

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A.)

CIVIL APPLICATION NO. E111 OF 2025

BETWEEN

S.B.M. HOLDINGS LIMITED.....APPLICANT

AND

SULTAN KHIMJI (*Suing as the
seller's representatives on behalf of
the former shareholders of*

**FIDELITY COMMERCIAL BANK LIMITED).....1ST
RESPONDENT**

**CENTRAL BANK OF KENYA.....2ND
RESPONDENT**

*(Being an application for stay of proceedings pending the hearing
and determination of an intended appeal against the ruling of the
High Court at Nairobi (F. Gikonyo, J.) dated 20th February 2025
in*

HCCC Case No. E333 of 2022)

RULING OF THE COURT

1. Vide a chamber summons application dated 16th September 2024

brought under **section 6(1) and (2)** of the **Arbitration Act, 1995**

and **Rules 2 and 8** of the **Arbitration Rules, 1997**, the applicant,

S.B.M. Holdings Limited (S.B.M. Holdings) sought an order for stay of the proceedings pending the final determination of the arbitration proceedings between it and the 1st respondent already commenced in **L.C.I.A. Arbitration Number 246196, S.B.M. Holdings Ltd -vs- Sultan Khimji.**

2. In his ruling delivered on 20th February 2025, the learned trial Judge, in dismissing the application, pronounced himself as follows:

“42. Therefore, the issues that; S.B.M. 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.””

3. Aggrieved, the applicant lodged a Notice of Appeal dated 24th January 2025. Subsequently, it filed the Notice of Motion application dated 3rd March 2025 under **Rule 5(2)(b)** of this Court’s **Rules** seeking, in essence, that the proceedings in Nairobi High Court **Commercial Case No. E333 of 2022** be stayed pending the hearing and determination of an intended appeal against the said ruling. That application is the subject of this ruling.
4. In support of the application, the applicant avers that in 2016, it and the 1st respondent signed a Heads of Terms agreement for the acquisition of Fidelity Commercial Bank, this agreement specified that any disputes would be resolved through L.C.I.A. arbitration in London; that a subsequent Sale and Purchase Agreement (SPA) in 2017 a separate document was between S.B.M. Africa and the sellers and provided for arbitration in Mauritius under Kenyan law; that the 1st respondent sued an incorrect S.B.M. entity S.B.M. Bank Holdings Limited in the High Court in Kenya in 2022. The applicant was later joined to the

case by a court ruling on 31st July 2024; an earlier application by the applicant to stay the Kenyan

proceedings pending arbitration under the S.P.A. was dismissed by the High Court on 28th July 2023. The applicant was not a party to that application. It was contended that the English High Court, in a separate action, granted a final anti-suit injunction against the 1st respondent on 22nd March 2024, holding that the dispute under the Heads of Terms was arbitrable in London. Further, that on 31st January 2025, the L.C.I.A. arbitral tribunal also ruled that it has jurisdiction over the claims the 1st respondent is pursuing in the High Court proceedings.

5. It was contended that despite this the High Court dismissed the applicant's application for stay of proceedings on 20th February 2025, stating that the issue had already been determined in the earlier ruling of 28th July 2023. Finally, the applicant contended that its right to a fair hearing will be violated if it is forced to participate in court proceedings in Kenya instead of the agreed arbitration forum and that further proceedings are scheduled for 19th May, 2025, and unless a stay is granted, the intended appeal will be rendered nugatory.
6. The 1st respondent opposed the application through a replying affidavit sworn by Sultan Khimji on 12th May, 2025 in which it was averred that the application does not meet the threshold for stay of proceedings because the previous court rulings on jurisdiction are binding and have not been set aside; that the

appeal would not be

rendered nugatory if the stay is denied as a fair hearing is guaranteed by the Constitution, and the applicant will have a fair opportunity to present its case during the ongoing proceedings; and that the applicant has not approached the Court with clean hands having initiated multiple anti-suit injunction proceedings in English and Mauritian courts to obstruct the Kenyan case, which amounts to forum shopping and an abuse of process. And, finally, that Mabeya, J. and Gikonyo, J. have already delivered two rulings on 28th July 2023 and on 31st August 2024 affirming the jurisdiction to hear the case and finding the dispute not arbitrable due to the serious nature of the fraud allegations, and that the applicant was advised that the correct procedure was to appeal these decisions, not file fresh applications for stay.

7. When the application came up for hearing before us on 13th May 2025, learned counsel Mr. Kimani Kiragu (SC) together with Mr. Lawson Ondieki appeared for the applicant, Ms. Violet Obire holding brief for senior counsel Mr. Kanjama, appeared for the 1st respondent and Mr. Chege appeared for the 2nd respondent. Both parties relied on their respective written submissions which they briefly highlighted.
8. In support of the application, the applicant's counsel submitted that the intended appeal is arguable, it was contended that the

High Court ruling of 20th February 2025 infringes the applicant's

right to a fair hearing guaranteed under **Article 50(1)** of the **Constitution**. It is contended that the applicant was not a party to the High Court proceedings of July 28, 2023, when a crucial ruling was delivered by Mabeya, J. and, therefore, it should not be bound by it.

9. It was submitted that the applicant was denied its right to access justice in breach of **section 6** of the **Arbitration Act** by the court's failure to hear its application to stay the dispute and refer it to arbitration on its merits once the applicant was joined to the case.

