applicants relied on the case of *Paramount Bank Limited v First National Bank Limited & 2 Others* [2023] KECA 1424 (KLR), in which the Court affirmed the binding nature of on-demand guarantees and the non-controversial obligation of the guarantor to honour them upon receipt of a proper demand.
9. The Applicants further submitted that the demand was indeed made and served, and that the Machakos High Court was notified of the same. They argued that the Guarantor's liability to pay under the terms of the guarantee therefore stood, and could not be disputed on the basis of authenticity alone. In response to the Guarantor's claim that the guarantees were not authentic, the Applicants



argued that there was no evidence or formal communication from the Guarantor directly disputing the veracity of the guarantees. They contended that the documents bore signatures of the relevant parties, who were presumed to have understood their contents prior to execution. Citing *Miller v Minister of Pensions* [1947] 2 ALL ER 372 and its application in *D.T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati* [2014] eKLR, the Applicants acknowledged that bank guarantees are subject to strict regulations, and may only be challenged under two limited exceptions: (a) where there is egregious fraud that undermines the entire transaction and is known to the bank; or (b) in exceptional circumstances involving unique equities to prevent irreparable harm. They submitted that neither of these exceptions was pleaded or established by the Guarantor in its Replying Affidavit.

10. The Applicants concluded their submissions by submitting that from the evidence on record, they have made a good case for granting the orders sought in the Chamber summons application and the same be allowed.

### **Guarantor's submissions**

11. The Guarantor commenced its submissions by providing a brief introduction and background of the matter. It identified one issue for determination, that is, whether the Applicants had met the legal threshold to justify the release of the funds held under the alleged bank guarantees.
12. The Guarantor submitted that it was neither privy to nor a party to the alleged bank guarantees, as the guarantees were not issued by it. Consequently, it argued that it could not be bound by the terms of a contract to which it was not a party. In support of this position, the Guarantor relied on the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR, where the Court reaffirmed the doctrine of privity of contract, which dictates that only parties to a contract may enforce rights or be subject to obligations arising therefrom. The Guarantor maintained that it had no knowledge of, nor any involvement in, the issuance of the bank guarantees in question.
13. Without prejudice to its denial of liability, the Guarantor further submitted that, even if it were to be considered a party to the guarantees, the law on guarantees requires that a valid and proper demand be made as a precondition to payment. This, it argued, is consistent with the language of the guarantees themselves, which provide that payment is to be made upon receipt of the first written demand. The Guarantor contended that the Applicants had failed to present any evidence demonstrating that a demand notice was issued and duly served upon it. In the absence of such proof, the Guarantor submitted that the Applicants had not discharged their evidentiary burden, and the application must therefore fail.
14. The Guarantor concluded its submissions by urging the Court to dismiss the application with costs.

### **Analysis and Determination**

15. I have considered the affidavits by parties and submissions made in respect of the summons by the Applicants and the Guarantor and it is my view that there are three issues for determination that;
  - a. Whether the Bank guarantees in question are valid and binding upon the Guarantor.
  - b. Whether there is sufficient evidence to demonstrate that a demand was made to the Guarantor as required
  - c. Whether the Applicants are entitled to payment under the said guarantees.



