



**Fidelity Commercial Bank v Linear Coach Co. Ltd & 2 others (Commercial Case 383 of 2010) [2023] KEHC 18748 (KLR) (Commercial and Tax) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 18748 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 383 OF 2010  
DO CHEPKWONY, J  
FEBRUARY 15, 2023**

**BETWEEN**

**FIDELITY COMMERCIAL BANK ..... PLAINTIFF**

**AND**

**LINEAR COACH CO. LTD ..... 1<sup>ST</sup> DEFENDANT**

**ALFRED MOFFAT MICHIRA ..... 2<sup>ND</sup> DEFENDANT**

**DUNCAN MOGAKA MICHIRA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This case was instituted in the year 2010 and has been handled by different Judicial Officers who have issued diverse orders herein. Of particular concern is the Notice of Motion dated May 6, 2019 seeking consolidation of this suit with Milimani Civil Suit No 654 of 2007, Duncan M Muchira & 4 Others – vs- Fidelity Commercial Bank. This Application was vehemently opposed by the Respondents and on December 13, 2019, the court delivered a ruling rejecting the prayer for the consolidation of the suits.
2. The matter went silent until the court issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution and scheduled for October 26, 2021. On that date, neither the Plaintiff nor its Advocate on record attended court to show cause why the suit should not be dismissed and the court proceeded to dismiss the same for want of prosecution.
3. On November 22, 2021, both counsel for the parties attended court and Mr Nyakiangana, counsel for the Defendant requested that the Plaintiff’s counsel Mr Omoke files a formal application for setting aside the dismissal order and the court directed so. In compliance thereof, the Plaintiff filed an



application dated November 10, 2021 seeking to set aside and or review the orders of October 26, 2021. This application was determined vide a court ruling of November 23, 2022, where the court held thus;

' 14. For the ends of justice and for the interest of justice, I will give the Plaintiff the last rope to hang only upon fulfilment of the following conditions:-

- a. That the suit vide Plaint dated June 3, 2010 be set down for hearing within the next 30 days from the date hereof.
- b. That the Plaintiff to pay throw away costs of Kshs 50,000 each to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants within the next thirty days from the date hereof.
- c. That failure by the Plaintiff to meet conditions (a) and (b) above, the orders herein shall be operation of law automatically lapse and the Plaintiff's suit shall stand dismissed for want of prosecution without further reference to this court.
- d. Costs of this application to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.'

4. The Matter came up before this court on February 8, 2023 and from the arguments of the parties, it was clear that the express orders issued by court on November 23, 2022 had not been complied with. The 3<sup>rd</sup> Defendant's Counsel then informed the court since there had been no compliance with the said orders, the suit should be dismissed as per the court's directions. in response, the Counsel for the Plaintiff stated that the court order for throw away cost of Kshs 50,000.00 was clear but the court had not expressly stated how much the costs of the application should be, hence the parties are unable to agree on a figure. The Plaintiff's Counsel requested for 21 days to comply with the court orders and set the suit down for hearing.
5. In rejoinder, the 2<sup>nd</sup> Defendant's Counsel stated the court orders issued on November 23, 2022 were conditional but the Plaintiff had not complied with the said conditions. He argued that by its request, the Plaintiff is either seeking to have the court review its orders without a formal application or asking the court to sit on its own appeal which is not permitted in law. He urged the court to dismiss the suit for non-compliance of the court's directions.
6. The Plaintiff's Counsel insisted that he was asking for the court's intervention on the costs of the application for it to comply with its orders.
7. Having carefully listened to the arguments and sentiments by both counsel for the parties with regard to the orders issued by this court on November 23, 2022, I have carefully read them and wish to state that these orders were clear and unambiguous. The orders were conditional to certain terms such as the setting of the suit for hearing within 30 days, the payment of the throw away costs of Kshs 50,000/= and the costs of the application. The court clearly stated that the Plaintiff's suit would be re-instated upon compliance of the said terms in the order, failure to which, the orders would automatically lapse and the Plaintiff's suit to stand dismissed for want of prosecution.
8. It is trite law that court orders are not issued in vain. They are meant to be obeyed and complied with otherwise the courts would be exposed to ridicule. This was the position held by the court in the case of *B -vs- Attorney General [2004] 1 KLR 431*, which held that:

' The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.'



9. The request by the Plaintiff is one that requires the court to sit on its own appeal and vary the court orders, a position that is shunned by the law. The court in the case of *Kivandi Mukusya –vs- Mutunga Matheka [1996] eKLR* held;

' When and where can it be said in the current application that orders sought are confined to review only and are not in substance tantamount to appeal rulings/judgments yet a court cannot sit on appeal over its own decisions. Be that as it may, even if this court was to be minded to consider that it was being asked and was only going to pronounce review orders, there is no argument worthy of such orders.'

10. In this case, I find that the Plaintiff's counsel has not demonstrated any reasons for this court to exercise its discretion and grant the Plaintiff more time to comply with the orders. It will be noted that even after counsel had indicated that the order on throw away costs was clear and the only unclear order was the one on costs of the application, there is no indication that any effort has been made by the Plaintiff to comply with the order on throw away costs by either production of receipt of payment or evidence of negotiations by the parties on the costs of the application.

11. In the ruling of November 23, 2022, the Plaintiff was given the last chance to revive its suit upon meeting the conditions as stated therein. It would therefore be absurd for the court to fall for the invite by the Plaintiff and tantamount to it sitting on its own appeal, a procedure not provided for in law. The Plaintiff has not made a formal application for review of the said court orders neither has an appeal been lodged against the court orders for any variations of the orders to be considered.

12. In the upshot, it is reiterated that court orders must be complied with as they are never issued in futility. The court orders of November 23, 2022 were clear and issued in mandatory terms that in the event the Plaintiff fails to meet the conditions set therein, the same would by operation of law automatically lapse and the Plaintiff's suit stand dismissed for want of prosecution. In view of this, this court's hands are tied.

13. By dint of the Plaintiff's non-compliance with the court orders issued on November 23, 2022 and considering that the suit has been pending in court since the year, 2010, it is in the interest of justice that the Plaintiff's suit be and is hereby dismissed for want of prosecution with costs to the Defendants.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of;

Mr. Muoke counsel for Plaintiffs

Mr. Nyakiangana for the 2<sup>nd</sup> Defendant

Mr. Morara Omoke for 3<sup>rd</sup> Defendant

Court Assistant - Sakina