10. It was further submitted that another arguable ground is that the High Court made findings of fact, that the applicant was litigating under a subsidiary's title and was aware of previous applications

without any supporting evidence. Reliance was placed in **National**

Bank of Kenya Limited & another -vs- Geoffrey Wahome

Muotia (2016) eKLR to support the argument that the applicant

only needs to demonstrate a single *bona fide* issue that deserves

the court's consideration.

11. Counsel further relied on the Supreme Court case of **Muruatetu &**

another -vs- Republic; Katiba Institute & 5 others
(Amicus

Curiae) (2017) KESC 2 (KLR), which held that a fair hearing means a hearing of both sides. It was contended that as the applicant was not a party to the initial ruling declining to consider its application

for arbitration on its merits, there was a violation of this right.

12. On the nugatory aspect, it was submitted that if the High Court proceedings are not stayed, the applicant will be compelled to participate in court proceedings despite an express agreement in the Heads of Terms to refer all disputes to L.C.I.A. arbitration, hence losing the agreed upon benefits of arbitration such as confidentiality. It was also submitted that these circumstances are

irreversible and not compensable by damages. Counsel relied on

this Court's decision in **Stanley Kang'ethe -vs- Tony Keter & 5 others (2013) eKLR.**

13. Finally, it was submitted that due to these unique circumstances, the applicant has demonstrated both limbs of the test and counsel urged the Court to allow the application.

14. In opposing the application, the 1st respondent submitted that the appeal is frivolous and does not raise arguable issues because the High Court decisions on non-arbitrability were delivered on merit after a fair hearing. It was contended that the previous High Court rulings by Mabeya, J. and Gikonyo, J. already determined that the High Court in Kenya has jurisdiction and that the dispute is not arbitrable.

15. It was submitted that these decisions have not been set aside or

stayed and that the applicant was afforded a fair hearing as guaranteed by the Constitution of Kenya. It was contended that the

applicant is essentially seeking to challenge a point of law that has already been decided on its merits in the High Court, making the present appeal an attempt to re-litigate settled matters. Counsel relied on **M/S Karsan Ramji & Sons Limited -vs- Athumani & another (Suing for and on behalf of the Mwanyundo Clan) & 6 others (2024) eKLR.**

16. With regard to the nugatory aspect, it was submitted that the appeal would not be rendered nugatory if the High Court proceedings continue. It was contended that granting a stay would unduly prejudice the 1st respondent by delaying the case and infringing on its constitutional right to an expeditious trial.
17. Finally, it was submitted that the applicant is actively pursuing arbitration in England and granting a stay in Kenya would allow the applicant to pursue claims in a foreign jurisdiction while depriving the 1st respondent of their right to redress in the Kenyan courts.
18. We have carefully considered the application and the grounds urged by both parties in support of their respective positions.
- 19.** As to whether the appeal is arguable, we have to consider whether there is at least a single *bona fide* arguable ground that

has been raised by the applicants in order to warrant ventilation before this Court. In **Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5**

Others (supra), this Court described an arguable appeal as one which must not necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous, and that this Court must not make definitive or final findings of either fact or law at this stage, because doing so may embarrass the ultimate hearing of the main appeal.

20. In a bid to satisfy the first prerequisite, the applicant has raised 5 grounds of appeal. Two of the grounds are that the learned Judge erred in holding that the only remedy available to the applicant was to seek an appeal against the ruling delivered by Mabeya, J. on 28th July 2023 when it was acknowledged by all parties that the applicant was not a party to the proceedings when the ruling was delivered. The issue of whether the applicant was denied the right to apply and to be heard pursuant to **section 6** of the **Arbitration Act**, and whether this amounted to a violation of the applicant's right to be heard pursuant to **Article 50** of the **Constitution** is arguable and it is certainly a matter for ventilation and resolution by this Court on appeal.

21. On the nugatory aspect, we are mindful that, as stated by this Court in **Meta Platforms, Inc & Another vs Samasource Kenya**

EPZ Limited t/a Sama & 185 Others; Central Organization of

Trade Unions Kenya & 8 Others (Interested Parties)
(Civil

Application No. E178 of 2023) [2023] KECA 999 (KLR) that
an

order of stay of proceedings pending hearing and determination of an appeal against an interlocutory ruling should only be allowed if the circumstances are such that the impugned order will significantly prejudice the applicant if the matter proceeds.

In the same case, the Court stated as follows:

“The nature of an order of stay of proceedings and the principles, which should guide a court in exercising its discretion to grant or refuse an application for stay, were adequately stated by the Court of Appeal of Nigeria, Abuja Division in the case of NNPC & Anor vs. Odidere Enterprises Nigeria Ltd (2008) 8 NWLR (Pt. 1090) 583 at 616-618 per Aboki JCA as follows:

‘Stay of Proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.’ ”

22. In this application the applicant submits that the appeal will be rendered nugatory if the trial in the High Court proceeds and it is ultimately found in the successful appeal that the trial was conducted in violation of the applicant’s right to a fair hearing. We bear in mind that the right to a fair hearing which the applicant is asserting is a right which by dint of **Article 50(1)** of the **Constitution** is non-derogable. In these circumstances, the balance tilts in favour of staying further proceedings until this Court determines whether or not the applicant’s right to a fair

hearing was violated.

23. Ultimately, we are persuaded that the applicant has satisfied both considerations under **Rule 5(2)(b)** and is entitled to an order of stay of further proceedings in the High Court **Commercial Case No. E333 of 2022**, which we hereby issue, until the hearing and determination of the applicant's appeal. Costs will abide the outcome of the appeal.

Dated and delivered at Nairobi, this 13th day of February 2026.

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.