### **Whether the Bank guarantees in question are valid and binding upon the Guarantor.**

16. The Applicants rely on irrevocable bank guarantees allegedly issued by Fidelity Commercial Bank (now SBM Bank Kenya) as security for the Appellants' appeal, referencing a consent dated 14<sup>th</sup> August 2007 and adopted on 12<sup>th</sup> September 2007. The Guarantor denies issuing the guarantees or being privy to the consent. However, SBM Bank Kenya has not denied taking over Fidelity Commercial Bank, from which the guarantees are alleged to have originated.
17. Under Kenyan law, successor institutions in a banking acquisition may inherit liabilities and obligations of the predecessor, unless expressly disclaimed or excluded in the acquisition terms approved by the Central Bank of Kenya (CBK). In the absence of any express denial or evidence that the guarantor disclaimed liabilities arising from Fidelity Commercial Bank guarantees, and in view of the Guarantor's silence on this key point, the Court draws an adverse inference that SBM Bank Kenya assumed the liabilities of Fidelity Commercial Bank, including the disputed guarantees.
18. Moreover, the guarantees are said to have been issued pursuant to a consent order of the court. Once adopted by the court, it became an order of the court with the full force of a judgment and binds all parties unless set aside on grounds of fraud, mistake, or misrepresentation, none of which have been pleaded here. It is now settled law that a consent judgment can only be set aside on grounds which would justify setting a contract aside.
19. In addition, the guarantee was issued as a precondition for the grant of stay orders pending appeal, which orders subsisted in favour of the appellant. Any disputes as to the issuance of the guarantee by the Guarantor can only be sufficiently addressed between the Appellants, APA Insurance Limited at whose instance the guarantee was issued and the Guarantor. In the absence of any representation by the respondents or the insurance company, the burden of proving the authenticity of the guarantee issued in the stated circumstances cannot be with the applicants.
20. Therefore, in light of the foregoing, the guarantees are prima facie valid and therefore binding upon SBM Bank Kenya as the legal successor of Fidelity Commercial Bank.

### **Whether there is sufficient evidence to demonstrate that a demand was made to the Guarantor as required**

21. From the record, the demand letter dated 23<sup>rd</sup> May 2018 forms part of the Applicant's supporting affidavit as Exhibit MD5. However, crucially, there is no evidence on record showing that the demand letter was served on the Guarantor either by a stamped receipt, email acknowledgment or affidavit of service. The obligation of the guarantor to pay arises upon service of a demand as per specific terms in the bank guarantees which states;

“We undertake to pay to the High Court of Kenya up to the above amount upon receipt of its first written demand without the High Court of Kenya having to substantiate its demand provided that in its demand the High Court of Kenya will note that the amount claimed by it is due.”
22. The above illustrates that the guarantee is one called “On-demand guarantee” as was explained by court in the case of *Mehta Electricals Limited v I & M Bank Limited & another* Civil Suit 55 of 2017 [2017] eKLR where the court distinguished between “On-demand guarantees” and “conditional guarantees” The obligation of the guarantor under an unconditional bank guarantee such as the ones herein is triggered by the presentation of a demand.



- 23. The Applicants produced a demand letter, they failed to provide evidence that it was actually served upon the Guarantor. This failure is material and goes to the core of the enforceability of the guarantee. I am persuaded by the court’s holding in the case of Paramount Bank Limited v First National Bank Limited & 2 others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) (24 November 2023) (Judgment) where the court stated that, “A bank’s obligation to honour an unconditional demand guarantee arises only as and when the beneficiary seeks payment in accordance with the terms of the guarantee.”
- 24. Thus, the demand’s condition precedent was not satisfied, and liability under the guarantee cannot be said to have crystallized.

**Whether the Applicants are entitled to payment under the said guarantees.**

- 25. Having established that the guarantor herein as successor of Fidelity Commercial Bank is bound by the guarantees and a valid demand is a condition precedent for triggering payment under the guarantees but no proof of demand was served on the guarantor, it follows that the Applicants have not met the threshold to enforce the guarantees at this juncture.
- 26. It follows therefore, that the court cannot compel payment under a guarantee where the triggering mechanism that is, service of the demand is not proved to ascertain that the bank was triggered to make the necessary payments.
- 27. Based on the above, the Applicants are not entitled to payment under the said bank guarantees at this stage for want of proof of service of demand. The upshot is Chamber Summons Application dated 12<sup>th</sup> June, 2023 is hereby dismissed. Each party to bear their own costs.
- 28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5<sup>TH</sup> DAY OF JUNE, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

- .....Appellant
- .....Respondent
- .....Guarantor

Sam Court Assistant

