



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 191 OF 2016

SBG SECURITIES LIMITED.....APPLICANT

- V E R S U S -

ALICE WANJIRU MUGAI.....1ST RESPONDENT

INVESTOX CAPITAL LIMITED....2ND RESPONDENT

(An appeal from the ruling of the Chief Magistrate's Court of Kenya at Nairobi

(Hon. I. Gichobi, RM) read and delivered on 18th march 2016

in Milimani CMCC No. 2824 of 2014.)

JUDGEMENT

1) Alice Wanjiru Mungai, the 1st respondent herein, filed an action against SBG Securities Ltd and Investox Capital Ltd, the appellant and the 2nd respondent respectively vide the plaint dated 19th May 2014 before the Chief Magistrate's Court, Nairobi. In the aforesaid plaint the 1st respondent sought for general damages for breach of fiduciary duty the appellant and 2nd respondent owed to the 1st respondent over the 1st respondent's shares. The 1st respondent also sought for payment of kshs.1,038,208/70 as special damages plus costs and interest. The appellant and 2nd respondent filed their statements of defence to deny the 1st respondent's claim. The appellant filed an application to have the suit struck out on the basis that the suit was frivolous, vexatious and in breach of section 35 of the Capital Markets Authority. The application was opposed by the appellant and the 1st respondent. The aforesaid application was placed before Hon. J. Gichobi, learned Resident Magistrate, who heard and eventually had the application dismissed for want of merit. The appellant being aggrieved, preferred this appeal.

2) On appeal, the appellant put forward the following rounds in its memorandum:

1. The learned magistrate erred in law and fact in finding that annexure SNN 1 to the application did not constitute the decision of the Capital Markets Tribunal and thereby misconstrued the evidence in support of the appellant's contention that the matter was never referred to the Capital Market's Tribunal for determination, as required.

2. The learned magistrate erred in law and fact in finding that the Capital Markets Authority had not made a decision on the matters in issue in the suit when on the material before the honourable court, the Capital markets Authority had made a decision, appeal whereon lay with the Capital Markets Tribunal as required under Sections 35 and 35A (22) of the Capital Markets Act cap 485 of the Laws of Kenya, as to disentitle the honourable of jurisdiction in the matter.

3. The learned magistrate erred in law and in fact in failing to sufficiently frame and address the issue of its own jurisdiction to hear and determine the matter, in view of the provisions of Section 35 and 35A(22) of the Capital Markets Act Cap 485A Laws of Kenya and in complete disregard of the appellants' submissions on the issue.

4. The learned magistrate erred in law and fact in finding that the claim as brought is proper and in allowing the plaintiff to

ventilate it at full hearing.

5. The learned magistrate erred in law and fact in failing to evaluate and consider the submission by the appellant and thereby arrived at the wrong conclusion about the merit of the application.

6. There was no god or proper basis for the orders made in the said ruling.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have this appeal disposed of by written submissions. I have re-evaluated the arguments which were presented before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of six grounds of appeal, the main issue which commends itself for determination is the question as to whether or not the learned trial Resident Magistrate erred in holding that the Capital Market Authority had not made a decision as required under Section 35 of the Capital Markets Act Cap. 485A Laws of Kenya. It is the submission of the appellant that the Capital Markets Authority hereinafter referred to as the "Authority" made a decision in response to the complaint made to it by the 1st respondent on 10th August 2010. The appellant pointed out that the Authority communicated to the 1st respondent its decision through its letter dated 9th March 2011. The appellant argued that upon receipt of the Authority's letter, the respondent should have made an appeal to the Capital Markets Tribunal under Section 35(1) (g) of the Capital Markets Act. On the basis of the above reason, the appellant urged this court to allow this appeal.

4) The 1st respondent vehemently opposed this appeal arguing that the learned Resident Magistrate made the correct decision. The 1st respondent argued that the existence of an alternative remedial process cannot oust the court's jurisdiction. The 1st respondent was of the view that the learned Resident Magistrate was right in refusing to strike out the suit. It was pointed out that the alleged response by the Authority was addressed to the Chairman, Commission on Administrative Justice and not the 1st respondent. It was also pointed out that the alleged response by the Authority was not conclusive. The 1st respondent further argued that the Authority had stated that it had no jurisdiction on the nature of claim made by the 1st respondent therefore the trial court cannot be faulted.

5) On its part, the 2nd respondent is of the argument that the Authority is allowed to express its decisions and determination on any issue in the form of a letter and in this case, the letter dated 10th July 2013 constituted the decision of the Authority on the issues herein. The 2nd respondent was of the view that the trial Resident Magistrate ought to have construed the letter as such. It was further argued that the decision in the aforesaid letter was capable of compliance and execution therefore it cannot be regarded as a mere letter. The 2nd respondent urged this court to allow the appeal.

6) Having considered the rival arguments, it is clear in my mind that the dispute in this matter is governed under the Capital Markets Act. Under the aforesaid Act, the mechanism of handling a dispute is clearly spelt out under Section 35 and 35A of the aforesaid Act. It is not in dispute that the 1st respondent wrote a letter of complaint to the Authority and thereafter to the chairman, commission on Administrative Justice. In its letter dated 10.7.2013, addressed to Otiende Amollo, the Authority stated that it has tried to resolve the dispute but the 1st respondent declined to take up offers made by the appellant and the 2nd respondent. In the same letter, the Authority was categorical that it is curtailed from seeking to enforce the claims for economic loss or lost profit. This court has been beseeched by the appellant to find that the letter should be regarded as the decision of the Authority. The learned trial Resident Magistrate formed the opinion that the letter cannot be regarded as the decision of the Authority but should be treated as a mere letter communicating and advising the matter had reached.

7) With respect, I agree with the position taken by the learned trial Resident Magistrate. It is plainly clear from the letter of the Authority dated 10.7.2013 that the Authority merely gave a detailed explanation of the position of the 1st respondent's complaint. In fact, the Authority tersely admitted that it had no authority to determine claims for economic loss and loss of profit. In short, the Authority did not make a decision, it merely gave the parties a forum to negotiate for a settlement. It is therefore not correct to state that the 1st respondent should have appealed to the Capital Markets Tribunal to impugn the decision of the Authority. Since there was decision made by the Authority, then, the 1st respondent cannot be expected to approach the Authority's Tribunal. The 1st respondent was therefore right to approach the court for the available remedies.

8) In the end, I find no merit in this appeal. The same is dismissed in its entirety with costs being awarded to the 1st respondent and payable by the appellant and the 2nd respondent jointly and severally.

Dated, Signed and Delivered in open court this 6th day of July, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondents