Shah v Capital Markets Authority & another; Shah (Third party) (Appeal 1 of 2016) [2017] KECMT 13 (KLR) (31 August 2017) (Decision)

Neutral citation: [2017] KECMT 13 (KLR)

REPUBLIC OF KENYA

IN THE CAPITAL MARKETS TRIBUNAL

APPEAL 1 OF 2016

JK KIBET, CHAIR, K. KINYUA & K. NYAMWEYA, MEMBERS

AUGUST 31, 2017

BETWEEN

RAJ PEMCHAND SHAH ..... APPELLANT

AND

CAPITAL MARKETS AUTHORITY ..... 1ST RESPONDENT

AFRIKA INVESTMENT BANK ..... 2ND RESPONDENT

AND

RONAK SHAH ..... THIRD PARTY

DECISION

Parties

1. The Appellant describes himself as an investor in the Nairobi Securities Exchange owning a portfolio of shares including those of Rea Vipingo Limited.

2. The 1st Reposndent is a Statutory6 body established under section 5(1) of the *Capital Markets Act* Chapter 485 of the Laws of Kenya.

3. The 2nd Respondent is a licensee of the 1st Respondent licensed to carry on the business of stockbrokerage.

4. The Third Party is an agent managing the share portfolio of the Appellant and also an agent of the 2nd Respondent. He is also the son of the Appellant.

Background

5. The Appeal before the Tribunal arises from the decision of the 1st Respondent which was communicated to the Appellant by a letter dated May 23, 2016 and the 2nd Respondent by a letter

of the same date. The decision was made following a complaint by the Appellant against the 2nd Respondent over alleged unauthorized sale of 107,143 shares in Rea Vipingo. The Appellant claimed that he suffered a los of Kshs 6,229,200 being the difference between the value at which the sahre4s wee sold and the subsequent value at which sales were acquired by REA Trading.

6. Upon receipt of a notice to show cause issued by the 1st Respondent, the 2nd Respondent simply reiterated that there was no wrongdoing on its part and that the Appellant had appointed the Third Party as his agent with discretionary authority to deal with his shares. The 2nd Respondent asserted that the Third Party also became its Agent as from October 28, 2013 following his execution of the Agency Agreement which die to internal processes was dated November 5, 2013.

7. The 1st Respondent having investigated the matter found that the 2nd Respondent had breached the regulations referred in its said letter dated May 23, 2016 and imposed a financial penalty of Kshs 45,572.10 in addition to directing the 2nd Respondent to provide its procedures manual for review. In the letter dated 23rd May, the 1st Respondent made several observations in respect to the agency agreement between the 2nd Respondent and the Third Party. Although it was pertinent, the 1st Respondent 's said letter made very little reference to the relationship between the Appellant and the Third Party. In respect to the Appellant's complaint the 1st Respondent found that the Appellant had appointed the Third Party as his agent.

Appellant's Submissions

8. The Appellant through his learned Counsel Mr Mweke relied on the Memorandum of Appeal filed on the 10th of June 2016, the accompanying statement of facts and annexures as well as the written submission filed on the 14th of June 2016. Learned Counsel submitted that three major issues arising from the Appeal. He reiterated that there had been clear breach of statute by the 2nd Respondent and consequently an order for restitution or compensation could not be resisted. He submitted that the provisions of regulations 23 (1) (b) *Capital Markets (Licensing Requirements) (General) Regulation* 2002 (herein after called "The Regulations") provides in mandatory terms that a stockbroker shall only accept written orders. He submitted that there were no written orders in respect to the sale of the Appellant's shares and that the 1st Respondent whilst sanctioning the 2nd Respondent ought to have directed the 2nd Respondent to pay compensation to the Appellant. It was argued that the 2nd Respondent had conducted itself unprofessionally contrary to the clear provisions of Regulation 22 (1) (b) of the Regulations which requ9ires the conduct of business to be efficient, honest and fair with integrity and professional skills. He referred the Tribunal to the case of *Peter Mathenge Gitonga vs Kenya Commercial Bank Limited* (2017) eKLR for the definition and test for professional negligence. He submitted that the 2nd Respondent had failed to exercise such competence as is required by the Regulations Counsel relied on *Jackson Powell on Professional Liability* 7th Edition at Page 1095 at para 15-022 to advance the same argument. Mr Mweke stated that having shown violation of applicable regulations and accruing fiduciary duty. It was inevitable that his client was entitled to wages.

9. Mr Mweke further cited the said Peter Mathenge case (supra) to show that where a fiduciary duty was breached, the balance favors the wronged person and that the injured party should be awarded monetary sums representing a fair and adequate compensation of the loss suffered. It was submission that has the 2nd Respondent not prematurely and without instruction sold his shares in Rea Vipingo, the Appellant would have earned Kshs 9,129,000 as opposed to Kshs 2,899,800 which was earned. It is the difference between the sums of Kshs 6,299,200 which the Appellant is claiming as damages. Heavy reliance was as well placed on Section 34A(2)-(4) of the *Capital Markets Act* (herein after called the "Act") which makes provisions for compensation or restitution based on the offences committed under the Act and the mandatorily couched terms of Regulation 25A(3) which mandates the Authority to

make orders for restitution where there is a breach of the provisions of the *Capital Markets Act* and the regulations made thereunder, the amount of loss is quantified and proved and that the notice is served on the person expected to make the restitution. It was his submission that the conditions above have been satisfied for purposes of compensation.

10. On the second limb, Counsel for the Appellant argued that his client's Constitutional right to property under Article 40 of the *Constitution* had been breached. It was the Appellant's submission that the wrongful sale of his Rea Vipingo shares amounted to an arbitrary deprivation of the property within the definition of Article 40 (2)(a) of the *Constitution* of Kenya 2010.

11. Learned Council submitted that there is no evidence to support the assertion by the 2nd Respondent that there were valid instructions to sell the Appellant's shares from the third party. He submitted that the Replying affidavit of one Paul Mwai dated March 17, 2017 is complete hearsay since he was not the one who allegedly received the instructions. Counsel bought to the Tribunal's attention the case of *Tenaya vs Uganda* (1976) 1EA 102 (HCU), where the High Court upheld an appeal where an Appellant had been convicted based on hearsay in the form of a report. It was his assertion that the 2nd Respondent has failed to discharge his burden of proof to the required standards as provided for in Sections 63(1), 63(2) (b) the *Evidence Act*. He submitted that the 1st Respondent erred on relying on unproved instructions to escape the mandate of section 25A (3). Further, Mr Mweke argued that the 1st Respondent cannot refer to admission made during the meeting without prejudice records of the same.

12. It was argued that the Appellant's Constitutional rights to fair hearing and fair administrative action had been violated and that during the meeting of August 28, 2012, the 2nd Respondent was not present and consequently the Appellant and the Third Party did not have an opportunity to see, hear or respond to the 2nd Respondent's evidence upon which the 1st Respondent relied upon to make the determination on the complaint raised before it. This is he submitted was contrary to Article 50 (2)(k) of the *Constitution* which guarantees the right to adduce and challenge evidence. Counsel also relied on the provisions of Section 4(3)(f) and 4(4(© of the *Fair Administrative Actions Act* 2015 which he submitted give effect the Article 47 of the *Constitution*. The sections provide:

    (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person the administrator shall give the person directed by the decision.

        (f) Notice of the right to cross examine or where applicable or

        (g) information materials and evidence to be relied upon making the decision or taking the administrative action

        And

    (4) The Administrator shall accord the person against whom administrative action is taken and opportunity to: -

        (c Cross examine persons who give adverse evidence against him and

13. Counsel referred to various authorities including *Sceneries Limited vs National Land Commission* (2017) eKLR, *Republic v Lucas M Maitha Chairman Vetting Control and Licensing Board & 2 others Ex-parte Interactive Gaming and Lotteries Limited* in support of the arguments and propositions contained in the Appellant's written submissions. Lastly, it was Mr Mweke's submission that the 1st Respondent erred in holding that there was ratification of the sale through the application of the proceeds. He submitted that since the wrongful transaction had not been reversed, the Appellant was entitled to apply the proceeds of the sale as he deemed fit and that such application could not be held

as having ratified the sale. Counsel submitted that 1st Respondent could not hold on the one hand that their instructions to sell and at dame time hold that there was ratification.

1st Respondent's Submissions

14. Mr Githendu learned Counsel for the 1st Respondent relied on the written submission filed dated July 5, 2017 statement of Defence as well as the documents filed on July 8, 2016 as well as the documents filled on the same day.

15. He submitted that there were three issues that the Tribunal is called upon to determine and these are:

    i. Whether the sale of the Rea Vipingo shares was authorized by the Appellant.

    ii. Whether the Appellant's right to fair administrative action under Article 47 of the *Constitution* was violated

    iii. Whether the Appellant deserves compensation or restitution by the Tribunal.

16. He submitted that there is no dispute that he 2nd Respondent was guilty of regulatory infractions in particular, regulations 22 and 23 of the *Regulations*. In respect to the first issue Counsel submitted that the sale was authorized by the fact that the Third Party was the Appellant's agent and had discretionary mandate over the portfolios of equity investments belonging to the Appellant. The agency was said to have been admitted by the Appellant at Paragraph 2 of his statement of Defence. He referred the Tribunal to the emails that were exchanged between the Third Party and the 2nd Respondent which he termed as proof of the agency Mr Githendu submitted that the agency was created by ratification and quoted *Chitty on Contracts* Volume 2 by Sweet and Maxwell at page 32-027. According to him the ratification was proven by the fact that the Appellant allowed the process to be applied in buying other shares, his failure to direct the 2nd Respondent to segregate the funds received from him the sale, allowing the Third Party to derive a benefit from the contested sale and failing to terminate the agency between himself and the Third Party despite his claim that the sale of the shares being unauthorized.

17. In respect to the second issue, he submitted that the Appellant's r5ight to Fair and Administrative action enshrined in Article 40 of the *Constitution* was never infringed and that the 1st Respondent exercised its power under Section 11(3) (h) of the *Capital Markets Act* to commence an investigation and that the Act empowered the 1st Respondent to do all such other acts as may be indicated or conducive to the attainment or exercise of it's powers donated by the Act. This he said included exercising discretionary powers and designing an investigative procedure which is well described in their statement of facts. He strongly asserted that the manner in which the 1st Respondent undertook the administrative action met the Constitutional threshold. Mr Githendu referred the Tribunal to the case of *Dry Associates Limited v CMA & Another Interested Party* (2012) eKLR where Justice Majanja upheld an investigative process as being fair and dismissed a petition challenging it.

18. Counsel submitted that the Appellant was not entitled to an order for compensation for the amount of Kshs 6,299,200 since the sale was lawful and the right to property not infringed. It was his submission that the Tribunal should consider that there was a benefit derived by the Appellant in the sale of the Rea Vipingo shares and that making such an order would amount to unjust enrichment on the part of the Appellant. He submitted that the Appellant intended to benefit and indeed obtain a full benefit from the sale of the shares when the Third Party invested the finds. He termed this as an application of double standards by the Appellant who disputes the validity of the transaction and at the same time acquiescing in the subsequent transactions to buy other securities using the proceeds of the sale.

19. Counsel for the Respondent also submitted that the claim of alleged loss by the Appellant through the sale is remote. He submitted that this was an afterthought after the appellant realized belatedly that perhaps he could have benefitted more had he retained the sold shares. It was his further submission that computation was erroneous and misplaced since the Appellant could not ascertain that he would have held the shares long enough to sell them at price of the takeover of Rea Vipingo. He referred the Tribunal to the case of *Hadely vs Baxendale* (1854) 9 Exch 341 that laid down the criteria for the award of damages – that is the loss must be foreseeable to any person in the Defendants position and if not foreseeable the Defendant should have been in possession of particular information indicating the likelihood of the event recurring. It was Counsel's submission that the 2nd Respondent has failed to satisfy the criteria and that in fact none of the parties foresaw the takeover.

20. Counsel argued that there was material non-disclosure of the full extent to which the proceeds of the shares were applied and that it was a conscious attempt to conceal gain from the sale of the shares. He referred the Tribunal to the case of *Regina Munyiva Kioko vs Kenya Tourist Development* (2012) eKLR where it was held that the court will decline to grant reliefs where a plaintiff had failed to disclose material facts.

21. Learned Counsel further argue that Sections 34A (2) – (4) of the Act do not apply to the 1st Respondent as it is neither a court of law nor was it conducting criminal proceedings when it dealt with the contested sale of the Appellant's shares. He submitted that an award of restitution was not available to the Appellant for the reason that it was not prayed for and that the law of restitution was concerned with reversing a Defendant's unjust enrichment at the expense of a claimant which is not the case in this Appeal. In his view to warrant a claim of restitution under section 25A (2)-(3), the Appellant was supposed to have calculated his loss with reference to any gain of the 2nd Respondent which the Appellant had failed to do. He submitted that the Appellant did neither of the above.

2nd Respondent's submission

22. Mr Omari learned Counsel for the 2nd Respondent joined issue with the submissions of Mr Githendu. He associated himself with the submission on compensation and restitution, unjust enrichment; on whether the sale was sanctioned by the Appellant, the submissions on Fair Administrative action, submissions on whether the right to won property was violated and on the remoteness of damage. His point of departure was the finding that the 2nd Respondent had violated the Regulations. He relied on the statement of facts dated 20th July, statement of defence, list if documents and Submission dated July 4, 2017.

23. Mr Omari submitted that on October 28, 2013, the Third Party introduced himself as the new agent on the Appellant. This was confirmed by Mr Kanti Shah the previous agent of the Appellant. H submitted further that on the same day the Third Party was provided with the portfolio statement and that on October 31, 2013, the Third

    Party requested for quotes.

24. It was his further Submission that on the November 1, 2013, the 2nd Respondent received instructions to sell the shares, He made reference to page 4 of his list of documents which contained the email exchange between the Third Party and Mr Stephen Ngigi. He asserted that subsequent instructions were then issued to try and buy back the shares.

25. He argued that there was an agency agreement between the Third party and the 2nd Respondent empowering the Third Party to deal with and issue instructions in respect to the Appellant's portfolio of shares.

26. He further submitted that pursuant to the arrangement between the Appellants and the Third Party, the Third Party issued verbal instructions. He alluded to the affidavit of Mr Stephen Ngugi. He submitted that subsequently an agreement in writing was executed between the Third Party and the 2nd Respondent dated 5th November. He posited that there was other transactions post November 5, 2013 that took place which the Appellant had no quarrel with except the Rea Vipingo one. He referred the Tribunal to a schedule of the other sales that took place. He argued the reason why the Appellant had issued with the Rea Vipingo shares was purely driven by financial greed. He asserted that there was no complaint from the Appellant on the commissions made by the Third Party. In the learned Counsel's view, this was simply an attempt by the Appellant to enrich himself unjustly. It is his submission that the question of earning over Kshs 6,000,000 is hearsay. That no explanation has been made as to how the figure was arrived at.

27. Mr Omari then submitted that since the Appellant has not challenged the agency agreement, then he should not be allowed to claim that the proceeds are irregular.

28. Learned Counsel faulted the timing of the complaint. He states that the complaint to Nairobi Securities exchange was done on October 23, 2014 almost one year after the sale of the shares.

Third Party's Submissions

29. Mr Githui Counsel for the Third party relied on the statement of facts and the Defence filed March 3, 2017 and the submissions filed on July 31, 2017 and all the cited authorities in the submissions. He associated himself with the submissions of the Appellant then proceeded to highlight three major issues to rebut the 2nd Respondent's submissions. These issues he listed at Agency, Liability, and whether the Third Party was entitled to commission. It was his submission that the agency between the Third Party and the 2nd Respondent began on November 5, 2013. That the decision by the 1st Respondent in the letter at page 28 of the 2nd Respondents documents clearly showed part (b) that there had been execution of an order without written instructions which was contrary to the provision of the Regulations.

30. He submitted that the proper chronology of events of November 1, 2013 is per pages 1-10 of the Appellant's list of documents. That he 2nd Respondent informed the Third Party of the sale of the shares through an email. The Third Party then responded by expressing disapproval of the sale and instructed the 2nd Respondent not to do anything else without consulting him. In a subsequent email, the Third Party then told the 2nd Respondent that they should not have sold the shares without confirming the price. In another email, the Third Party then asked the 2nd Respondent to reverse the sale since he had not authorized it. There being not re4sponse from the 2nd Respondent, the Third Party then followed up with another email asking that at least half the shares be bought back. The 2nd Respondent then responded by saying that they will try and get the shares the following week. Counsel concluded this by submitting that the 2nd Respondent cannot therefore claim that there was an order.

31. On the question of liability, Counsel argued that it should solely be on the 2nd Respondent. He supported his assertion with the doctrine of estoppel that the 2nd Respondent was estopped from shifting blame to the Third Party. He submitted that the 2nd Respondent had already accepted the verdict rendered by the 1st Respondent and therefore liable for their actions. He relied on the authority of *Trade Bank Limited vs LZ Engineering Construction Limited* [2000] 1 EA 266 (CAK) where the court of appeal stated:

> " Issue estoppel and eh doctrine of the res judicata arise in these appeals. Issue estoppel and *res judicata* bar the appellant from re-litigating matters already ruled on by the Court since

the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the same action which point had been decided with certainty."

Determination

32. We4 have carefully considered the appeal, the statement of facts together with all the supporting documents. We have also considered the Response of the Third Party to the case against him as framed by the 2nd Respondent. We listened carefully to the Counsels and have carefully considered all submissions. There were not agreed issues and therefore each counsel framed issues as he saw them.

33. As correctly pointed out by Mr Mweke Counsel for the Appellant the matter before the Tribunal is an appeal was filed under section 35 (1) (g) which states as follows:

35 (1) Any person aggrieved by any direction given by the Authority or by the Investor Compensation Fund Board –

a. – (b)

(G) Refusing to grant compensation to an investor who had suffered pecuniary loss resulting from failure of a licensed stockbroker to dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces.

The Appellant faults the decision of the 1st Respondent for denying him compensation after holding that the 2nd Respondent had notably breached provisions of the Regulations. In the course of the hearing, we understood the Appellant's Counsel to argue that the Appellant was also aggrieved by the finding of the 1st Respondent that the Third Party had its authority and instructions to deal with the shares of Rea Vipingo.

On a very preliminary issue, the Appellant in his submission has prayed in aid of the provisions of Sections 34A (2)-(4) and 25A (2)-(3) of the *Capital Markets Act*. The wording of Section 34A of the Act suggests that is a Section which guides a court hearing an offence under the Act, whose nature is criminal. For avoidance of doubt the section provides:

(2) The court may make an order for the payment by a person convicted for an offence under this Act of compensation to a person who suffers loss by reason of the offence.

(3) An order for compensation under subsection (2) may be addition to or in substitution of any penalty or remedy available to that person.

(4) The amount of restitution or compensation for which a person is liable under subsection (2), is –

a) The loss sustained or adverse impact of the breach on the person or persons claiming compensation or restitution:

b) The profits that have accrued to the person in breach

c) Where harm has been done to the market as a whole, the illegal gains received or loss averted as a result of the illegal action may be determined by the court.

This being a Tribunal without any criminal jurisdiction, we find the reliance on this section is of no assistance to the Appellant in the determination of this question.

34. Section 25A (2)-(3) empowers the 1st Respondent to make orders for restitution in addition to any other sanctions imposed upon a party to the conditions set out therein. The Section states as follows:

> In addition to any other sanction that may imposed under this section the Authority may make orders for restitution, subject to the provisions of subsection (3)
>
> The Authority shall make orders under subsection where the breach of the provisions of this Act or the regulations made under the Act results in a loss to one or more aggrieved persons, but subject to the following conditions:
>
> a. The amount of the loss is quantified and proved to the authority by the person making the claim.; and
>
> b. The notice is served by the Authority of the person expected to make the restitution, containing details of the amount claimed and informing them of their right to be heard.

a. It is clear from the forgoing provisions of the Act, that there are certain conditions to be met before an order for restitution is made.

35. Applying the above test to the facts of the appeal before us, it is clear from the decision of the 1st Respondent communicated in the letter dated May 23, 2016 that there was breach of Regulation 22A (1) and 23 (a) by the 2nd Respondent. The 1st Respondent after considering the submission made by the parties held as follows:

a. By effecting the agency agreement on the November 5, 2015 after executing the transaction of the sale of Rea Vipingo shares with the agent on the November 1, 2013, without an existing agency agreement, AIB acted contrary to the requirements of Regulation's 22A (1) of the *Capital Markets (Licensing) (General) Regulations*, 2002 which provides that a stockbroker may conduct business through stockbroking agent provided the stockbroking agent has been contracted in writing to render such services; and

b. By executing a sale order without the client's written instructions, AIB acted contrary to the requirements of Regulations 23 (a) of the *Capital Markets (Licensing) (General) Regulations* 2002 which provides that an "order" or the purpose of eh regulation shall constitute written instructions by a client to a stockbroker as to the security name, quantity, price or price limits and duration or validity of instructions.

We accept the Third Party's submissions that the 2nd Respondent accepted the verdict rendered and paid the penalty imposed. We reject the 2nd Respondent's final argument that the payment of the penalty was purely a business decision and not an admission of liability. Complying with the verdict and not appealing against the decision is clear admission of liability.

36. The Appellant's main complaint is that the 1st Respondent having found that the 2nd Respondent breached the Regulation's to order compensation or restitution to the extent claimed by the Appellant or at all. The main issue before us is therefore whether or not the 1st Respondent ought to have ordered compensation in favor of the Appellant. If the answer in the affirmative, then the other question is whether we should set aside the decision of the 1st Respondent only to the extent of failing to order compensation or restitution.

37. It is necessary to once again to look into the matter placed before the 1st Respondent. The issue turns on the conduct of the Third Party in regard to his relationship with the Appellant and the 2nd Respondent. The answer to the question at o whether there was an order for the sale of shares as defined in the Act,

is to be found in the exchange of email between the Third Party and on Mr Stephen Ngugi of the 2nd Respondent. There is no dispute and neither did we hear any submissions to the contrary, that the Appellant had duly instructed and authorized the Third Party to deal with his portfolio of shares. The fact that was confirmed by the Third Party in his email to Mr Ngugi. It appears that shortly after the Third party was appointed by the Appellant, he was given copy of the full portfolio of the shares held by the Appellant and shortly thereafter the shares in Rea Vipingo were sold.

38. An issue arose immediately after the sale of the shares but it was too late for the 2nd Respondent to retrieve the shares despite an email from Mr Ngugi advising that they will try and get the shares back. We have carefully examined and re-examined the exchange of email. On November 1, 2013, the Third part sent an email and the opening statement read as follows:

> " You should have asked me for the price before you sold."
>
> In another email sent on the same date 2.11pm the Third Party confirmed having issued telephone instructions to buy back 53000 shares at 25/= per share. In the same email, the Third Party was asking of recommission the sale of the Trade. We understand the trade to mean the sale of the 107,143 shares. Further o the same email, the works the Third-Party uses is we didn't agree on price"., There is an affidavit sworn by Mr Ngugi on to which he depones to a telephone conversation with the Third party in which he claims that he was instructed to sell the shares.

39. An analysis of the above4 exchange and the affidavit of Mr Ngugi leads one to the conclusion that there were indeed instructions on telephone issued by the Third Party to Mr Ngugi to sell the shares. The affidavit of Mr Ngugi id uncontroverted. The email of the Third Party on 1st November refers to a telephone conversation suggesting clearly that those parties were in touch on telephone. The Third Party's complaint as it appears from his emails appears to be on the question of price. The issue of price is stressed in both emails of November 1, 2013. In the second email of 1st November, he confirms instructions issued to buy back 53000 shares. The claim is that 107,143 shares were sold without authority. If indeed there was a complaint on the sale:Why wasn't the Third-Party instructing Mr Ngugi to buy back all the shares from the person who had bought them?Why didn't the Appellant reject the proceeds of the sale and make an immediate demand for restitution and compensation? Instead, it was shown by documentation that the proceeds of the sale had been used in other trade for the benefit of the Appellant.Why did the Third Party take the benefit of the proceed arising from a sale which was unauthorized?

Considering all the factors we have come to the inevitable conclusion that there were indeed verbal instructions issued to the 2nd Respondent to sell Rea Vipingo shares.

40. It is also worth noting that which the Third Party was complaining of the sale of shares a price that was not agreed, there seems to have been a quick arrangement in which the Third Party and the 2nd Respondent were signing an agency agreement on the November 5, 2013 a few days after the alleged dispute sale took place. One would have imagined that this was a period of some "cold" war and would not expect the parties to be signing agreements if indeed there was a looming fight over unauthorized sale.

41. The first complaint made by the Appellant was a letter21st June through his Advocate Gilani and Company. Eventually the matter appears to have reached the Nairobi Securities Exchange a year later and landed before the Chairman of the 1st Respondent two years thereafter. This conduct on the part of the Appellant is not consistent with the conduct of a person who was truly aggrieved by some sale

of shares. Our view is that a valid contract was established between the Appellant through his agent and the 2nd Respondent and that the said verbal contract is binding upon the Appellant.

42. We have found that the 2nd Respondent acted on the oral instructions. We do not suggest for a moment that the oral instructions fall within the definition of an "order" as contained regulation 23 (a) of the Regulations. An "order" as defined ought to be in writing. This notwithstanding, our view is that the instructions issued by the Third Party having been acted upon the 2nd Respondent albeit of the Regulations, are still binding on the Appellant the Third Party being his agent.

43. The obligation to obtain written instruction was on the 2nd Respondent and it failed to do so. The enforcement action taken again the 1st Respondent cannot be faulted. The question is whether the 1st Respondent have ordered compensation in favor of the Appellant having found that the 2nd Respondent had breached the Regulations. Our reading of the letter of the 1st Respondent to the 2nd Respondent dated May 23, 2016 appears to clearly zero in on the fact that the 2nd Respondent acted on telephone instructions without obtaining a written order. The 1st Respondent's letter is clear on the existence of a transaction of sale pursuant to telephone and email communication. Can the Appellant be entitled to benefit from a situation which was commenced and perpetuated by his agent or which he is liable a s principal? The Third Party cannot conceivably, distant himself from the breach of the rules by 2nd Respondent. We have alluded to the events post the sale of the shares to show that the Appellant benefited from the proceeds of the sale of shares and the Third Party form the Commission thereof. The Appellant's Counsel submitted on the issue of estoppel against the statute. We do not find that that is an argument available to the Appellant and the Third Party. Equity demand that one must come to it with clean hands. The Appellant has approached this tribunal being tainted with profiting from a transaction carried out in breach of the regulations and therefore equity must turn its back on hi, The Court in case of *Mapis Investment (K)Limited vs Kenya Railways Corporation* (2005) Eklr stated thus:

> '....If the person invoking the aid of the court is himself implicated in the illegality.it matters not whether the dependent has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him'.
>
> We therefore find that the decision of the 1st respondent not to order compensation or recitation in favor of the Appellant cannot be faulted. Having found so, it would be unnecessary for us to consider the question of quantification of the alleged loss. However, since it had been pleaded, and in the event, we were wrong, we will consider.

Quantification of Loss And Proof Thereof

44. The Appellant argues that he suffered a loss to the tune of Kshs 6,229,200 being the difference between the amount he was paid and the amount he would have been paid at the take-over of Rea Vipingo if his shares had not been sold in November 2013. His claim is that he would have earned the sum Kshs 9,129,000 as opposed to the amount he received as proceeds from the sale of the shares of Kshs 2,899,800 at the rate of Kshs 27/= per share. The figure of Kshs 9,129,000 was arrived at from the price of Kshs 85 per share which was paid to the minority share holders of Rea Vipingo following the takeover, a period of close to two years after the sale of the Appellant's shares.

45. There is evidence of the public announcement of the take-over contained at page 35B of the Appellant's bundle of documents. The protracted takeover process of Rea Vipingo by Rea trading began on 13th November 201 and was concluded on March 26, 2015. It is worth noting that the takeover began 12 days after the sale of the shares. This then begs the question, whether the Appellant's loss was a foreseeable consequence of the 2nd Respondents breach of regulations or whether the damage was too remote. The *locus classics* on remoteness of damages is the case of *The Wagon Mound A.C* 388

discussed at page 144 of *Streets on Torts*. Its principal holding is that if the damage which materializes is damage by fire. Similarly, the decisions of the House of lords in *Hughes vs lord Advocate*, (1963) AC' 837, the Privy Council in the *Wagon Mound (No 2)*, (1963) and the Court of Appeal in *Stewarts vs West African Terminals, limited*(1964) 3 all ER 1006 accepted that the harm suffered must be of a kind, type or class foreseeable as a result of the Defendant's negligence. The case of *Hadley vs Baxendale* (1854) 9 Exch 341 as relied on by the 1st Respondent is as well very instructive in the criteria put fort by the court. The criteria are.

i. The loss must have been foreseeable to any reasonable person in the defendant's position: or

ii. If it was not so foreseeable: the defendant must have been in possession of particular information indicating its likelihood in the event.

46. The Criteria in *Hadley vs baxendale* is discussed in the law of Damages (Butterworths Common Law Series) on page 129 at paragraph 6.07 is stated to have originally applied to damages for breach of contract at common law, however in practice, the principles enunciated in it obtain a good deal more widely and it has also been held that statutory rules as to damages encapsulate them.

47. Assuming the Appellant suffered loss, and we have found that he did not. The issue is question, would whether the 2nd Respondent could have foreseen the loss or whether the 2nd Respondent was in possession of particular information indicating the likelihood of the loss in the sale of Rea Vipingo shares. The other

48. question that ought to be asked is whether indeed any of the parties could have foreseen the takeover of Rea Vipingo by REA Trading. The 1st Respondent argued that the answer to these questions is in the negative. The 1st Respondent submitted that in fact none of the parties had knowledge on the takeover since the official communication of the takeover was only issued on November 13, 2013. Though there is no evidence on record of the accuracy of this date: all parties have held it to be correct. It, therefore, follows that at the time of the sale, neither party was seized of the information that Rea Vipingo would be taken over with its shares soaring to Kshs 85/=. The document tendered in by the Appellant justifying his computation of the alleged loss is the public announcement from Centum investment Company. Limited which revealed the price of ordinary shares of Rea Vipingo to be Kshs 85/=. Given that this information that came to both parties on March 26, 2015, it does very little to advance the Appellant's case. Instead, it seems the Appellant has handed the Respondents the very arsenal that would undo his own case.

49. We also agree with the submissions of the 1st Respondent that the Appellant alludes to a loss and the same time fails to disclose the full extent of the application of the proceeds of the sale. Both Respondents have argued that the Appellant derived a benefit in the application of the sale proceeds in other securities. An annexure to the Notice to show cause at page 19 of the 2nd Respondent's bundle of documents shows a schedule of the application of the sales proceeds and the profits made.an analysis of the schedule results in one conclusion, that quite contrary to the alleged loss, the Appellant seems to have made some gains from investing the proceeds of the sale.

Accordingly, we dismiss the Appellant's appeal and award costs of the Appeal the 1st Respondent. The 2nd Respondent having been found guilty of breach of regulations shall not be entitled to any costs.

DATED AT NAIROBI THIS 31ST DAY OF AUGUST ,2017.

Jinaro Kibet Chairman

Karumba Kinyua Member

Kennedy Nyamweya Member