



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 77 OF 2010

SEBASTIAN MUTIMU KANGATA.....PLAINTIFF/RESPONDENT

VERSUS

CAPITAL MARKETS AUTHORITY.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 5th March 2019, brought under the provisions of Section 1A and 3A of the Civil Procedure Act and Order 5(1) of the Civil Procedure Rules and all other enabling provisions of the law.
2. The Applicant is seeking for orders that;
 - (a) *It be granted leave to issue third party notice to Patrick Ndwiga Gakiavi;*
 - (b) *Consequently the said Patrick Ndwiga Gakiavi be enjoined as a third party;*
 - (c) *Costs of this application be provided for.*
3. The application is premised on the grounds on the face of it and an affidavit sworn by Githendu Eric Timothy, an Advocate of the High court of Kenya, and the legal counsel of the Applicant. He deposed that, the Respondent alleges that the Applicant failed to exercise its oversight role over Nyaga Stock Brokers Limited who violated the capital market licenses requirements (general) 2002, consequently leaving the Respondent to suffer finance losses and damage to the tune of Kenya shillings 37,259,962.84.
4. It is the Applicant's position that, at all material times, Mr. Patrick Ndwiga Gakiavi and Elizabeth W. Gakiavi were shareholders of Nyaga Stock Brokers Limited. That Patrick was the managing director and the majority shareholder holding 99.9% of the shares, while Elizabeth held 0.01% of the shares. Further that, Patrick as the managing director, was responsible for the management, control and conduct of the affairs and business of the plaintiff including but not limited to ensuring compliance with the rules and regulations relating to stock brokers licensed by the defendant, which included executing unauthorized transactions in the securities of its clients thereby engaging in an act, practice and/or course of business which constituted fraud.
5. Further, between 2007 and 2008, the defendant discovered that Mr. Gakiavi in his capacity as the managing director had fraudulently transferred colossal amounts of money from Nyaga Stock Brokers to his personal bank account number 030705101450, when the Stock Broker was experiencing grave financial difficulties. That the financial position of the company deteriorated further thereby necessitating its placement under statutory management by the defendant's board in exercise of its statutory mandate as provided under the Capital Markets Act.
6. On 14th March 2008, PriceWater House Coopers (PWC) was appointed by the defendant to carry out a forensic audit into the affairs of Nyaga Stock Brokers. PWC carried out the forensic audit and produced a report dated 23rd October 2008, with key findings that a total sum of Kshs. 481,511,360 was extracted from the account of Nyaga Stock Brokers by Mr. Gakiavi, either personally or through his companies.
7. Therefore, from the foregoing, it is pertinent that leave be granted by the Honourable court for the Applicant to issue a third party notice and subsequently enjoin Mr. Gakiavi to these proceedings because the Applicant is entitled to contribution/indemnity by the proposed third party Mr. Gakiavi. It is in the interest of justice and equity that this application is allowed.
8. However the Application was opposed vide grounds of opposition dated 9th May 2019, which states that the application is incompetent and there has been inordinate, inexcusable and unexplained delay in filing the application.

9. That the parties canvassed the application through oral submission on 30th May 2019. Mr. Oraro SC in support of the application reiterated the averments in the supporting affidavit and relied on the report of Price Water House Coopers (PWC), that being enjoining the third will be given an opportunity to be heard on the averments on the content of the report. However, the learned counsel Mr. Kang'atta, submitted that, under the provisions of Order 1 Rule 15, of the Civil Procedure Rules, the application should have been filed within fourteen (14) days of closure of pleadings and that the Applicant could only come to court seeking enlargement of time, and the court cannot exercise its power to enlarge time and grant the orders sought. However in response, the Applicants argued that the court has power under section 1A and 1B to determine the matter on merit.

10. I have considered the application and the submissions by the parties in the light of the legal provisions that govern the same. The procedural provisions of Order 1 Rule 15 empowers a defendant who has a claim against a person not already a party to the suit and against whom he is claiming for contribution for indemnity, to apply to court within fourteen (14) days after the closure of pleadings for leave of the court to issue a third party notice to that effect. From the court record in this matter, the plaint herein dated 12th February 2010 was filed on 12th February 2010. Summons was issued on 15th February 2010. The defendant entered appearance on 5th March 2010 and filed a defence dated 23rd March 2010 on the same. Therefore basically, the pleadings closed by that date. The Applicant should have made this application within fourteen days from the date.

11. I do note from the record that, the matter remained dormant until the 18th July 2013, when the plaintiff applied through a notice of motion dated 17th July 2017 for dismissal of the suit for want of prosecution. The Respondent filed a response to that application on 3rd October 2013. The ruling to that application was delivered on 15th July 2014, wherein the suit was dismissed with costs to the defendant/Applicant. However the plaintiff filed a civil suit No. 126 of 2015 which was heard and the orders dismissing the suit was set aside. The parties then commenced on the preparation of the case for hearing which was then set for hearing on 7th March 2019. However the matter was not heard following the filing of this application.

12. The Respondent has rightfully observed that this application has been filed out of time and that the Applicant should have sought for enlargement of time before filing of the same. That was and has not been done. The Applicant urges the court to exercise its discretion under Section 1A and 1B of the CPA. It suffices to note that the provisions of Order 1 Rule 15 are couched in mandatory terms in regard to the fourteen days thereunder. Indeed the Applicant did not apply at the time of hearing of the application albeit orally for enlargement of time.

13. Be that as it were, the provisions of Article 159(2)(b) and (d) of the Constitution 2010, provides that, the court in exercising its judicial authority shall be guided by the principles inter alia; that justice shall not be delayed and it shall administered without undue regard to procedural technicalities. Similarly, the overriding objectives under Section 1A and 1B of the Civil Procedure Act, provides that the court in furtherance of the overriding objectives shall handle all matters presented before it with an aim of attaining just determination of the proceedings and timely disposal of the same in a cost effective manner. Finally, the orders sought herein will substantially affect the third party if the court allows the application. The Plaintiff will only be prejudiced if there will be any continued delay of the hearing of the matter.

14. In that case, I find that it is in the interest of justice that the application be allowed as prayed. I therefore allow the application with orders of costs to the Plaintiff/Respondent.

15. Those are the orders of the court.

Dated, delivered and signed in an open court this 8th day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Kang'ata for the plaintiff/Respondent

Mr. Momanyi for Mr. Oraro SC for the defendant/Applicant

Dennis.....Court Assistant