



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 35 OF 2017

GEOFFREY NGARI WANJOHI.....APPELLANT

VERSUS

ABC CAPITAL LTD.....1ST RESPONDENT

TSAVO SECURITIES LTD.....2ND RESPONDENT

JUDGEMENT

BACKGROUND:

1. This is an appeal against the ruling of Honourable Chief Magistrate Mr. D.O. Mbeja, Senior Resident Magistrate in NBI CMCC No. 2227 of 2010 delivered on 19th January 2017.

2. The appellant had brought the suit stating that:-

(1) On or about 24th September, 2009 the 2nd respondent acting as an agent of the appellant duly issued instructions to the 1st respondent to sell shares held by it on behalf of the appellant.

(2) The 1st respondent duly sold the shares for Kshs.140,927.35/= but failed to forward the payment to the appellant.

(3) The appellant was claiming Kshs.140,927.35/= being proceeds of the appellant's shares sold by the respondents, their agents, servants and or employees, and which has been retained unlawfully by the respondents jointly and severally.

3. The respondents in response contended that:-

(1) Through the 2nd respondents, the appellant issued to the 1st respondent instructions to sell shares on 24th September, 2009 and by a duly signed Client Authorization Form dated 29th September, 2009, the appellant authorized that payment be through a cheque and to be forwarded through his agent the 2nd respondent.

(2) The number of shares of Safaricom ordered for sale were 4,000 and not 400 as stated.

(3) Upon sale, the 1st respondent drew cheque number 021271 for the full amount Kshs.140,927.35 and forwarded the same to the 2nd respondent for transmission to the appellant.

(4) When the 1st respondent sold the appellant's shares, it was acting on express instructions of the appellant.

(5) The appellant, employed by the 2nd respondent, failed to advise the 2nd respondent on diverse matters *inter alia* investment in listed equities and fixed income securities.

(6) The appellant in breach of their contract with the 2nd respondent, diverted the 2nd respondents clients.

4. The preliminary objection was premised on the following grounds *inter alia*:

(1) That the honourable court did not have the substantive and requisite jurisdiction to hear and determine the matter pursuant to the Companies Act.

(2) That the dispute primarily revolved around Company Law issues, which exclusively and squarely fall within the ambit of the Commercial and Admiralty Division of the High Court.

(3) That both section 2 of the repealed Companies Act and section 3 of the new Companies Act bestowed upon the High Court original and exclusive jurisdiction to hear and determine this matter.

(4) That the said suit is bad in law, incompetent and misconceived and an abuse of the court process.

5. The preliminary objection was heard and the Honourable magistrate rendered a ruling on 9th January 2017, striking out the appellant's suit in NBI CMCC No. 2227 of 2010 for lack of jurisdiction to hear and determine the matter.

THE GROUND OF APPEAL:

6. The appellant filed this appeal being dissatisfied with the judgment and particularly with the main element being, ***“the court’s decision that it had no jurisdiction to determine the matter and referring the matter to Capital Markets Tribunal.”***

APPELLANT’S SUBMISSIONS:

7. It is the appellant's submissions that:-

(a) The suit is of a commercial nature.

(b) The subject matter in the suit is a money and/or debt claim. It purely revolves around withholding of proceeds emanating from sale of shares. The said claim is for liquidated shares which occurred when the shares were sold off by the brokerage or investment firm in the normal course of business.

(c) There is no dispute in regards to the quantity of shares, the value or the amount at which the same were sold at.

(d) There is no dispute between the parties herein with the various companies with which the appellant bought the above mentioned shares, both during the subsistence of the shareholding and even afterwards.

(e) Being that the shares had already been liquidated at the time of instituting the suit, the function, authority and jurisdiction of the Capital Markets Tribunal had already been overtaken by events and therefore ceased.

(f) The claim in this suit is purely a monetary claim by the appellant from the respondents.

(g) The appellant submit therefore that the right forum for the suit to be heard and determined is the Magistrate's Court as provided for under Article 169 sub-article 2 of the Constitution of Kenya 2010 as read together with the Magistrates' Courts Act, 2015.

8. Section 7(1) of the Magistrates' Courts Act No. 26 of 2015 provides as follows:

“2. The magistrates' courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed;

(a) Seven million shillings for a Chief Magistrate.

(b) Five million shillings for a Senior Principal Magistrate.

(c) Four million shillings for a Principal Magistrate.

(d) Three million shillings for a Senior Resident Magistrate.

(e) Two million shillings for a Resident Magistrate.”

9. From the foregoing provisions of the Constitution and the Magistrate's Courts Act, 2015, it is quite clear that the claim before the court which is for the sum of Kshs.140,927.35/= together with interests and cost of the suit would amount to sums below two millions and therefore should be heard and determined in a Magistrate's Court.

10. The courts cannot therefore purport to take away that which has been provided for by the Constitution and the Magistrates' Courts Act, 2015.

11. On whether the magistrate erred in conferring jurisdiction to the Capital Markets Tribunal, without prejudice to the foregoing, the Capital Markets Tribunal which is constituted under section 35A of the Capital Markets Authority Act Cap. 485 Laws of Kenya is of an appellate jurisdiction. It has powers to hear and determine appeals against the decisions of the Capital Markets Authority.

12. Further, the Capital Authority's which is established under section 5 of the Capital Markets Authority Act lacks jurisdiction to hear and determine money claim suits as in this instance. There is absolutely on law which ousts the jurisdiction of the court from hearing purely monetary claims.

13. Even if the Capital Markets Authority had jurisdiction to hear the matter, the court should be guided by Article 159(1) as the Capital Markets Statute does not oust or abrogate the jurisdiction of the Magistrate's Court on money claims which leads to money decree.

14. Article 159(1) (d) provides that justice should be administered without undue regard to procedural technicalities. A court of law cannot arrogate itself jurisdiction and neither can it abrogate the same.

15. The learned trial magistrate appeared to suggest that section 35A (1) ousts his jurisdiction merely because the proceeds of the cheque number 021371 for Kshs. 140,927.35 emanated from sale of shares. This, appellant submit is a technicality abhorred by Article 159(1) (d) of the Constitution.

RESPONDENT'S SUBMISSIONS:

16. Respondent's first point is the Capital Markets Tribunal that has jurisdiction to determine this matter. Section 5 of the Capital Markets Act establishes the Authority, whose principle objectives include protecting investors such as the appellant. Section 11 of the Act provides as follows:-

"...The principle objectives of the Authority shall be –

a) The development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises;

b) To facilitate the existence of a nationwide system of securities commodities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives market;

c) The creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;

d) The protection of investor interests;

e) The facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and

f) The development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya."

17. The respondent's main focus is on section 11(e), which states the appellant's contention in the plaint, as one of its principal objectives. The appellant being an investor alleges to have suffered financial loss, loss which arose from a breach of his agent's duties. Whether or not his claim has met should be determined in the Authority.

18. In fact, the Capital Markets Act has gone as far as providing the appellant with a remedy, readily available at the Authority, should his claim have merit. Section 18 of the Capital Markets Act establishes the Investor Compensation Fund, whose purpose is granting compensation to investors who suffer pecuniary loss resulting from the failure of a licensed stockbroker or dealer to meet his contractual obligations.

19. Respondent further rely on section 11(3) (cc) (ii) which also provides the appellant with further readily available remedy should his case have merit:-

".....For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions –

.....(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include –

....(ii) ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach..."

20. The respondent therefore submit that the appellant was in a wrong forum, and he continues to prolong this case in a wrong forum, in form of this appeal, yet his remedy is available in the Capital Markets Authority.

21. Thirdly, and further to the above, Regulation 69 of the Capital Markets (Licensing Requirements) General Regulations provides for a further compensation to an aggrieved investor. It states that whenever an investor has suffered pecuniary loss due to the failure of a

stockbroker, dealer or an investment bank carrying out stockbroking business or dealing, operations, to meet its contractual obligations, which loss has not been compensated –

“(a) from the bank guarantee or securities furnished by such licensed person to the securities exchange or central depository as the case may be of which such licensed person is a trading participant; or

(b) from the Compensation Fund of the securities exchange of which such licensed person is a trading participant; or

(c) from any payment made by a statutory manager appointed under section;

33A(2)(a) of the Act, (hereinafter referred to as “the net loss”) the investor shall apply to the Authority for compensation from the Compensation Fund in cash or securities equal to the net loss.”

22. It therefore matters not that the claim is monetary or commercial, or of whatever amount. The appellant’s compensation lies at the Capital Markets Authority, in the Investor Compensation Fund. Should this fund not compensate him adequately, his net loss can be found in the Compensation Fund.

23. Should the Authority fail to grant the appellant compensation, section 35 of the Act comes into play. It states:

“(1) Any person aggrieved by any direction given by the Authority to such person or by a decision of the Authority or by the Investor Compensation Fund Board-

...(g) refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces, may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations, suspension or removal, as the case may be, within fifteen days from the date on which the decision was communicated to such person.

(2) The Capital Markets Tribunal may require the Authority or the Investor Compensation Fund Board to show cause for its action or decision, and may affirm or, after affording the Authority or the Board an opportunity to be heard, set aside such action or decision....”

24. This provides the appellant with the 1st appeal to the tribunal (established under section 35A0, in case he is aggrieved. It is only after that he has a right to appeal to this Honourable Court for an intervention.

25. The respondent submits that the inherent jurisdiction of this court does not work blindly and should therefore not be invoked unnecessarily. The appellant in this matter ought to have exhausted the dispute mechanism provided for under the Capital Markets Act, the Tribunal, and invoked its inherent jurisdiction. Only then would he be able to seek this court’s intervention.

26. The respondent rely on the Court of Appeal’s decision in *Speaker of The National Assembly vs Hon. James Njenga Karume [1992] eKLR* where the court stated:

“Whereas it is indubitable that the High Court has unlimited original jurisdiction in civil matters such as this, by dint of Article 165(3) of the Constitution, it is also trite that where the Constitution or an Act of Parliament makes specific provision for the resolution of a particular category of disputes, then the court ought to defer to and give the body so mandated the opportunity to deal with the dispute in accordance with that prescribed procedure....”

27. It is therefore correct from the above that a specific dispute resolution mechanism has been set out in the Capital Markets Act for the resolution of disputes, including the dispute herein between the appellant and the respondents. Despite the provisions of Article 165(3) of the Constitution, procedure ought to have been followed to conclusion before the jurisdiction of this court could be invoked by the appellant.

28. Similarly in *Secretary, County Public Service Board & Another vs Hulbhai Abdille [2017] eKLR* the court refused to allow the orders sought stating that:

“...Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum....”

29. As the respondent has made it clear above the Capital Markets Authority is perfectly capable of handling this dispute. It not only lies within its primary objectives, but it also has funds set aside for compensation of the aggrieved investor.

30. Finally the respondent submitted that even in Judicial Review matters court have been reluctant to proceed where mechanisms provided for have not been exhausted. In the case of *Vania Investments Pool Limited vs Capital Markets Authority & 8 Others [2014] eKLR* the court rightly stated:

“...We agree with a learned judge that the appellant failed to demonstrate that the circumstances of its case qualified as exceptional to warrant a hearing by way of judicial review before the statutory procedure had been exhausted...”

31. Similarly in this case, the appellant has failed to show anything special in this matter, for it to be admitted for hearing in the Honourable Court, despite there being a tribunal well capable of handling the matter. He should therefore file his claim in the Capital Markets Authority.

32. It is respondent's submission that it matters not that the dispute is of a commercial nature. Provided that statute went ahead and conferred jurisdiction upon another body, courts have always and correctly held that it is that body that ought to handle the matter. It was therefore proper for the Chief Magistrate Court to down its tools and further refer it to the Tribunal, instead of claiming the jurisdiction of another court.

33. From the foregoing it is respondent's submission that the appellant falls within the description of Regulation 69 of the Capital Markets (Licensing Requirements) General Regulations. He is an aggrieved investor, who alleges that his agent breached a contractual term leading to financial loss. He should therefore seek compensation from the Capital Markets Tribunal.

ISSUES:

34. After going through the record, pleadings and submissions filed, I find the issues are; ***whether the trial court lacked jurisdiction? what is the order as to costs?***

Analysis and determination:

35. The appellant claim in plaint was Kshs.140,927.35/= being proceeds of the appellant's shares sold by the respondents, their agents, servants and or employees, and which was retained unlawfully by the respondents jointly and severally.

36. A preliminary objection was premised on the following grounds *inter alia*:

i. That the honourable court did not have the substantive and requisite jurisdiction to hear and determine the matter pursuant to the Companies Act.

ii. That the dispute primarily revolved around Company Law issues, which exclusively and squarely fall within the ambit of the Commercial and Admiralty Division of the High Court.

iii. That both section 2 of the repealed Companies Act and section 3 of the new Companies Act bestowed upon the High Court original and exclusive jurisdiction to hear and determine this matter.

iv. That the said suit is bad in law, incompetent and misconceived and an abuse of the court process.

37. In Respondents submissions in support of trial court decision in striking out the suit it is submitted that under section 11(e) of the Capital Markets Act, the appellant being an investor who alleges to have suffered financial loss, from a breach of his agent's duties, whether or not his claim has been met should be determined in the Authority.

38. The appellant contention is that the appellant's submissions that:-

The suit is of a commercial nature. The subject matter in the suit is a money and/or debt claim. It purely revolves around withholding of proceeds emanating from sale of shares. The said claim is for liquidated shares which occurred when the shares were sold off by the brokerage or investment firm in the normal course of business.

39. There is no dispute in regards to the quantity of shares, the value or the amount at which the same were sold at.

40. There is no dispute between the parties herein with the various companies with which the appellant bought the above mentioned shares, both during the subsistence of the shareholding and even afterwards.

41. Being that the shares had already been liquidated at the time of instituting the suit, the function, authority and jurisdiction of the Capital Markets Tribunal had already been overtaken by events and therefore ceased.

42. The claim in this suit is purely a monetary claim by the appellant from the respondents.

43. The appellant submit therefore that the right forum for the suit to be heard and determined is the Magistrate's Court as provided for under **Article 169 sub-article 2 of the Constitution of Kenya 2010 as read together with the Magistrates' Courts Act, 2015.**

Section 7(1) of the Magistrates' Courts Act No. 26 of 2015 provides as follows:

"2. The magistrates' courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed; twenty million shillings for a Chief Magistrate, fifteen million shillings for a Senior Principal Magistrate, ten million shillings for a Principal Magistrate, seven million shillings for a Senior Resident Magistrate, five million shillings for a Resident Magistrate."

44. Section 11 (e) of the capital market Authority states The facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and

45. The aforesaid has nothing to do with monetary claim like the instant one where it is alleged shares were sold and cheque passed to the 2nd defendant who is withholding the same.

46. The broker/respondent does not deny execution of the appellant instructions and thus the lower court under section 7 of magistrate Act has to determine why the amount should not be passed to the appellant.

47. The court thus allows the appeal and orders as follows;

i. The matter is remitted back to lower court for trial.

ii. Costs to the appellant against both respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE