



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 371 OF 2014

CAPITAL MARKETS AUTHORITY.....PLAINTIFF

- VERSUS -

JEREMIAH GITAU KIHEREINI.....1ST DEFENDANT

KINGSWAY NOMINEES LIMITED.....2ND DEFENDANT

KINGSWAY FAMILY HOLDINGS LIMITED.....3RD DEFENDANT

RULING

1. By an application dated 20th February 2015, the 1st and 2nd defendants have sought the dismissal of the suit. The basis for that application was that the suit was scandalous, frivolous, vexatious and an abuse of the process of the court.
2. In the alternative to the dismissal of the suit, the applicants asked the court to stay all proceedings in the case.
3. It is the contention of the applicants that these proceedings constitute an Enforcement Action. By taking steps to prosecute an Enforcement Action, the plaintiff is said to have brazenly violated the judgement of Majanja J. in the case of **JEREMIAH GITAU KIHEREINI Vs CAPITAL MARKETS AUTHORITY & THE ATTORNEY GENERAL, CONSTITUTIONAL PETITION No. 371 of 2012.**
4. According to the applicants, the learned Judge had expressly stated that before any Enforcement Action could be undertaken, it was imperative that the 1st Defendant, **JEREMIAH GITAU KIHEREINI**, be given a reasonable opportunity to be heard.
5. The applicants' further contention was that the Court of Appeal did uphold the decision of the High Court, when it delivered its verdict in **CAPITAL MARKETS AUTHORITY Vs JEREMIAH GITAU KIHEREINI & THE ATTORNEY GENERAL CIVIL APPEAL No. 9 of 2014.**
6. The High Court had held that the Capital Markets Authority ("**CMA**") had breached Kiereini's right to a fair administrative action by failing to accord him a fair opportunity to respond to findings made by the ad hoc Committee appointed by the **CMA**, before taking Enforcement Action, and before making public, the action being taken against him.
7. It was also a finding of the High Court that Kiereini had not been given proper notice, for the purposes of the Enforcement Action. That finding was premised upon the fact that the purported Notice of the allegations against Kiereini also included findings which the Committee had made on some of the allegations.
8. And as if to make matters worse, the Notice was found to also have already laid out the sanctions

- which the committee had imposed against Kiereini.
9. And it was not just Kiereini who was being informed about the sanctions, the whole world received the same information, through a press release from **CMA**.
 10. Ultimately, Kimaru J. held that the Board of **CMA** was at liberty to take action against Kiereini, **“upon giving him**

reasonable opportunity to be heard on the findings of the Committee and to defend himself on the basis of any charges or allegations that may lead to enforcement action being taken against him”.

11. The learned Judge quashed the Report and Resolutions of the Capital Markets Authority dated 3rd August 2012, in as far as they relate to Kiereini. The other thing which the High Court quashed was the Enforcement Action taken on the basis of the Report and Resolutions set out in the letter dated 3rd August 2012.
12. The Capital Markets Authority was dissatisfied with the decision of the High Court, and they therefore lodged an appeal at the Court of Appeal.
13. In its determination, the Court of Appeal upheld the decision of the High Court on the issue of jurisdiction. It found that the issue which Kiereini had laid before the High Court was constitutional in form.
14. According to the Court of Appeal the Committee only carried out investigations. Indeed, the Court said that the power of enforcement was not delegated to the Committee. Therefore, the Committee was not given a carte blanche by **CMA**, so that it could supplant the Board on the entire process of both the investigation and the enforcement.
15. The Court of Appeal went on to state as follows;

“What deserved a constitutional challenge was the summary imposition of sanctions and other penalties before giving Kiereini an opportunity to be heard in mitigation. Some of the findings made by the committee bordered on criminal offences and yet penalties were imposed before hearing the affected person”.

16. In the final analysis, the Court of Appeal set aside the sanctions, penalties and offences imposed by the Capital Markets Authority.
17. At the same time, the Court emphasized the fact that it was possible that the Board may arrive at the same conclusions after they had accorded a hearing to Kiereini, but that cannot be an excuse for not complying with the law in the first instance.
18. For that reason, the Court of Appeal made it clear that the Capital Markets Authority would be at liberty to re-impose the sanctions, penalties and offences against Kiereini, if they are merited: but such re-imposition could only take place after the **CMA** had given to Kiereini an opportunity to be heard.
19. The respondent appreciated the fact that the proceedings before this court were commenced when the Court of Appeal had not yet rendered its judgement in **CAPITAL MARKETS AUTHORITY Vs JEREMIAH GITAU KIERENINI CIVIL APPEAL No. 9 of 2014**.
20. According to the Respondent, it acted in compliance with the orders of the Court of Appeal when, on 22nd December 2014, it summoned Kiereini before the Board for a hearing in mitigation.
21. As far as the Respondent was concerned, the Enforcement Action could only commence after the Board had heard Kiereini’s mitigation.
22. In the meanwhile, the Respondent submitted that it was important to conserve the subject matter of the case, so that Kiereini does not dispose of the shares which could be useful in meeting potential enforcement penalties.
23. In the considered opinion of the Respondent, the institution of these court proceedings whilst the Board was also handling other proceedings, could not be construed to mean that the applicant was being subjected to 2 parallel proceedings.
24. The Capital Markets Authority says that these court proceedings were instituted so as to obtain court orders to restrain Kiereini and the other defendants from disposing of or encumbering or in any other manner, dealing with any shares which they own in the Nairobi Securities Exchange and the Central Depository & Settlement Corporation,

“pending the judgement and outcome of Civil Appeal No. 9 of 2014 (Capital Markets Authority Vs. Jeremiah Gitau Kiereini & Another) and/or completion of applicable due process hearings on any enforcement action to be taken by the plaintiff in accordance with the report and recommendations of the ad hoc committee of the Board CMA dated May, 2012”.

25. To the extent that these proceedings sought a relief pending the decision in Civil Appeal No. 9 of 2014, the same has now been overtaken by events. I say so because nobody can continue waiting for that which has already been delivered.

26. And in so far as the plaintiff made reference to the applicable due process hearings on any enforcement action

“to be taken by the plaintiff...”;

that suggests that the plaintiff was yet to commence Enforcement Action. However, even though the plaintiff seems to suggest that it was yet to undertake the Enforcement Action, the pleadings before me appear to tell a different story.

27. The following are the reliefs sought in the Plaintiff;

“a) A declaration that as found in the investigations carried out by the plaintiff, the 1st defendant is liable to pay a sum of Kshs. 189 million to the plaintiff for purposes of remission to the Investor Compensation Fund established under section 18(1) of the Capital Markets Act.

b) An order that the 1st Defendant do pay to the plaintiff the said sum of Kshs. 189 million to the plaintiff for purposes of remission to the Investor Compensation Fund established under section 18(1) of the Capital Markets Act.

c) That in the alternative to (b) above, the plaintiff be allowed by this Honourable Court to apply and liquidate the defendants’ shares held in their CDS account to the tune equivalent to the said sum of Kshs. 189 million.

d) Costs of this suit.

e) Interest on (a) and (b) above, at Court rates from the date of Judgement.

f) Any other order this Court may deem fit and just to grant in the circumstances of this case”.

28. Clearly, the reliefs sought indicate that the CMA was undertaking Enforcement Action, as it was seeking to recover money from the applicant, on the basis that the said money was already found to be due and payable.

29. It thus follows that determination about the liability or culpability of Kiereini had been made.

30. If that be the case, yet the Court of Appeal had already upheld the findings that Kiereini had had sanctions and penalties imposed upon him before he was heard in mitigation, it does appear to me that the CMA had failed to heed the directions given by both the High Court and the Court of Appeal. By so holding, am I suggesting that the findings by the Committee be set aside?

31. No, I am not. I am simply saying that when the CMA says that Kiereini should be compelled to pay back Kshs. 189 million, before he is afforded an opportunity to be heard in mitigation, that implies that mitigation would count for naught.

32. The Court of Appeal had also noted that some of the findings made by the Committee bordered on criminal offences yet penalties were imposed before hearing the affected person.

33. To my mind, that finding implies that, although the courts had not set aside the investigative findings of the Committee, it would most probably be wrong to have the Board sustain such findings, as they were arrived at before Kiereini was heard.

34. If these proceedings were permitted to continue, there was a possibility that the applicant would have his shares sold, with a view to recovering money which the CMA has concluded to be payable, yet such an Enforcement Action had preceded the fair hearing which the applicant is entitled to.

35. So, should the suit be dismissed, as the applicant has said?

36. The Court of Appeal faulted the process because it failed to offer due protection to the applicant's right to a fair administration action, including the right to a fair hearing. The said Court reiterated that the right to a fair hearing was so jealously guarded by the Constitution that the Court decided to apply Article 10 on transparency and accountability.

37. I stand with the Court of Appeal on the need to jealously safeguard the right to a fair trial. But I also recognize the possibility that even after giving to Kiereini his right to a fair hearing, the Capital Markets Authority could still arrive at findings similar to those that were arrived at earlier.

38. In those circumstances, it is yet possible that **CMA** may ultimately get round to prosecuting the Enforcement Action.

39. I therefore hold the view that the striking out of the action is too drastic a step to take in these proceedings. The justice of the case demands that the court do balance the competing rights of the parties to the action. And in my considered view, the right balance is struck when the proceedings herein are stayed until the plaintiff will have given to the applicant a fair opportunity to be heard.

40. Accordingly, I do now order that all further proceedings in this case be stayed until the plaintiff complies with the orders of the Court of Appeal in Civil Appeal No. 9 of 2014.

41. The costs of the application shall be paid by the plaintiffs, to the applicants.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of July 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Rono for Gatonye for the Plaintiff

Komu for Regeru for the 1st Defendant

.....for the 2nd Defendant

No appearance for the 3rd Defendant

Collins Odhiambo – Court clerk.

