



**Muoka v SBM Bank Limited (formerly Fidelity Commercial Bank Ltd) (Miscellaneous Cause E486 of 2016) [2025] KEHC 15562 (KLR) (Commercial & Admiralty) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15562 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
MISCELLANEOUS CAUSE E486 OF 2016**

**PM MULWA, J**

**OCTOBER 30, 2025**

**BETWEEN**

**PHILIP JOHN MUOKA ..... APPLICANT**

**AND**

**SBM BANK LIMITED (FORMERLY FIDELITY COMMERCIAL BANK LTD) ..... RESPONDENT**

**RULING**

1. The Applicant filed the Notice of Motion dated 20<sup>th</sup> September 2024, brought pursuant to Article 50 of *the Constitution*, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 9 rule 9 & 10, Order 10 Rules 10 and 11 and Order 51 Rule 1 & 15 of the Civil Procedure Rules 2010.
2. In a nutshell, the Applicant seeks orders that:
  - i. A stay of proceedings and execution herein;
  - ii. M/s Robson Harris Advocates LLP be granted leave to come on record after judgment; and
  - iii. The judgment and consequential proceedings as against SBM Bank (Kenya) Limited be set aside.
3. The application is supported by the affidavit of Stephanie Kioko, who avers that judgment was entered against Fidelity Commercial Bank Limited on 17<sup>th</sup> September 2024 in the sum of Kshs. 5,983,019.59. The Applicant contends that it was never a party to the said proceedings, yet execution has been levied against it through a proclamation notice and warrants of attachment both dated 19<sup>th</sup> September 2024.
4. The Applicant states that it only acquired a majority stake in Fidelity Commercial Bank and took over its operations, but that proper documentation of parties in legal proceedings was necessary. It further



avers that upon acquisition, it settled all pending legal fees owed by Fidelity Commercial Bank to the Respondent vide a Settlement Agreement dated 26<sup>th</sup> March 2018, for Kshs. 30,000,000/=, in full and final settlement of all fees due.

5. It is therefore the Applicant's case that the present execution is irregular, in bad faith, and amounts to unjust enrichment by the Respondent. It maintains that a decree of the court cannot be executed against a party who was not part of the suit and that the application was brought without undue delay.
6. The Respondent opposed the application through an affidavit sworn by Philip John Mokuu, contending that the client was duly served with the Bill of Costs but failed to respond, leading to taxation and entry of judgment.
7. The Respondent argues that the Settlement Agreement of 26<sup>th</sup> March 2018 expressly excluded non-litigious or commercial matters, as evidenced by prior email communication from the client. It asserts that the taxed amount arose from non-litigious work and therefore does not fall within the scope of the said agreement.
8. The Respondent further avers that the Applicant has been dishonest and indolent, having failed to file a reference under Rule 11 of the Advocates Remuneration Order or seek enlargement of time. It maintains that the execution is lawful and properly founded on a valid certificate of taxation.
9. The Respondent filed written submissions dated 26<sup>th</sup> May 2025, while the Applicant filed submissions dated 31<sup>st</sup> March 2025. Both parties reiterated their affidavits and relied on legal authorities to support their respective positions.

### **Analysis and determination**

10. Having considered the pleadings, affidavits, and submissions, the determinative issue in this matter is whether the Settlement Agreement executed between the parties on 26<sup>th</sup> March 2018 constituted a valid and binding remuneration agreement within the meaning of Section 45 of the *Advocates Act*, thereby barring subsequent taxation.
11. Section 45(6) of the *Advocates Act* provides:

“Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.”
12. Where there is a valid remuneration agreement, the taxing officer has no jurisdiction to tax a bill of costs arising from the same subject matter. The only recourse is to apply to set aside or vary the agreement under Section 45(2) (See *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Ltd* [2006] eKLR).
13. Similarly, in *Mbugua & Mbugua Advocates v Kenindia Assurance Co. Ltd* [2020] eKLR, the Court emphasized that:

“Once a valid remuneration agreement exists, it becomes a complete bar to any taxation proceedings on the same services unless the agreement is first set aside.”
14. The Applicant has produced a duly executed Settlement Agreement in which the Respondent acknowledged receipt of Kshs. 30,000,000/= in full and final settlement of all fees due for all services rendered to Fidelity Commercial Bank Limited. The wording is clear, comprehensive, and unqualified.



15. The Respondent relies on an earlier email communication allegedly excluding “non-litigious” or “commercial matters” from the scope of the settlement. However, the parole evidence rule embodied in Section 97 of the *Evidence Act* prohibits the introduction of extrinsic evidence to vary or contradict the express terms of a written contract. A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. (See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR).
15. There is no evidence that the Settlement Agreement was vitiated by fraud, mistake, or duress. It has never been set aside or varied by a competent court as required by Section 45(2). Accordingly, it remains binding and enforceable.
16. The Respondent, having freely executed the agreement and received the full settlement, cannot now turn around and reopen the issue of fees through taxation. It follows, therefore, that the Taxing Master acted without jurisdiction in entertaining and taxing the bill of costs arising from matters already settled. The subsequent judgment founded on such taxation was irregular, unlawful, and nullity ab initio.
17. To allow the execution to proceed in these circumstances would offend the equitable maxim that a court of equity will not permit unjust enrichment, and would violate Article 50(1) of *the Constitution*, which guarantees every person a fair hearing before adverse action is taken.
18. Order 9 Rule 9 of the Civil Procedure Rules provides that where judgment has been entered, a change of advocates shall not be effected without leave of court. The purpose of this provision is to protect advocates who may have vested interests arising from existing costs or retainer. The application for leave is therefore properly before this Court, and the same is allowed.
19. In the result, I find that the Notice of Motion dated 20<sup>th</sup> September 2024 is meritorious. The judgment entered on 17<sup>th</sup> September 2024 is set aside.
20. This ruling will apply to Misc. Nos. 464 of 2016, 465 of 2016, 466 of 2016, 467 of 2016, and 468 of 2016.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.**

**P.M MULWA**

**JUDGE**

In the presence of:

Ms. Odongo Applicant (SBM)

Mr. Kimani Mungai for Respondent/Applicant

Court Assistant: Carlos

