



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 564 OF 2009

DILESH SOMCHAND BID PLAINTIFF

VERSUS

AFRIKA INVESTMENT BANK LTD..... DEFENDANT

AND

CITIBANK N.A. THIRD PARTY

R U L I N G

1. CitiBank N.A. (hereinafter referred to as the applicant) was joined as a 3rd party in this suit, pursuant to leave granted by the court on 30th October, 2009 upon the application of Afrika Investment Bank Ltd. (hereinafter referred to as the defendant). By an application dated 25th October, 2010 filed on 27th October, 2010, the applicant has now come to this court seeking to have its name as 3rd party struck out of the proceedings herein. In the alternative, the applicant seeks to have the suit struck out or dismissed as against the 3rd party and the costs of the suit awarded to the 3rd party.

2. The application is supported by grounds stated on the face of the Chamber Summons, and the affidavit sworn by Sarah Kamincha, an officer of the applicant. To the affidavit is exhibited a copy of the Safaricom IPO prospectus and an agreement between the Government of Kenya and the applicant, which shows that the applicant was contracted as a processing agent in respect of the IPO on behalf of the Government of Kenya. The applicant contends that it was at all times acting as an agent for a disclosed principal who was the Government of Kenya and that the defendant being privy to the two documents was aware of the agency relationship between the applicant and the Government of Kenya.

3. The applicant therefore maintains that the 3rd party proceedings against it are frivolous, vexatious and an abuse of the court process, as it is trite law that an agent for a disclosed principal cannot be sued for acts done on behalf of the principal. In addition, the applicant maintains that no breach of his obligations as set out in the prospectus has been demonstrated.

4. In response to the application, Davis Gachuba, the Chief Executive Officer of the defendant, has sworn a replying affidavit. In the affidavit Gachuba avers *inter alia*, that: the defendant's claim against the applicant is in respect of the applicant's role as lead receiving Bank and/or application processing agent in respect of the IPO; that the court having given leave for the 3rd party proceedings against the applicant, the allegation that the proceedings are frivolous, vexatious, embarrassing or otherwise an abuse of the process of the court, cannot hold; that the agreement dated 19th March, 2008 which was relied upon by the applicant reveals that the applicant was appointed as authorized selling agent on the basis of its representation that it had the required professional skills, personnel, technical and financial resources to provide the services under the agreement; the obligations of the applicant as processing agent and authorized selling agent were clearly set out in the agreement; and the applicant was required to provide the Government of Kenya with certain indemnities.

5. It was maintained that the defendant having relied on the representations of the applicant with regard to their professional skills and having suffered or being likely to suffer loss arising from the applicant's failure to perform his duty with the required skill and care, the defendant is entitled to look to the applicant for indemnity or contribution.

6. It is averred that the defendant's inability to comply with the plaintiff's instructions arose from the applicant's default in ensuring credit into the plaintiff's CDS account of the allotted shares, and refund to the plaintiff of the balance of Kshs.127,968,500/=. The defendant contends that the applicant must therefore be called upon to explain how it performed its obligations in relation to the claims made in the suit.

7. Counsel for the defendant submitted that the application was misconceived because neither **Order 1 Rule 10** nor **Order VI Rule 13 (1)** of the former **Civil Procedure Rules** under which the application was made is available to the applicant. Counsel argued that those orders deal with pleadings and do not include 3rd party proceedings which are commenced with leave of the court.

8. The plaintiff also filed grounds of opposition objecting to the application on the premise that the prayer for dismissal of the plaintiff's suit was misconceived and bad in law because the plaintiff's suit is against the defendant while the 3rd party proceedings were filed by the defendant.

9. I have given due consideration to this application. I do note that applicant has moved the court under the former **Order I Rule 10** and **Order VI Rule 13 (1)** of the **Civil Procedure Rules**. I do concur with counsel for the defendant that these provisions are not appropriate provisions in dealing with 3rd party proceedings. **Order I Rule 10** of the **Civil Procedure Rules** deals with substitution and addition of parties. It is specifically dealing with parties in the capacity of either plaintiffs or defendants.

10. In regard to **Order VI Rule 13 (1)** of the **Civil Procedure Rules**, it provides for the striking out of pleadings which pleadings is defined in **Section 2** of the **Civil Procedure Act** to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. In this case, even if I was to accept that the 3rd party proceedings initiates a suit between the defendant and the applicant, the pleadings as between the applicant and the defendant would be the 3rd party notice and the applicant's defence to the 3rd party notice. None of these documents was the subject of the application before me.

11. In the case of 3rd party proceedings, **Order 1 Rule 22** of the **Civil Procedure Rules**, 2010 (former **Order I Rule 18**) provides as follows:

"22. If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice to be tried in such manner at or after the trial of the suit, as the court may direct and, if not so

satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

12. In this case, the applicant has entered appearance as a third party. The applicant has even filed a defence to the third party claim. Therefore the appropriate avenue if the applicant is of the view that as between it and the defendant there is no proper question to be tried regarding its liability, is to raise the issue when parties appear before the court for directions under **Order 1 Rule 22** of the **Civil Procedure Rules, 2010**. Without such directions, it would be premature for this court to address the issues which have been raised by the parties regarding the applicant’s liability.

13. For the above reasons, I come to the conclusion that the application dated 25th October, 2010 must fail. It is accordingly dismissed with costs.

DATED and **DELIVERED** at **NAIROBI** this 17th day of March, 2011.

H.M. OKWENGU
JUDGE

Ruling read in the presence of:

Kuyo holding brief for Sehmi for the Plaintiff.

Kuyo for the Defendant.

Irene - Court clerk.

Githaiga for 3rd Party/Applicant