



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fidelity Commercial Bank Limited v Shah & 3 others (Civil Application E038 of 2022) [2022] KECA 1275 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1275 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E038 OF 2022  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**FIDELITY COMMERCIAL BANK LIMITED ..... APPLICANT**

**AND**

**MAHENDRAKUMAR CHANDULAL SHAH ..... 1<sup>ST</sup> RESPONDENT**

**KIRTIBALA MAHENDRAKUMAR SHAH ..... 2<sup>ND</sup> RESPONDENT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**ARYAN LIMITED ..... 4<sup>TH</sup> RESPONDENT**

*(An application for conservatory orders and stay of execution pending the hearing and determination of the intended appeal from the decision of Hon. Patrick J. O. Otieno delivered on 25th May 2022 in Mombasa Civil Case number 212 of 2011 as consolidated with Civil Suit no 130 of 2012)*

**RULING**

1. The Applicant herein, Fidelity Commercial Bank Limited, through its learned counsel, Mr. Wilberforce Akello, moved this court by way of Notice of Motion dated 29<sup>th</sup> July, 2022 seeking the following orders:
  - a) That the court be pleased to review and/or set aside its decision and/or orders given on 27<sup>th</sup> July, 2022 and replace it with appropriate reliefs.
  - b) That a stay of execution of the Judgment of Honourable Justice Patrick J O Otieno delivered on 25<sup>th</sup> May, 2022 in Mombasa High Court Civil Case Number 212 of 2011 (as consolidated with Civil Suit No. 130 of 2012) be issued in the matter pending the delivery of the Ruling scheduled for 16<sup>th</sup> December 2022.



c) That the costs of this Application be provided for.

2. Before the filing of the instant application, the applicant had by its application dated 22<sup>nd</sup> June, 2022 sought stay of execution of the same judgement pending the determination of its intended appeal. Upon the hearing of the said application on 27<sup>th</sup> July, 2022, the Court scheduled the delivery date of the ruling therefor for 16<sup>th</sup> December, 2022. The Applicant's counsel then orally sought for an order that the status quo be maintained pending the delivery of the said ruling. After considering the said oral application, the court declined to grant the said orders.
3. In this application, it is argued that unless the orders sought herein are granted the application dated 22<sup>nd</sup> June, 2022 will be rendered inconsequential and purely a waste of judicial time since the Respondents have already initiated the process of transfer of the subject property in addition to execution of the various portions of the impugned judgement. In the applicant's view, should the said execution proceed, the consequential results would be irreversible and would defeat the essence of the application dated 25<sup>th</sup> June, 2022 and the intended appeal.

It was further averred that the 4<sup>th</sup> Respondent had filed a Party and Party Bill of costs before the trial court seeking taxation and that the outcome of the said process would prejudice the application. According to the applicant, the present application is different from the earlier one since the applicant now seeks stay of execution as opposed to the order for maintenance of status quo which was being sought in the oral application. It was therefore submitted that, contrary to the Respondents' view, the present application is not res judicata. It was submitted before us that the circumstances of this case justifies review of the order issued earlier on and in support of its case, the applicant relied on the decision of *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR.

4. Though not part of the prayers sought in the application, Mr. Akello while submitting urged us, in exercise of the Court's residual jurisdiction, to bring forward the date of the ruling in respect of the application dated 22<sup>nd</sup> June 2022 which is set for delivery on 16<sup>th</sup> December 2022.
5. In opposing the application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through their learned counsel, Mr. David Oyatta, argued that the grounds put forth in support of the instant Application are the very same grounds in support of the earlier application save for the averment that the process of transfer of the subject property has been initiated and the filing of the Bill of Costs. Just like in the earlier application where the Respondents' position was that the subject property and the rent held in escrow account reverted back to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prior to the filing of the said application, it was similarly the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' position in the instant application that the Decree had been executed hence there is nothing to stay. As a result, the application for stay has been overtaken by events.
6. Learned Counsel submitted that since the taxation of the party and party bill of costs in the High Court commenced in June, 2022, that cannot be a ground for seeking a stay of execution. It was contended that the instant application is misconceived and does not meet the laid down test since the Applicant has not demonstrated that the decision sought to be reviewed contains errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. It was further contended that the Applicant has neither shown how the Court erred in the exercise of its discretion nor that it exercised its discretion whimsically.
7. The Court was informed by Mr. Oyatta that the 3<sup>rd</sup> Respondent had never participated in the proceedings.
8. On behalf of the 4<sup>th</sup> Respondent, it was submitted by Ms Eunice Kibe, Learned Counsel, that both applications seeking stay of execution of the decree have been overtaken by events due to the



partial lawfully concluded executions of the decree as the subject property reverted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

9. We have considered the application before us. At the outset we must state that the matter before us is an application, the grant of which would have the effect of staying the execution of the judgement sought to be appealed against, pending the delivery of the ruling scheduled for delivery on 16<sup>th</sup> December, 2022. It is that ruling that will determine whether or not the said judgement will be stayed pending the hearing and determination of the said appeal. Accordingly, in determining this application we are not called upon and we must be cautious not to stray into the issues that will be determined by the said ruling. To do otherwise would have the effect of prejudicing the outcome of the said ruling. In making our decision in the instant application, we will therefore avoid the temptations by the applicant to deal with the issues that rightly belong to the arena of the pending ruling.
10. The applicant has attempted to distinguish the instant application from the oral application that was made on its behalf on 27<sup>th</sup> July, 2022 on the ground that the said application did not seek stay of execution, but rather sought the maintenance of status quo pending the delivery of the ruling. With due respect to the applicant, it is not the language employed by the applicant in seeking relief that determines whether or not the doctrine of res judicata applies; rather, it is the effect of the relief sought that determines if a similar relief, whether baptised differently, may be sought.
11. The law is that a party must bring the whole of his dispute before the Court for adjudication and is not permitted to do so in instalments. The law, as we understand it is that a party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event. Otherwise it would be oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments. See *Apondi v Canuald Metal Packaging* [2005] 1 EA 12.
12. In this case, the applicant's forum of choice for seeking the preservation of the subject property was the oral application made on 27<sup>th</sup> July, 2022. The question before us is therefore whether the applicant herein, when it made its oral application for maintenance of status quo on 22<sup>nd</sup> July, 2022, could have sought, either in the alternative or in addition thereto, an order staying execution of the judgement pending the delivery of the ruling. In our view, nothing stopped the applicant from doing so. Accordingly, subject to what we state hereinbelow, the fact that the applicant sought an order maintaining status quo on 27<sup>th</sup> July, 2022 pending the delivery of the ruling on 16<sup>th</sup> December, 2022 and now seeks an order staying execution of the judgement pending the said delivery does not remove the matter from the grip of the doctrine of res judicata.
13. It is now trite that where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time. See *Gurbachan Singh Kalsi v Yowani Ekori* [1958] EA 450.
14. The applicant however seeks that we review the order issued by this Court on 22<sup>nd</sup> July, 2022 declining to maintain status quo pending the delivery of the ruling on 16<sup>th</sup> December, 2022. The fact that the applicant seeks a review is in itself an indication that the subject matter of the instant applicant had



already been dealt with. If not the applicant would be seeking fresh orders. It is true that in *Benjoh Amalgamated Ltd and Another vs. Kenya Commercial Bank Ltd* [2014] eKLR, this Court held that since the promulgation of *the Constitution* of Kenya, 2010, the Court has the residual power to review its decision, where there is no appeal to the Supreme Court in order to correct errors of law that has occasioned real injustice, or failure, or miscarriage of justice. That jurisdiction, the Court observed, has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence without causing further injustice. The Supreme Court in *Menginya Salim Murgani vs. Kenya Revenue Authority* (supra) held that to grant such an application in circumstances that would require the Court to re-open and re-hear the case would amount to the Court quashing and setting aside its own decision which would be beyond the scope of the powers of review as conceived in legal parlance.

15. In this case, the only grounds upon which review is sought are that the process of transfer of the suit property has been initiated and that a Bill of Costs has been filed. In his oral arguments made before this court on 27<sup>th</sup> July, 2022, Mr Akello alluded to the threats of transfer of the subject property. Accordingly, the first ground upon which this application is based is the same as the ground upon which the oral application was made and cannot therefore be a ground for review. As for the second ground, we are not convinced that the mere fact that a Bill of Costs has been filed amounts to “real injustice, or failure, or miscarriage of justice”. The Bill of Costs is yet to be taxed and we cannot speculate as to what would be the likely outcome of that process.
16. Having considered the arguments and the material placed before us in the instant applicant we find that no case has been made out to justify our review of the order made on 27<sup>th</sup> July, 2022. No new grounds have been placed before us that materially alters the circumstances prevailing at the time the order of 27<sup>th</sup> July, 2022 was made. Consequently, we dismiss the application dated 29<sup>th</sup> July, 2022 in its entirety. We award the costs therefor to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents.
17. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2022.**

**S. GATEMBU KAIRU (FCI Arb.)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*SIGNED*

**DEPUTY REGISTRAR**

