



**Wiseman Talent Ventures v Capital Markets Authority (Civil Suit 08 of 2019)
[2019] KEHC 3698 (KLR) (Commercial and Tax) (27 September 2019) (Ruling)**

Wiseman Talent Ventures v Capital Markets Authority [2019] eKLR

Neutral citation: [2019] KEHC 3698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 08 OF 2019
MW MUIGAI, J
SEPTEMBER 27, 2019**

BETWEEN

WISEMAN TALENT VENTURES PLAINTIFF

AND

CAPITAL MARKETS AUTHORITY DEFENDANT

Test in determining if crypto assets are securities to warrant regulation by the Capital Markets Authority

Wiseman Talent Ventures sought a temporary injunction to stop the Capital Markets Authority (CMA) from interfering with its cryptocurrency trade involving Kenicoin and an Initial Coin Offering (ICO). The applicant argued cryptocurrencies were not securities and thus outside CMA’s mandate, and claimed no misleading information was published. CMA contended that Kenicoin’s tokens resembled securities, citing regulatory powers under the Capital Markets Act and referencing the U.S. Howey test. CMA received public complaints and found discrepancies in Kenicoin’s operations, prompting a cautionary notice to protect investors. The court found that the CMA acted within its statutory mandate, as Kenicoin’s ICO had features of securities and posed risks to investors, justifying CMA’s intervention and cautionary notice to protect the public.

Reported by John Ribia

Capital Markets Law – mandate – scope of persons regulated by the Capital Markets Authority – crypto currency coin issuers – test to determine if a crypto asset was a security - what was the test to be applied in determining of crypto assets were securities to be administered by the Capital Markets Authority - whether Kenicoin (a crypto currency) and the associated Initial Coin Offering (ICO) constituted a “security” within the meaning of the Capital Markets Act, thereby falling under the regulatory jurisdiction of the Capital Markets Authority - whether the Capital Markets Authority had the statutory mandate under in issuing a cautionary public statement and conducting investigations into the applicant’s cryptocurrency operations - whether the absence of a specific regulatory framework for cryptocurrencies excluded or limited the jurisdiction of the CMA to regulate



ICOs and digital tokens - Capital Markets Act (Cap 485A) sections 11(1), 11(3)(d) & (w), 12A, 13 and 30A; Securities Exchange Commission (SEC) vs WJ Howey Co. 328 US 293(1946)

Civil Practice and Procedure – injunctions – temporary injunctions – conditions - what conditions must one satisfy to be granted a temporary injunction – where a crypto currency operator sought an injunction against the Capital Markets Authority to stop investigative and regulatory action - whether the crypto currency operator had laid out a prima facie case with a likelihood of success to warrant the grant of a temporary injunction against the Capital Markets Authority regulatory actions; Giella vs Cassmann Brown Co Ltd [1973] CA 360; American Cyanamid v Ethicon Limited [1975] AC 396.

Brief facts

Wiseman Talent Ventures sought a temporary injunction to restrain the Capital Markets Authority (CMA) from interfering with its cryptocurrency trade and affairs pending the hearing of the suit. The applicant stated that it was trading in Kenicoin, a digital asset operating on Kenicoin Exchange, through an Initial Coin Offering (ICO), where tokens were sold in exchange for legal tender or cryptocurrencies like Bitcoin and Ethereum. The applicant argued that cryptocurrencies were not securities and therefore outside CMA's regulatory mandate under the Capital Markets Act (the Act). It claimed it had not violated any laws or published misleading information.

Conversely, the CMA contended that Kenicoin's tokens were securities under the Act, as the applicant was raising funds from the public through digital tokens on a platform resembling a securities exchange. CMA relied on the SEC v. W.J. Howey Co. test, emphasizing economic reality over form, and asserted jurisdiction over ICOs given their similarity to traditional capital markets activities. Following a public complaint, the CMA investigated and found discrepancies in the applicant's disclosures, including promises of guaranteed returns and misleading information about investors and funds raised.

Due to the risks posed to investors, the CMA issued a public caution on January 3, 2019 and took steps to regulate the ICO pending a formal regulatory framework.

Relevant provisions of the Law

- i. What was the test to be applied in determining of crypto assets were securities to be administered by the Capital Markets Authority?
- ii. Whether Kenicoin (a crypto currency) and the associated Initial Coin Offering (ICO) constituted a "security" within the meaning of the Capital Markets Act, thereby falling under the regulatory jurisdiction of the Capital Markets Authority (CMA).
- iii. Whether the Capital Markets Authority had the statutory mandate in issuing a cautionary public statement and conducting investigations into the applicant's cryptocurrency operations.
- iv. Whether the absence of a specific regulatory framework for cryptocurrencies excluded or limited the jurisdiction of the CMA to regulate ICOs and digital tokens.
- v. What conditions must one satisfy to be granted a temporary injunction?
- vi. Whether the crypto currency operator had laid out a *prima facie* case with a likelihood of success to warrant the grant of a temporary injunction against the Capital Markets Authority's regulatory actions

Held

1. In order to grant the temporary injunction, the Court must be satisfied that;
 - a. The applicant had established a *prima facie* case with probability of success
 - b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and
 - c. If the court was in doubt, the application would be determined on a balance of probabilities/ convenience.
2. The applicant failed to establish a *prima facie* case because the applicant had not proved the exact scope of the Kenicoin business and the investment thereof such that the Capital Market Authority's



- (CMA) conduct caused loss and damage that may be considered immeasurable or unquantifiable to be compensated by damages after full hearing and determination of the suit.
3. The applicant did not give sufficient information/evidence to the court to demonstrate the nature and scope of the cryptocurrency business to inform the court the amount of financial investment to start up and run the said business.
 4. There was no disclosure of the structure and or processes of the business; its physical and contact addresses, the list of members, financiers or promoters, what capital they injected to start up the said business and more importantly the source and relevant information available to the consumer public on viability and process of purchase of the Kenicoin. The plaintiff claimed that all transactions were stored in block chain network and it was not possible to retrieve the list of subscribers yet in the same breath claimed that the Kenicoin transaction could easily be verified.
 5. In considering CMA's mandate, the test used to determine if crypto assets were securities was whether the scheme involved an investment of money in a common enterprise with profits to come solely from efforts of others. If the test was satisfied, it was immaterial whether the enterprise was speculative or non-speculative or whether there was a sale of property with or without intrinsic value. The statutory policy of affording broad protection to investors was not to be thwarted by unrealistic and irrelevant formulae. (Howey test as used by the United States Supreme Court case of *Securities Exchange Commission (SEC) vs WJ Howey Co.* 328 US 293(1946))
 6. Although the court acknowledged that there was no comprehensive legal regime to regulate emerging markets on cryptocurrencies, the absence of a specific regime did not ouster jurisdiction of the general regime of law as exemplified by the cited provisions of Capital Markets Act and the application of the Howey test.
 7. Even with the absence of a comprehensive legal regime to regulate cryptocurrencies, the Authority had residual jurisdiction as per section 2 and 11 of Capital Markets Act. Any other interpretation of law would result in absurdity that millions of Kenyan money from the public was processed or utilized outside the legal framework for regulation of financial framework in Kenya and that if a party engaged in financial services outside the legal financial framework the party could not be said to be transparent and accountable.
 8. All persons were obligated to be transparent and accountable in policy matters. The applicant's business was not transparent and the plaintiff was not accountable in facilitating investors to make informed decisions on purchase of cryptocurrency, making investment in expectation of profits that were based on speculation of the market. There was no information to the public on the registration, offering process and disclosure requirements as provided for in other securities under the Capital Markets Act.
 9. Nobody should be allowed to engage in financial transactions exposing Kenyan public without any form of regulation.
 10. The decision that commended itself to the court and met the best the ends of justice, protected public good was based on where the greatest harm would be occasioned if the temporary injunction was granted or not based on the circumstances.
 11. The applicant as a sole proprietor engaged in the sale of Kenicoins as investment in exchange of public money without regulation posed greater danger to the consumer/investor public than the damage or loss by the sole proprietor. The balance of convenience tilted in favour of protecting the public by conduct of investigations, disclosure requirements and regulation.
 12. A temporary injunction could not be granted at the instant stage of proceedings because a *prima facie* case had not been established, irreparable injury was not demonstrated. In fact, the CMA as regulator of securities market commenced inquiry and/or investigations and an injunction was not proper at the instant stage as the horse had bolted and thus the injunction would amount to putting a padlock to an empty house.



13. The Authority was allowed to proceed with investigations/inquiry while adhering to the applicant's constitutional right to fair hearing and observing rules of natural justice.

The application was dismissed with costs to the CMA.

Citations

Cases

1. Rou v African Bank of Kenya Ltd & 2 others ([1973] KLR 125) — Mentioned
2. Giella v Cassmann Brown Co Ltd ([1973] EA 358) — Mentioned
3. American Cynamid Co v Ethin Company ([1975] AC 396) — Mentioned
4. Securities Exchange Commission (SEC) v WJ Howey Co (328 US 293 (1946)) — Explained

Statutes

1. Capital Markets Authority Act (cap 485A) — section 2(j)(m); 5(1); 11(1)(3)(d)(r)(w); 12A — Interpreted
2. Civil Procedure Rules, 2020 (cap 21 Sub Leg) — order 40 — Interpreted
3. Capital Markets Act
4. Companies Act

Advocates

None mentioned

RULING

Background of the Application

1. The applicant approached the court through a notice of motion dated January 14, 2019 for the orders;
 - a. The court issues a temporary injunction against the defendant, restraining them from interfering with the applicant's trade and in any way whatsoever or dealing in any way with the affairs of the Plaintiff pending the hearing and determination of the application.
 - b. The court issues a temporary injunction against the defendant, restraining them from interfering with the applicant's trade and in any way whatsoever or dealing in any way with the affairs of the Plaintiff pending the hearing and determination of the suit.
 - c. The court grants such further or other consequential orders as may seem fit
 - d. The cost of the application be borne by the defendant.
2. The application was based on the following grounds;
 - a. The plaintiff is engaged in the business of trading in cryptocurrencies in kenicoïn.
 - b. All the transactions are recorded and stored in a network of computers within the block chain network and not in a single server and hence it is impossible to hack or retrieve such subscribers Information.
 - c. The plaintiff cannot copy, paste or export information as all accounts are highly encrypted and anonymous for anyone to trace the owners
 - d. The defendants actions in demanding the details of the subscribers, are illegal and show its lack of knowledge on how cryptocurrencies operate



- e. The kenicoin transaction can easily be verified from any part of the world through the etherscan explorer and is therefore transparent.
 - f. The defendants actions are not mandated under the *Capital Markets Authority Act*, in dealing with cryptocurrency and are thus an abuse of its authority.
 - g. The defendant has published a cautionary statement in a local newspaper warning the members of the public from trading in kenicoin which has caused panic to the customers
 - h. The defendant has already published in the local media quotes that have made Safaricom close the Paybill for customers of Kenicoin.
 - i. The defendant's actions should be enjoined to prevent market loss of Kenicoin
 - j. The plaintiff sought restraining orders to prevent irreparable damage by the defendant's actions whereas it lacks mandate
3. The application was supported by the affidavit of the Applicant Mr. Haron Kiriba Sole proprietor of the Plaintiff business and deals in cryptocurrencies. He stated that cryptocurrency is a digital asset designed to work as a medium of exchange that uses strong cryptography to secure financial transactions. The trading is online with the name of Kenicoin on Kenicoin Exchange and engages in Initial Coin Offering (ICO). In the Initial Coin Offering tokens/coins are sold to speculators or investors, in exchange for legal tender or other cryptocurrencies such as Bitcoin and Ethereum. The business will eventually have a public ICO.

Supplementary Further Affidavit

4. The application was supported by a further supplementary affidavit dated April 1, 2019, deponed by the Sole proprietor of the Plaintiff.
5. The deponent stated that no guidelines and notices had ever been issued in respect to cryptocurrency by the Respondent under the Act.
6. The deponent also averred that the Plaintiff had never contravened any provisions of the Act nor has it ever published information that is misleading on the website.
7. The deponent stated that cryptocurrencies are not securities and hence do not fall within the Respondents mandate. Upon the Applicants summons to be interviewed, the Applicant provided all the required information on December 11, 2018 where the Respondent had confirmed that all the information received would be treated as confidential and would only be used for regulation purposes.
8. The deponent stated that the Applicant customers had been warned that Kenicoin was a fraud as shown in Exhibit- AMU3 and as a result of the reckless statement, it led to the fall of Kenicoin as captured in its website. The Applicant had never received any complaint from any member of the public. The purported complaint form from the Respondent did not meet the standards of a compliant but as an inquiry.

Respondents Replying Affidavit

9. The Respondent's Replying Affidavit was filed on 6th March 2019 and replied to the Applicants Notice of Motion 28th February 2019.
10. The Respondent deponed it is a statutory body established under section 5(1) of the *Capital Markets Authority Act*. One of its core objectives under section 11(1) (3)(d) & (w) of the *Capital Markets Authority Act*.



Authority Act is to issue guidelines and notices on all matters within the jurisdiction of the Authority under the Act. The Authority is mandated to do all acts as may be incidental or conducive to the attainment of the objectives of the Authority of exercise of power under the Act.

11. Section 12A of the same Act, grants the Respondent the mandate to issue guidelines and notices as it may consider necessary that would better the carrying out of its functions. The emphasis is on regulation of capital markets activities and products subject to the assessment of the extent to which they appropriately cater for the proper protection of investor interests and appropriate level of disclosure.
12. The Respondent also stated that in the course of exercising its powers under section 11(3) of the Act, it can also exercise the related powers under section 13 of the Act requiring any person to furnish the Authority with information within such period as specified in a notice issued by them.
13. The Respondent stated that as a regulator, it is charged under Section 30A of the Act with the responsibility of regulating public offers of securities. In the exercise of its powers under section II of the Act, the respondent issued a market guidance statement on Initial Coin Offerings (ICO) in February 2018 the Cautionary Statement on ICOs explaining the risks associated with them.
14. The plaintiff/applicant's business was raising money from the public through the issuance of digital tokens in the form of coins and further providing a platform www.kenicoinexchange.com which mimicked a "securities exchange" where the coins were being offered for sale, purchase or exchange in form of a security which in the defendant's view was a security under section 2(j) of the Act.
15. The respondent averred that in October 2018, CMA received a complaint from a member of the public that the Plaintiff's firm was raising money from the public through issuance of digital tokens in the form of coins. They were doing so by providing a platform for trading of the said coins on a purported exchange.
16. After the respondent had enquired, the investor sought to find out through the Respondents assistance if the coins were genuine investments. The Respondent issued Summons for information to interview Mr Haron Kiriba who is the CEO Founder of the Plaintiff business.
17. From the interview, the Respondent established that Kenicoin was first introduced to the members of the public through ICOs on 7th April 2018 to 14th August 2018 where the going price for 1coin was discounted at Ksh 100 which price experienced exponential growth to Ksh 400.
18. The buying and selling of the coins was online vide the platform www.kenicoinexchange.com. Where buyers and sellers met online.
19. The defendant found various discrepancies in the said platform on Kenicoins and the information the Plaintiff/Applicant gave to CMA on total number of purchasers, value of Kenicoin, total registered users and amount of funds raised. The defendant observed that the Plaintiff/Applicant promised guaranteed returns of 10% monthly on initial investments in Coins which were issued at Ksh 100/- and were marketed at Ksh 2000/- at Kenicoin Exchange.
20. The Respondent noted the nature and features of capital raising was taking the form of capital markets which had not been approved and hence issued a press release dated 3rd January 2019 to caution the public against participation in the transaction.
21. The Respondents also stated that it had jurisdiction over the nature of crypto asset as the ICO's were similar to the traditional IPOs which are investments regulated by the Respondent. The Respondent therefore averred that in the interim, pending the publication of an appropriate framework for the



regulation of ICO's, it would be a failure on the part of the Respondent to observe while the investing public were at a risk of significant loss without the Respondent taking appropriate measures.

Respondent's Supplementary Affidavit

22. The Respondent filed on 28th June 2019 a Supplementary Affidavit dated 11th June 2019: -
23. The Applicant is unlawfully engaging in the business of cryptocurrency, issuing cryptocurrency to the public and trading with Kenicoin. The Applicant is registered to conduct the business of Talent Mentorship Program and has hence approached this court with dirty hands and should not be granted the orders sought.
24. The Respondent further stated that it has issued market guidance notes and cautionary statements together with other capital markets regulators in other jurisdictions and the International Organization of the Securities Commissions, concerning Initial Coin Offerings.
25. The Respondent reiterated that it issued the cautionary statements against the Kenicoin ICO in order to protect the interests of the investing public and in the general interest of the public. Further, in order to realize the protection of the investor, the Respondent, in the media statement identified information discrepancies between what was contained in the website versus the information furnished by Mr. Haron Kiriba during a meeting with the respondent on 11th December 2018.
26. The Respondent stated that its warning to the investing public was informed by the outrageous remarks which included guarantees of exponential returns for would be investors in Kenicoin. The outrageous information is contained in the Applicant's website, brochure and Kenicoin white paper which is equivalent to an information prospectus. Some of the statements by the applicant were: -

High return on investment for the people buying Kenioins due to its short supply and prospective higher demand in various business utilities”

“...with its limited amount in the market, the value of the Kenicoin must keep assuming upward trajectory as demand continues to soar...”
27. The Respondent stated that its actions in publishing the cautionary statement against Kenicoin was a sincere warning to the investing public against information asymmetry, contradictions and misrepresentations in the Applicant's documents who had published disclaimers in its website.
28. The Applicant has neither demonstrated that indeed that there are over 50 ICOs published every month nor that the Respondent has not cautioned Kenyans against the purported 50 ICOs per month. The Respondent reiterated that it issued sufficient caution to Kenyans on trading in cryptocurrencies through its market guidance of 20th February 2018.
29. The Respondent invites the court to reject the arguments of the Applicant because the substance of Kenicoin and the ICO qualify the tokens to be commonly known as securities according to section 2(j) of the *Capital Markets Act*.
30. Further, the Respondent reiterates that its conduct of inquiries into the affairs of the Applicant in respect to the Kenicoin ICO and the subsequent cautionary notice were done pursuant to the CMA's mandate to protect investors interests as provided under section 11(1)(d) of the Act and the powers of CMA under section 11(3)(w) of the Act “to do all such other acts as may be incidental or conducive to the attainment of the objectives of the CMA or the exercise of its powers under the Act”
31. It is irrational and unreasonable for the Applicant to fail to provide information and instead seek injunctive orders from being held accountable by the Respondent who is the regulatory agency vested



with the mandate to protect investors and to oversee the public issuance of products in the nature of securities.

32. It is therefore in the interests of the public, justice and equity that the application by the Applicant be dismissed with costs.

Respondents Written Submissions

33. The Respondent filed its written submissions dated 11th June 2019 to the Plaintiff's application.
34. The Respondent relied on section 11(1) and (3) of the *Capital Markets Act* that states some of its core objectives and more particularly Section 11(i)(d) – “the protection of investor interests.”
35. The Respondent relied on the following case on the definition of securities as per section 2(j) and (m) of *Capital Market Act*. The defendant relied on the United States Supreme Court case of *Securities Exchange Commission (SEC) vs WJ Howey Co* 328 US 293(1946) where the court determined if an investment is a security and therefore subject to regulation by the Securities Exchange Commission (SEC). The court relied on substance rather than form; that is not whether the item was referred to as stock, bond or share but its economic reality. The ‘Howey’ test has been applied to determine if crypto-assets are securities in the U.S and there are 4 ingredients to consider;
- a) Is there an investment for money?
 - b) Is there an expectation of profits from the investment?
 - c) Is the investment of money in a common enterprise?
 - d) Are there Profits that come from the efforts of a Promoter or 3rd Party?
36. The defendant's view of downloaded Plaintiff's White Paper 2018 at pages 31-45 of the Respondent's Supplementary Affidavit shows that in purchase of kenicoins the Plaintiff referred to “a very marginal price..” at Pg 6 of the document which means that there is investment of money.
37. The Consumers/Investors expected profits from the investment- purchase of kenicoins. The White paper and downloaded material from the website contain promises that investors would reap upon investment in kenicoins.
38. The investment of money is in a common enterprise; the Promoters are inviting investors to pool their money together to invest in the project in “crowd sale of cloud tokens ICO” Pg 1 of the White paper.’
39. There would be profit from efforts of Promoter or 3rd Party because the White Paper posits that; “Kenicoins has planned to roll out an innovative tool that would not only help investors save but also get rewarded substantially...” the promise to reward consumers with profit includes the promoter(s)
40. The defendant applied the Howey test against the provisions of *Capital Markets Act* and found the Kenicoins to have all hallmarks of a security.
41. The defendant stated that having demonstrated the Kenicoins and its ICO are a Security and Security offering respectively, the defendant acted within its mandate under section 11(3) (r) of the Act of regulating and overseeing the issuance and subsequent trading both in primary and secondary markets of capital markets instruments.

Plaintiff's Oral Submissions

The Plaintiff/Applicant submitted as follows;



42. The defendant wrote to Safaricom Ltd to stop/close down the Applicant's Pay bill Number.
43. The defendant caused the publication of an Article prejudicial to the Plaintiff/Applicant's business in Business News Page 7 in Standard Newspaper on 19th March 2019. The publication continues to draw negative perspective towards the Applicant's customers whose damage will be difficult to quantify.
44. The defendant summoned the Plaintiff by letter dated 4th December 2018 for interview and information provision. The Applicant was summoned on 11th December 2018 at 10am and the applicant appeared before a panel and shared information with the panel.
45. The defendant issued a Cautionary Statement Notice published on 4th January 2019 warning the public to exercise caution in respect to digital tokens "Kenicoin". From then on the value of Kenicoin fell sharply and continues to fall. The value of a young ongoing business has been lost and the loss is immeasurable.
46. These actions by defendant have led to the Plaintiff/Applicant incurring loss and substantial damage which cannot be compensated by damages.
47. The defendant is not mandated under the Capital Markets Act to regulate crypto - currencies.
48. The Applicant opposed the defendant's interpretation that Kenicoin as a Security under the Capital Markets Act by relying on materials and cases from outside jurisdiction that are not binding to the Court.
49. Based on the above facts, the Applicants stated they had made out a prima facie case to warrant the Interlocutory Injunction against the defendant.

The applicant relied on the case;

1. *Giella vs Cassmann Brown Co Ltd* 1973 CA 360
2. *Rou vs African Bank of Kenya Ltd & 2 Others* 1973 KLR 125
3. *American Cynamid Co vs Ethin Company* 1975 WII All ER

Determination

50. The Court considered evidence on record and submissions by Counsel for parties. This Court is called upon to determine the issue of whether a temporary injunction is granted against the defendant to restrain the defendant from interfering with the Applicant's Kenicoin trade pending the hearing and determination of the suit.

Injunction

51. Order 40 CPR 2010 provides;
 1. Cases in which temporary injunction may be granted
Where in any suit it is proved by affidavit or otherwise—
 - a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the



defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. Injunction to restrain breach of contract or other injury
 - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.
52. In the celebrated case of *Giella vs Cassmann Brown Co Ltd* [1973] EA 358 it was held that in order to grant the temporary injunction, the Court must be satisfied that;
 - a) The Applicant ad established a prima facie case with probability of success
 - b) The Applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and
 - c) If the Court was in doubt, the application would be determined on a balance of probabilities/ convenience.
53. In *American Cynamid vs Ethicon Limited* [1975] AC 396 it was held;

“If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to Interlocutory relief.”

Has the Plaintiff /Applicant made out a prima facie case?

54. The Plaintiff’s case is that as a sole Proprietor he operates the crypto currency business after developing a website Kenicoi.com where trading of other coins within cryptocurrency takes place. He carried out the said business without interruption and without incidence until the events outlined in the Plaintiff/applicant’s submissions occurred. The thrust of the Plaintiff/Applicant’s case is that the publication in newspaper on Kenicoi, the closure of the Paybill by Safaricom Ltd, the Cautionary statement by the CMA, the defendant summoning the Applicant for enquiry and/or investigations and requirement to produce relevant information on cryptocurrency, all these activities by CMA, the defendant culminated to causing irreparable loss and damage to the Plaintiff/Applicant’s business that is immeasurable and/or unquantifiable and cannot be compensated by damages. The Plaintiff alleged that the activities by the defendant were/are irregular as it lacks the mandate to regulate cryptocurrencies.
55. The Applicant annexed to the Supplementary Further Affidavit of 3rd April 2019 a graph of the market index price from Kenicoiexchange.com website to indicate fall of value of the Kenicoi upon the defendant’s unauthorized actions.



56. However, the Court noted that no explanation has been advanced on how the figures were arrived at and the author/expert of the graph did not shed light on the calculations or source of information to show either decline or increase of kenicooin value was/is related to the defendant's actions.
57. This Court expects that any party who comes to Court does so with clean hands, and that he who alleges must prove the allegation. The fact that the party says so does make it so unless there is sufficient information availed to Court of the existence of the alleged fact.
58. The Plaintiff/Applicant did not give sufficient information/evidence to this court to demonstrate the nature and scope of the cryptocurrency business to inform the Court the amount of financial investment to start up and run the said business. Secondly, there is no disclosure of the structure and or processes of the business; its physical and contact addresses, the list of members, financiers or promoters, what capital they injected to start up the said business and more importantly the source and relevant information available to the consumer public on viability and process of purchase of the Kenicooin. The Plaintiff claimed that all transactions are stored in block chain network and it is not possible to retrieve the list of subscribers yet in the same breach claims that the kenicooin transaction can easily be verified. How?
59. The Respondent annexed documents to the Replying Affidavit filed on 6th March 2019 annexed as LM-4 copies of Kenicooin materials advertising as follows;
- a) An innovative crypto currency based banking platform; next generation banking platform for the people in Kenya and Africa and will have wide acceptance because of highly attractive features ...with high return on investment for the people buying Kenicooins due to supply and prospective higher demand in various business utilities. A better and flexible option for small savings compared to the ban allows to save very marginal amount.....
 - b) One of the best ICO's in Africa; the multi utility Crypto Currency Platform; Kenicooin is a crypto –currency that is backed up by real business. Many innovative platforms are being developed which will have Kenicooin as the sole and exclusive medium of exchange and transactions..... Kenicooin ICO is over. We are thankful to all our investors for making our ICO such a great success.
 - c) Why buy Kenicooins? It is the most reliable crypto currency in the world to invest in, it's the only self-regulated crypto currency in the world whose earnings are anchored on block chain smart contract, with kenicooin your return on investment (ROI) is guaranteed 360%returns within 36 months and monthly earnings for 3 years guaranteed, creating constant cash flow at an increasing rate due to coin growth in value. Kenicooin is truly vision beyond horizon.
60. From the above excerpts from the copies of Kenicooin materials on line; it is disturbing that the information is out there, it is not clear who the author(s) are when and where this was carried out who certified this information nor any contact given to for an interested Investor to enquire further on the purchase of Kenicooin.
61. Other questions that come to mind are; who determines the value and/or fluctuation in value of the Kenicooin how and where is this done; on what platform are the values and variations done in what currency is it at the national, regional or international level?
62. Finally, this Court is concerned whether the business is licensed and/or registered to operate legally by any Government Ministry or Department so that the Investor Public is sure that they are engaged in a known, accepted and legal business. With all these questions, the Plaintiff has not proved the exact scope of the Kenicooin business and the investment thereof such that the defendant's conduct



caused loss and damage that may be considered immeasurable or unquantifiable to be compensated by damages after full hearing and determination of the suit.

CMA's Mandate

63. This case raises the question of law if at all the Kenyan legal system regulates emerging markets in cryptocurrencies
64. The Applicant contends that the defendant, CMA has no mandate, there are no regulations on cryptocurrency, and in any event no authority is granted to the defendant.
65. The Respondent states while there may be no specific regulatory regime on cryptocurrency, the Capital Market Act donates such mandate by virtue of section 2(j)(g)&(m) of the Act where the definition of a security includes;

Interests, rights, or property, whether in the form of an instrument or otherwise, commonly known as securities

Futures in respect of securities of other assets or property

Any other instrument prescribed by the Authority to be a security for the purpose of the Act.....

Section 11(1)(d) & (f) of the Capital Market Act that outlines objectives of Capital Markets Authority to include;

The protection of investor interests

The development of a framework to facilitate use of electronic commerce for development of Capital markets in Kenya.

66. And the United States Supreme Court case of Securities Exchange Commission (SEC) vs WJ Howey Co 328 US 293(1946) where the court held;

“The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from efforts of others. If the test be satisfied, it is immaterial whether the enterprise is speculative or non speculative or whether there is a sale of property with or without intrinsic value,....the statutory policy of affording broad protection to investor is not to be thwarted by unrealistic and irrelevant formulae.”

67. From the above legal provisions and case law, the defendant relied on the Howey case and its broad mandate from the Act pursuant to a formal complaint by a member of the Public to investigate the matter. After initial inquiry the defendant issued a Cautionary Notice on 4th January 2019.
68. This Court is persuaded by the Howey case; although it is not binding the interpretation thereof is applicable to the present circumstances that deems cryptocurrency as security. Even if the parties considered the Kenicoin a type of currency; this court noted that even the Central Bank of Kenya earlier issued Banking Circular No 14 of 2015 on Virtual Currencies-Bitcoin to all Commercial Banks Mortgage Finance Companies and Micro Finance Banks and stated;
 - a) Transactions in virtual currencies such as Bitcoin are largely untraceable and anonymous making them susceptible to abuse by criminals in money laundering and financing of terrorism.



- b) Virtual currencies are traded in exchange platforms that trend to be unregulated all over the world. Consumers may therefore lose their money without having any legal redress in the event these exchanges collapse or close business.
- c) There is no underlying or backing of assets and the value of virtual currencies is speculative in nature. This may result into high volatility in value of virtual currencies thus exposing users to potential losses.

Regulation

Should cryptocurrency/bitcoin/kenicoin be regulated in Kenya?

69. I have anxiously considered the submissions by Counsel for the applicant and concede to the plaintiff/applicant's assertion that there is no comprehensive legal regime to regulate emerging markets on cryptocurrencies.
70. On the other hand I agree with the Respondent too that the absence of a specific regime does not ouster jurisdiction of the general regime of law as exemplified by the cited provisions of *Capital Markets Act* and the application of the Howey test outlined above. The interpretation of cryptocurrency as a security is because it is a scheme that involves an investment of money in a common enterprise with profits to come solely from efforts of others as illustrated by Howey test.
71. I have noted that in some countries specific legislation on these currencies exist. A study by BOWMANS titled Unscrambling Blockchain: Regulatory Frameworks in Cryptocurrency by David Gerald, Irene Muthoni & Brian Kalule is a comparative study on how cryptocurrency is regulated in different countries.
72. Uganda- bitcoin, one coin and first coin in use. No regulation on cryptocurrency but Central Bank of Uganda issued Circular warning to the Public
73. South Africa- cryptocurrency is regulated as security by broad definition in the *Companies Act*.
74. Switzerland, Singapore and Japan- offer sophisticated analytical reference points
75. Argentina- Bitcoins are not considered legal currency because they are not issued by the Central Bank and therefore are not considered legal tender.
76. Mexico enacted a law in March 2018 that provides broad rules applicable to virtual assets known as cryptocurrencies.
77. China- the Central Bank of China, in December 2013, banned financial institutions and payment services from Bitcoin-related business
78. USA- cryptocurrency is regulated by the Securities Exchange Commission (SEC)
79. Therefore, cryptocurrency is either outlawed or regulated in some form in various countries. The defendant has residual jurisdiction as per section 2 & 11 of *Capital Markets Act*.
80. Any other interpretation of law would result in absurdity that millions of Kenyan Money from the Public is processed or utilized outside the legal framework for regulation of financial framework in Kenya. The Central Bank of Kenya enforces the National Payments Systems Act No 39 of 2011, which regulates payments systems, payment service providers and is for connected purposes. So if cryptocurrencies are considered currency then there would be regulation by Central Bank of Kenya.



81. If a party engages in financial services outside the legal financial framework the party cannot be said to be transparent and accountable.
82. This is required by the Constitutional National Values and Principles of Governance provided by;
 Art 3 (1) Every person has an obligation to respect, uphold and defend this Constitution.
 Art 10 National values and principles of governance
- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—
- (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.
83. All persons are obligated to be transparent and accountable in policy matters. The plaintiff/Applicant's business is not transparent and the Plaintiff is not accountable to facilitate investors make informed decisions on purchase of cryptocurrency, making investment in expectation of profits that are based on speculation of the market. There is no information to the public on the registration, offering process and disclosure requirements as provided for in other securities under the [Capital Markets Act](#).
84. Nobody should be allowed to engage in financial transactions exposing Kenyan public without any form of regulation.
85. From the above analysis, the decision that commends itself to me and meets the best the ends of justice, protects public good is based on where the greatest harm would be occasioned if the temporary injunction is granted or not based on the current circumstances.
86. The Applicant as sole Proprietor engaged in the sale of Kenicoins as investment in exchange of public money without regulation poses greater danger to the Consumer/Investor public than the damage or loss by the Sole Proprietor. The balance of convenience tilts in favour of protecting the public by conduct of investigations, disclosure requirements and regulation.
87. A temporary injunction cannot be granted at this stage of proceedings because a prima facie case is not established, irreparable injury was/is not demonstrated. In fact, the defendant as regulator of securities market commenced inquiry and/or investigations, an injunction is not proper at this stage as the horse has bolted and thus the injunction would amount to putting a padlock to an empty house.
88. It is only proper for the main suit to be heard and determined on its merits and any damage loss or injury if proved be compensated by damages. Pending legislative process on publication of appropriate framework for regulation of initial coin offering (ICO), the investing public ought to be protected



through regulatory measures. In the meantime the defendant shall proceed with investigations/inquiry while adhering to the applicant's constitutional right to fair hearing and observing rules of natural justice. The plaintiff/applicant's recourse to fair administrative action should be canvassed as Judicial Review application in the relevant form.

Disposition

1. The plaintiff/Applicant failed to establish a prima facie case, the damage, injury, loss or damage occasioned by defendant's actions that if the temporary injunction is not granted will escalate and will not be adequately compensated by damages.
2. The balance of convenience tilts in favour of Investor/Consumer protection through, inquiry, investigation and regulation of crypto currency/Kenicoins as security under Capital market Authority, the defendant whose mandate is to regulate Capital markets and securities.
3. The Applicant's application is dismissed with costs to the defendant.

DELIVERED SIGNED & DATED IN OPEN COURT ON 27TH SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

In the presence of;

Counsel for Applicant

Counsel for Respondent

Court Assistant: Jasmine

