



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 1 OF 2015

CAPITAL MARKET AUTHORITY.....APPELLANT

- V E R S U S -

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA.....1ST RESPONDENT

SOBAKCHAND SHAH 2ND RESPONDENT

ANNE MURAYA3RD RESPONDENT

HARVEEN GADHOKE, DOREEN MBOGO, ANNE MURAYA &

WAMAE KIARIE MUGO T/A DELOITTE & TOUCHE....4TH RESPONDENT

(Being an appeal arising from the decision and determination of the Disciplinary committee of the Institute of Certified Public Accountants of Kenya delivered by a letter and communication of the 4th day of November, 2014)

JUDGEMENT

1) Capital Markets Authority hereinafter referred to as CMA, the appellant herein, filed a complaint vide a letter dated 29.2.2012 to the Institute of Certified Public Accountants of Kenya hereinafter referred to as ICPAK arising from a review of the audit report of Cooper Motors Corporation Holdings Ltd hereinafter referred to as C.M.C. Holdings Ltd. C.M.A had appointed a firm of forensic investigations from South Africa known as Webber Wetzel to conduct an independent investigation into the affairs of CMC Holdings Ltd pursuant to the provision of Section 11(3) (m) of the Capital Markets Authority Act. The report arising from the investigations revealed inadequacies in the manner the books of accounts at C.M.C Holdings Ltd were kept and the manner the external audit was conducted. As a consequence of the complaint by CMA the Institute's council considered the allegations against the concerned accountant and auditors being Sobakchand Shah, Anne Muraya and Harveen Gadhoke, Doreen Mbogo, Anne Muraya and Wamae Kiarie Mugo T/A Deloitte & Touche, the 2nd, 3rd and 4th respondents respectively and thereafter referred the complainant to its Disciplinary Committee. In the end, the Disciplinary Committee held that Sobakchand Shah, the 2nd respondent was negligent in the conduct of his duty as the then Finance Director and that he failed to disclose material information to the auditor which was pertinent in the conduct of their duty.

2. The disciplinary committee further resolved that the member's membership be suspended for a period not exceeding two years and also went ahead to impose a fine of ksh.20,000/= and costs of ksh.50,000/=

before reinstatement and with publication as per the provisions of the Accountants Act, 2008. It would appear no adverse orders were made against the external auditors, the 3rd and 4th respondents herein, though there were some findings of breach made by the council against them. Capital Markets Authority being dissatisfied by the decision of the 1st respondent's Disciplinary Committee preferred this appeal.

3) On appeal, C.M.A put forward the following grounds:

1. The Disciplinary Committee of the Institute of Certified Public Accountants of Kenya and the Institute of Certified Public Accounts of Kenya erred in failing to undertake their mandate as provided by Section 8 of the Accountants Act by disregarding and failing to consider crucial facts on the complaint filed on the matter of Cooper Motors Corporation Holding Limited and with respect to the acts by members of the Institute of Certified Public Accountants of Kenya.

2. The Disciplinary Committee of the Institute of Certified Public Accountants of Kenya and the Institute of Certified Public Accounts of Kenya erred in law and failed to undertake their mandate, more so as envisaged by Section 8 of the Accountants Act, by failing to give a reasoned decision setting out the facts and the expected professional practice and accounting standards, the hence setting a bad precedent.

3. The Disciplinary Committee of the Institute of Certified Public Accountants of Kenya and the Institute of Certified Public Accounts of Kenya erred by failing to consider and make a determination on breaches of the fundamental principles expected of a professional accountants as envisaged by Section 100 of the Code of Ethics for professional Accountants issued by the Council of Institute of Certified Public Accountants of Kenya.

4. The Disciplinary Committee of the Institute of Certified Public Accountants of Kenya and the Institute of Certified Public Accounts of Kenya erred by failing to apply their mind and expertise to the full spectrum and on all the issues raised by the appellant on the matter of Cooper Motors Corporation Holdings Limited to enable them give adequate weight and attention to the severity of the issues in the complaint and the implications thereof.

5. The Disciplinary Committee heard and determined the complaint without giving the appellant, being the complainant and the regulator of the capital Markets in Kenya, an opportunity to be heard and to provide full spectrum of the complaints.

6. The Disciplinary Committee breached the Constitutional rights guaranteed by Article 50 of the Constitution by failing to give all parties in the dispute an opportunity to make presentations before it.

7. As a consequence of breach of Article 50 of the Constitution the Disciplinary Committee failed to benefit from and consider all material facts and hence reached an unfair and inconclusive determination.

8. The Disciplinary Committee erred in law by failing to consider the implication of Section 22 of the Accountants Act and the role and duty of partnerships in Audit Firms whole rendering services to clients more so on the role of Deloitte & Touche, its partners and finance and accounting stall in Cooper Motors Corporation Holdings Limited at the material time.

9. The Disciplinary Committee erred by failing to give any reasons, justification of legal reasoning for the failure to consider and deliberate on the role and acts of Deloitte & Touche, its partners and finance and accounting staff in Cooper Motors Corporation Holdings Limited at the material time.

10. The Disciplinary Committee erred by failing to consider that the entity instructed by Cooper Motors Corporation Holdings Limited, as external Auditors at the material time, was Deloitte & Touche and further failed to determine whether the said firm was vicariously liable for the

failures, omissions, negligence and breaches by its partners, duly authorized representatives and agents.

11. The Disciplinary Committee held and/or made a finding that CPA Sobakchand Shah was culpable and guilty of professional misconduct for failure to disclose the existence of off shore accounts, failure to disclose the existence of the Southern Sudan subsidiary and failure to disclose the existence of conflict of interest, but that notwithstanding, the said committee erred by exercising its powers and mandate and/or sanction powers sparingly by making recommendations that were not commensurate to the severity and gravity of the findings and acts done and it also failed to give due regard to the implications of such lenient recommendations.

12. The Disciplinary Committee erred by failing, neglecting and/or refusing to consider or take into account and make a determination on all materials and documents presented before it and more so the report and extracts of the forensic investigations undertaken by Webber Wentzel of South Africa on the affairs of Cooper Motors Corporation Holdings Limited which raised, inter alia, the following pertinent issues, to wit;

a) the interest earned on hire purchase contract had been disclosed as operating income in the income statement instead of being finance income.

b) That interest earned on deferred debtors' accounts had been disclosed as finance income in the income statement, only recognized when the customer had paid. This is against standard accounting treatment of income wherein interest income is accrued on a time basis.

c) That with respect to after sales services, the impairment allowance was computed in contravention of International Accounting Standards (IAS) 39 which guides the fundamental principles of impairment.

d) That Deloitte & Touche did not issue a management letter for the year ending 30th September 2009 although it was apparent that many of the concerns with trade receivables were already in existence. The absence of a management letter was all the more glaring given in the relevant period of review directors questioned the amount of borrowing amounting to about kshs. 3 billion classified as trade payables under Post Import finance (PIF) facility and that the 2009 accounts were signed off despite the fact that they were not in compliance with International Finance Reporting Standards (IFRS).

e) That Deloitte & Touche issued a management letter for the year ending 20th September 2010 only one (1) month before the end of the next financial year. The said management letter was inconclusive under the circumstances of the case, and furthermore it mainly touched on credit policy, credit control and unallocated credits. Due to the lateness in issuance of the management letter there was no time to implement the recommendations even in the subsequent financial period.

f) That there was an admission of falsification of accounts by understating overdrafts by ksh. 750 million and overstating creditors by the same sum to fulfil management's promise to the Board of reducing overdrafts.

g) That a trust known as the Fairvalley Trust was purportedly created on 18th December 1999 by a former Group Chairman of Cooper Motors Corporation Holdings Limited, as settler for benefit of past, present and future employees of the company and its associates. The trustees were the Regent Trust Company Limited based in St. Hellier, Jersey Channel Islands. The trust had two bank accounts as at 30th September 2009 at Kleinwort Benson (Channel Islands) Limited, a sterling capital account and a sterling income account. The aggregate market value of the trust's investments at 30th September 2009 was CBP

1,477,434. In 2009, the capital and income distribution to the company employees was GBP 35,350 and GBP 116,295 respectively. It had been established that a feeder bank account in the name of Corival (1996) limited was founded by way of over-invoicing CMC Motors and thereafter channelling the over-invoiced amounts into the bank accounts. The trust distributed GBP 538,648 to the beneficiaries between the years 2008 and 2011 of which GBP 131,050 was from the capital account in contravention of the letter of wishes of the trust. The parties who benefited from the payments by the Trust were a few selected directors of Cooper Motors Corporation Holdings Limited and a few of its senior staff.

13. By failing to consider the facts and documents as set out in ground (12) above, the Disciplinary Committee and the Institute of Certified Public Accountants of Kenya made incomplete and erroneous recommendations and determination.

14. The Disciplinary Committee and the Institute of Certified Public Accounts of Kenya failed in their fiduciary duty by failing to make recommendations to the Director of Public Prosecution and other statutory bodies for further action on the matter of Cooper Motors Corporation Holdings Limited.

13. The Disciplinary Committee of the Institute of Certified Public Accountants of Kenya and the Institute of Certified Public Accounts of Kenya erred in failing to consider and make a determination on the permissible disclosures envisaged by Section 140 of the Code of Ethics for Professional Accountants issued by the Council of the Institute of Certified Public Accountants of Kenya and consequently make the necessary disclosures and reports under the circumstances of the case.

4) When the appeal came up for hearing learned counsels recorded a consent order to have it disposed of by written submissions. Learned counsels were also permitted to make oral highlights. Though the appellant put forward a total of fifteen (15) grounds of appeal, those grounds revolve around the assertion that the 1st respondent's Disciplinary Committee did not properly consider and appreciate the dispute before it, did not give the appellant an opportunity to be heard and did not provide justification or legal reasoning for its findings. The appellant claimed that the Disciplinary Committee of ICPAK was to conduct an inquiry on the said complaint but it was never given notice or informed of the documents filed by the respondents thereto or informed of any proceedings before the said committee or even invited to present its complaint or respond to the responses filed by the concerned accountants or auditors, if any.

5) In response to the appellant's appeal, the respondents raised a preliminary point of law, that is to say that this court lacks jurisdiction to entertain this appeal. I am of the view that this ground of appeal should be disposed of first before considering the other grounds touching on the merits of the appeal. It is the submission of the 1st appellant that this court does not have jurisdiction to entertain an appeal arising from the recommendations of the Disciplinary Committee made under Section 33(1) of the Accountants Act. It is argued that the jurisdiction of the High Court in determining ordinary appeals from the Disciplinary Committee under the Accountants Act is limited. It is stated that the provisions of the Accountants Act provides two levels of appeals against a determination and actions of the Disciplinary Committee.

First, under Section 33(3), where a member is aggrieved by the determination of the Disciplinary Committee under Section 33(1) may make an appeal to the council within 60 days of the communication of the determination. Under Section 33(4), the council may upon receipt of the appeal, direct the Disciplinary Committee to reopen the inquiry.

Secondly, a person aggrieved by a determination of the Disciplinary Committee under Section 33(2), may appeal to the High Court against such a decision, within 60 days of being notified of the determination. The 1st respondent is of the view that the orders that the High Court can give under appeal it is clear that appeals under Section 34 of the Act to which this court has jurisdiction deals and relates to the effect of determination of the committee having a direct effect on the registration

of a member, whether cancellation or suspension of registration of a member and nothing more. For the above reasons, the 1st respondent argued that this court has no jurisdiction to question a determination of the committee under Section 33(1) of the Accountants Act since that power is reserved to the council of the 1st respondent upon a member making an appeal under Section 33(3) of the Accountants Act. It was further argued that upon the determination of such an appeal by the council as by law provided Section 33(4) of the Act grants power to the council to direct the reopening of the inquiry and direct specific aspects of the matter it requires the Disciplinary Committee to reconsider. The 1st respondent is of the submission that by granting powers to the council to reopen an inquiry, it is clear that an issue whether a matter ought to be reconsidered on the merits is a preserve of the council upon an appeal by an aggrieved member.

6) The 2nd respondent is of the submission that an inquiry into professional misconduct under the Accountants Act is a matter between the accountant whose conduct under investigation and the Disciplinary Committee. It was pointed out that the Act does not contemplate complainants participating in the inquiry as a must.

7) On her part, the 3rd respondent is of the view that the appeal against her is malicious and an abuse of the court process. She pointed out that nowhere in its report did Webber Wentzel make any reference to any failure on the part of either the 3rd and 4th respondents. Accordingly, there is no basis for the appellant to join the 3rd respondent in the appeal. The 4th respondent too was of the submission that there was no complaint against it. The 4th respondent also argued that the appellant has no right of appeal under the Accountants Act. It is said that the Act makes reference to a 'person' as opposed to a 'member'. The 4th respondent avers that the right of appeal under Section 34 is preserved for a member of ICPAK, the 1st respondent, who is aggrieved by a determination of the Disciplinary Committee under Section 33(2) thereof and who remains dissatisfied by the decision of the 1st respondent's council upon an appeal to it.

8) The accountants Act regulates the conduct of its own members and should be read and interpreted as a whole. Section 34 being read together with the entire part IV of the Act on disciplinary provisions makes it clear that the Act only handles matters relating to the members of the institute and not individuals or institutions that are not registered with the institute. Accordingly, the 4th respondent argues that Section 34 does not give the appellant being a non-member of the institute a right of appeal against the decision of the Disciplinary committee.

9) In response to the preliminary objection, the appellant argued that the Accountant Act gives members of the institute the right to appeal against the decision of the Disciplinary Committee to the Institute's Councils and that this mode of appeal is only available to the member of the institute. The appellant further pointed out that Section 34 of Accountants Act provides for appeals to the High Court and it provides for appeals against the determination of the Disciplinary Committee under Section 33(2), which relates to the recommendation of the said committee to the council. The appellant was emphatic that Section 34(1) of the Accountants Act uses the word 'person' hence giving a right to non-members of ICPAK, such as the appellant herein to lodge an appeal to the High Court against the decision of the Disciplinary Committee. For the above reasons the appellant urged this court to reject the preliminary objections raised by the respondents.

10) considered the rival submissions of the parties to this appeal, I have come to the following conclusion in this dispute. There is no dispute that the appellant was the complainant before the 1st respondent's Disciplinary Committee. It is also not in dispute that the appellant is not a member of the Institute as provided for under the Accountants Act. With respect, I am persuaded by the arguments of the 3rd and 4th respondents that the appellant has no right of appeal against the decision of the Disciplinary Committee. The right of appeal is the preserve of a member of the Institute who is aggrieved by the determination of the Disciplinary Committee. The accountants Act provides the regulatory framework of the 1st respondent as a professional body.

11) The second and most important preliminary point ably argued before this court is whether this court has jurisdiction to entertain this appeal. With respect, I agree with the submissions of the 1st respondent that an appeal to this court only lies as per the express provisions of Section 34(1) and only limits itself to the decisions under Section 33(2) of the Accountants Act. I am persuaded by the 1st respondent's submission that the Disciplinary Committee being a specialized tribunal, a court of law is least equipped to supervise and question the technical and scientific rationale of the decisions of such specialized bodies. The role of the court is limited to ensuring that in conducting their affairs such bodies adhere to the regulatory framework and observe legal controls and directions obtaining in Constitutive Acts of Parliament.

12) It is apparent that the appellant moved this court under the provisions of Section 34 therefore the orders sought to be granted cannot by law be granted by the court but by the council upon the determination of an appeal brought under Section 33(3) of the Accountant Act. The appeal before this court concerns the decision and orders of the Disciplinary Committee of the 1st respondent and not on the decision of the council of the 1st respondent. Any person aggrieved by the decisions made by the council to refer the matter to the Disciplinary Committee and questions whether and what evidence the council of the 1st respondent considered in making a decision to refer the matter is not appealable to this court and cannot therefore form the basis of this appeal.

13) In the end, I find that the appellant has no right of appeal and that this court has no jurisdiction to hear and determine the appeal.

14) The appeal therefore is determined on the basis of the twin preliminary issues without considering the other grounds on merits. Consequently, the appeal is ordered struck out with costs to the respondents.

Dated, Signed and Delivered in open court this 28th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent