

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERICAL AND ADMIRALTY DIVISION

PETITION NO. E173 OF 2019

**IN THE MATTER OF: ALLEGED VIOLATION AND
INFRINGEMENT OF THE RIGHTS AND
FREEDOMS IN ARTICLES 2,3,6(2), 10, 19
20, 21, 22, 23, 25, 27, 28, 40, 47, 48, 50(1) &
(2), 258 (1) & 259 (1) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF THE CAPITAL
MARKETS ACT**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF THE CAPITAL
MARKETS (COLLECTIVE INVESTMENTS
SCHEMES) REGULATIONS 2001**

AND

**IN THE MATTER OF: THE FAIR ADMINSTRATIVE ACTION ACT,
2015**

BETWEEN

EDWIN H. DANDE APPLICANT/PETITIONER

VERSUS

THE CAPITAL MARKETS AUTHORITY..... RESPONDENT

AND

CYTONN ASSET MANAGERS LIMITED.....1ST INTERESTED PARTY

CYTONN UNIT TRUST FUNDS 2ND INTERESTED PARTY

RULING

1. The subject matter of this Ruling is a Notice of Motion application dated 30th December 2019, brought under the provisions of Articles 22 and 23 (3) of the Constitution of Kenya 2010, Order 40 Rules 1,2 and 3 of the Civil Procedure Rules, Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (c) & (e) of the Civil Procedure Act, and all enabling provisions of the law.
2. The Applicant is seeking for orders that;
 - (a) *The Honourable Court be pleased and do hereby suspend the purported malicious letter dated 20th December, 2019 to the effect that, should Cytonn Unit Fund fail to secure a new trustee on or before December 31st 2019, the Authority hereby directs that Cytonn Asset Managers suspend on boarding of new clients/unit holders to the above mentioned Fund with effect from Wednesday 1st January*

2020, pursuant to Section 11(3) (cc) of the Capital Markets Act, (Cap 485) Laws of Kenya, pending the hearing and determination of the Petition;

- (b) A conservatory order to issue staying the Respondent's decision to suspend on boarding of new clients'/unit holders to the above mentioned Fund with effect from Wednesday 1st January 2020, pursuant to section 11(3) (cc) of the Capital Markets Act Cap 485 pending the hearing and determination of this Petition;
 - (c) The costs of this application be provided for; and
 - (d) Any other or further relief which the honourable court deems fit and just to grant.
3. The application is supported by grounds on the face of it and an affidavits dated 30th December, 2019 and 9th March, 2020 sworn by **Edwin Dande**. He averred that, he is the Chief Executive Officer and Managing Partner of Cytonn Group of Companies which encompasses of the Cytonn Money Market Fund, Cytonn Balanced Fund and Cytonn Equity Fund. The Funds are regulated by the Capital Markets Authority (herein the "CMA").
4. The 1st Interested Party is an affiliate of these group of companies and a Fund manager of the 2nd Interested party, while the 2nd Interested party is a Collective Investment Scheme established and registered as a Trust under Part II of the Capital Markets (Collective Investment Schemes) Regulations 2001 (herein "*the Regulations*").
5. The 2nd Interested party, has appointed the 1st Interested Party pursuant to the provisions of Part V of Regulations as its Funds Manager and in return the 1st Interested party, has appointed the Co-operative Bank Limited (herein "*the Bank*"), as its Trustee, in accordance with Regulations 25.

However, the Bank tendered its letter dated 1st August, 2019 resigning as a Trustee in accordance with Regulation 29(1).

6. That pursuant thereto, it was incumbent upon the 1st Interested Party to appoint a new Trustee and in case of failure, the Bank was obligated, subject to Regulation 29(1), to within two (2) months appoint a qualified company as the new Trustee. However, by October 2019 the 1st Interested Party, had not appointed a new trustee. As a result, a meeting was held on 6th November, 2019 between the Respondent and the 1st Interested Party, where it was resolved that the Bank Limited would seek to facilitate the appointment of a qualified person as prescribed under the Regulations.
7. In that regard, the Bank was to come up with a Request for Proposal (RFP), for the provisions of Trustee services and share the same with the 1st Interested Party but that was not done. That, on 19th November, 2019 the Bank issued a bulky two hundred (200) pages request for quotation for provision of the said services but there was no response and the 1st Respondent notified them of the same by a letter dated 5th December, 2019. A subsequent meeting scheduled for 6th December, 2019 to discuss the appointment did not take place.
8. Be that as it were, by a letter dated 20th December 2019, the Respondent, issued a directive to the 1st Interested Party that, should the 2nd Interest Party, fail to secure a new Trustee on or before 31st December 2019, then the 1st Interested Party should suspend on boarding of new clients and/or unit-holders to the 2nd Interested Party's unit fund, with effect from 1st January 2020, pursuant to section 11 (3) (cc) of the Capital Markets Act.

9. However, the Applicant avers that, the said directive is unreasonable and malicious as;
- (a) *The Respondent did not give the 1st Interested party's Board a chance to inform its investors;*
 - (b) *The Respondent failed to give adequate notice of the nature and reasons of the proposed administrative action which action adversely affect the rights and fundamental freedoms of each and every investment partner of Cytonn Group of Companies;*
 - (c) *The directive does not demonstrate how it intends to protect the public;*
 - (d) *The directive undermines public interest and place the interest of investors in jeopardy of losing their investment;*
 - (e) *The Respondent has not taken into effect the circumstances leading to non-responsive request for a Trustee and which is beyond the 1st Interested party's control;*
 - (f) *The Respondent has violated and abrogated its role as Regulator in arriving at the impugned decision and issuing the said directive. It has other sanctions to impose with less severe ramifications; and*
 - (g) *The sanction imposed is not anchored in statute*
10. Further, the impugned directive will cripple the operations of Cytonn Group of Companies as the 2nd Interested Party, is its fund raising unit. That, it is an economic sabotage and amounts to commission of an economic crime by the Respondent. In addition, the decision by the Respondent flies in the face of the need for a fair administrative action, that is, expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed under Article 47 of the Constitution of Kenya. That, the Applicant's directors have taken measures by giving the Respondent their proposal on regulatory

amendment vide their letter dated 29th November, 2019 which letter was not responded to date.

11. However, the Respondent opposed the application vide an affidavit sworn by its Acting Director, **Abubakar Hassan Abubakar**, sworn on 17th January, 2020. He averred that, the Respondent, has statutory supervisory power to regulate and ensure there is compliance with the Law and Regulations for the protection of not only the Scheme but also the investors therein and ensure that, the Scheme has in place a Compliant and Operative Fund Manager, Trustee and Custodian.
12. That, the Trustee is integral to the operation of the Scheme, and no Scheme can be allowed to proceed without a qualified person appointed in accordance with the Capital Market Act and Regulations. That, where a Trustee resigns as provided for under Regulations 29, the Respondent remains obligated to exercise care and due diligence to protect the investors and all other players, through the process of appointing a new Trustee.
13. That, the 2nd Interested Party, is subject to the provisions of the Act, Regulations and all lawful directions issued by the Respondent. That the 1st Interested Party failed to appoint a new Trustee as required by the law prompting the Bank to exercise its statutory duty to appoint a new Trustee, as prescribed under the Regulations, so as to provide a seamless transition from outgoing to incoming trustee and within reasonable timelines.
14. On 19th November, 2019 the Bank sent out a request for quotation for the provisions of the Scheme Trustee services but as aforesaid, there was no response. The prospective Trustees, National Bank of Kenya, and Investment Services Limited have rescinded their earlier acceptance of appointment as Corporate Trustee for the 2nd Interested party's fund.

15. The Respondent argued that, it acted in good faith and in the exercise of its oversight role, while protecting the general public and investors. In that regard, by a letter dated 20th December, 2019 it invoked its powers and directed that should the 2nd Interested party fail to secure a new Trustee on or before the 31st December, 2019 they do suspend on board new clients and/or unit holders to the scheme with effect from 1st January 2020. The directive was issued after a series of consultative engagements with the parties and was not an ambush as alleged.
16. Further, the directive is meant to protect the new clients that may be exposed by the lack of a performing Trustee in place and unknowingly expose them to commercial risk. It is meant to shield the Scheme from further risk and does not in any way affect persons who are already unit holders, such as the Applicant. The Respondent averred that, its role in the appointment of a Trustee is to ensure that, such a Trustee is appointed by the Fund Manager in accordance with the law. Therefore, the allegations of push and pull between the Petitioner, the Respondent and any of the parties including the 2nd Interested Party is denied and so are, the averments as to economic sabotage. Finally, the application was termed as premature and an abuse of the court process.
17. However, in further response, the Applicant argued that, it is the duty of the Respondent to ensure that, the Bank, does not “down” its role of a Trustee until a new Trustee is appointed. But instead the Respondent has in collusion with the outgoing Trustee engaged in a malicious scheme to cripple the activities of the 2nd Interested party and drive it out of business. That, the Respondent has immense influence, as it has the last “say” of approving an intended Trustee as envisaged by Regulation 26.

18. The application was disposed of vide written submissions filed in court. The Applicant filed their submissions dated 6th March, 2020 on 12th March, 2020 and invited the court to first determine; whether it has met the threshold for the grant of conservatory orders. It was submitted that, the principles for grant of conservatory orders were as laid down in ***Petition No. 7 of 2011, Muslim for Human Rights (MUHURI) & 2 Others v. Attorney General & 2 Others (2011) eKLR***, wherein the Applicant has to demonstrate that, it has a prima facie case with probability of success and secondly that the Applicant is likely to suffer prejudice if the conservatory orders are not granted.
19. That, Section 11 (3) (cc) of the Regulation on which the decision is anchored does not prescribe the suspension of on boarding new clients to the Fund. Further, the Interested Parties are entitled to the benefit of the least severe of the prescribed punishment for an offence as provided for under Article 50 (2) (p) of the Constitution. Therefore, based on the same, the directive issued was illegal and *ultra vires* as such the Applicant has a *prima facie* case with high probability of success.
20. Further, the purported directive was actuated by malice and bad faith as it was issued within a short time frame not practically possible for its implementation. That, though it was dated on 20th December 2019, it was only served upon the 1st Interested Party on 23rd December 2019, and meant to take effect on 1st January 2020. Therefore, it is not only un-procedural but also discriminatory and violates the Fair Administrative Act.
21. Further, the issuance of the said directive imputes bad character on the part of the investors, partners, and other stakeholders in the Interested parties. That, suspending the activities of the 2nd Interested Party, will cause serious prejudice to both the Board and Potential Interested Investors. It will put a

stop to investments and cause panic in the entire Money Markets Industry. The prejudice suffered cannot be compensated by way of monetary damages.

22. Similarly, the Respondent has failed to observe the national values and principles as provided for under Articles 3 and 10 of the Constitution of Kenya, that calls upon State organs to uphold the Bill of Rights, in the performance of their duties. As such it is in the public interest that, the Respondent does not continue to issue directives that are against public policy and order.
23. The Applicant also submitted that, it is challenging the constitutionality of Regulations 26 (1) and 29 (1) of the Capital Markets (Collective Investment Schemes) Regulations 2001, which provides that, only Banks can be Trustees herein and upon which the impugned directive was issued. Therefore, if the conservatory order is not granted, the Petition will be rendered nugatory. Finally, it was argued that, the directive is illegal, null and void, as there is no vacuum in the position of a Trustee until the current Trustee appoints another one to take its place.
24. However, the Respondent submitted that, it has a duty under Section 5 of the Capital Markets Act (Cap 485) Laws of Kenya (herein "*the Act*") to supervise, license and monitor the activities of Market Intermediaries licensed under the Act. Similarly, it is empowered under the Regulations to regulate investment companies, unit trust, mutual funds and other schemes, which collects and pulls funds from the public for the purpose of investment and managed by or on behalf of the scheme. In a nut shell, it has the responsibility of protecting the interest of investors.
25. That, in enforcing the provisions of the law, the Respondent has the power to impose sanctions for breach of both the Act, the Regulations and/or non-

compliance with its requirements or directions. In that regard, it is empowered under; section 11 of the Act to *inter alia* order a person to remedy or mitigate the effect of any breach, suspend or cancel the listing of any securities, issue guidelines and notices and notices on all matters within its jurisdiction.

26. That the 2nd Interested Party is duly licensed by the Respondent and consequently it is under its supervision. Similarly, the 1st Interested Party, has the responsibility of ensuring the 2nd Interested Party has an active and performing trustee. The role of the trustee is well enumerated under regulations 27 (2).
27. That, for the Court to grant a conservative order, the Applicant has to demonstrate that it has an arguable *prima facie* case with a likelihood of success and whether, if the order is not granted, it is likely to suffer prejudice and/or that the Petition will be rendered nugatory. That the court should also consider public interest and relevant material facts, in exercising its discretion to grant the order or not. The court was invited to consider the holding in the case of ***Mirugi Karuiki v. Attorney General, Civil Appeal No. 70 of 1991*** as to what constitutes a *prima facie* case.
28. It was submitted that, in the instant matter, the pleadings filed will show that the Respondent has constantly and consistently accorded the Applicant an opportunity to put in place an active and performing trustee, an indication of good will and which negates the allegations of *mala fide*. The directive was issued when a Trustee was not appointed and therefore, it cannot be argued that, it was infringing on the Applicant's constitutional rights.

29. It was further argued that, the Applicant will not suffer any prejudice if the conservative order is not granted, as the collective investment scheme is still a going concern, the fund manager and custodian are still in place as well as the outgoing trustee. Further the Applicant and the Interested Parties have failed to demonstrate the rights that stand infringed or threatened and/or the prejudice they stand to suffer. That the right to dignity under Article 28 of the Constitution of Kenya, which has been invoked does not apply, neither does the complying with laid down regulations prejudice the integrity of a person.
30. The Respondent reiterated that the directive given was lawful, efficient, reasonable and procedurally fair in accordance with Article 47 of the Constitution. It did not infringe on the Applicant's right to a fair administrative action as the Applicant was given ten (10) days to take remedial measures and the correspondence annexed to the respective affidavits show that, the Applicant was given an opportunity to be heard contrary to the allegations in their submissions.
31. On the issue as to whether the grant of the conservative order will enhance constitutional values and objects, it was submitted that, such enhancement entails the observance of the said values and any form of derogation therefrom cannot be upheld. The Respondent further submitted that, greater public interest in this matter lies in the protection of the public and investors interest. It is incumbent upon the Applicant, market players, stakeholders, partners and the general public to ensure that, their business is carried out in a way that, it least exposes the public to economic risks and/or losses. Reference was made to the case of ***Saluni & Others v. Court Martial and Others Petition No. 235 of 2014.***

32. The Respondent submitted that section 11 (3) (cc) of the Capital Market Act while enumerating the express action or sanctions that may be imposed by the Respondent is not conclusive. The operative words “*may include*” indicates a variable endless but analogous list of sanctions that may be imposed by the Respondent, provided the same are justifiable and not capricious and the fact that the sanction is not express does not mean it is illegal.
33. It was further submitted that the Applicant is seeking to be shielded from statutory obligations and to continue with their business in utter disregard of the law, while at the same time be allowed to recruit unsuspecting clients who form part of the general public. That in declining to grant the conservatory orders sought by the Applicant, it will not render the Petition nugatory as the orders sought for in the main petition are far and wide reaching, to the extent that they seek to declare certain provisions of the Capital Markets (Collective Investment Scheme) Regulations 2001, as unconstitutional.
34. At the conclusion of the arguments and in considering the same, I find that, from the correspondence between the parties and the annextures to the submissions, it is clear that, the Bank by a letter dated 1st August 2019, gave notice of resignation. As per the Regulation 29;

“If a trustee wishes to resign it, shall give three months’ notice in writing to that, effect to the fund manager and the Authority and the fund manager shall appoint within two months after the date of such notice, some other qualified person as the new trustee upon and subject to such person entering into a trust deed supplemental to the trust deed comprised in the incorporation documents. If the fund manager is unable to

appoint a new trustee as aforesaid within such period of two months, the trustee shall be entitled to appoint a qualified company selected by it as the new trustee on the same basis as aforesaid”.

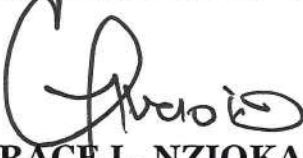
35. It is clear from the correspondence herein that the aforesaid provisions have not been complied with. By a letter dated 8th October, 2019, the 1st Respondent indicates that, it had been engaging various parties within the last two months to offer their services as Trustees for the Scheme without success. Therefore, it invited the resigning Trustee to appoint another qualified Trustee.
36. By a letter dated 5th December, 2019. The Bank notified the Respondent of the status of the search of new Trustee. That, on 19th November, 2019 a request was sent out for quotation for provision of the subject services to fourteen (14) persons but at the expiry of the two (2) weeks given, there was no response. The probable reasons given were, ***“internal approval for going into trustee business was not given, and internal considerations for the risk of taking on new business.”***
37. Apparently, the minutes of the meeting held by the respective parties herein reveals *inter alia* that, the Bank maintained its resignation stand and it would only require one month to procure the services of the new Trustee. The meeting concluded with a schedule of events and timelines which indicates that between 15th November to 31st December, 2019, the parties involved would have secured a new Trustee and the relationship between the Bank and 1st Interested party, be cut-off.

38. The above resolution did not work whereupon the Respondent's impugned letter of 20th December 2019 followed. It is clear to the court that, a new trustee has not been appointed in accordance with the provisions of Regulations 29. From the correspondence, there is no indication that further effort is being made to appoint one. To the contrary the 1st Interested party, is lobbying for change in the law as to the persons who can act as trustees.
39. Indeed, as stated herein, the prime role of the Respondent is to protect the interest of the investors, in that regard, section 11 of the Act, empowers the Respondent, to *inter alia*, **“(cc) impose sanctions for breach of the provisions of the Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include –**
- (i) levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed;**
 - (ii) ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach;**
 - (iii) publishing findings of malfeasance by any person; and**
 - (iv) suspending or cancelling the listing of any securities, or the trading of any securities, for the protection of investors.”**
40. In exercising this power, the Respondent directed the 1st Interested party not to on board new clients or unit holders. It is argued that, that particular sanction is not provided for under section 11 (3) of the Act. That is correct. But as argued by the Respondent the directive given is not illegal. In my considered opinion, the 2nd Interested party cannot operate without a

trustee. However, in regulating them the Respondent should cite clearly, the relevant provisions of the law.

41. Further, it is noteworthy that, since the Applicant came to court it's been eight (8) months and if there was effort, to recruit a new trustee, it should have been done. However, in the interest of justice I order that within thirty (30) days of the date of this order the Applicant shall take all the necessary steps to facilitate the recruitment of the new trustee. In the meantime, the Respondent is at liberty to issue a fresh thirty (30) days' notice properly anchored in law.
42. At the expiry of the period set, the Respondent should move appropriately, and take the relevant action according to the law. In that regard, save for the orders granted above, I decline to grant any of the orders sought as the 2nd Interested Party cannot continue to operate without a trustee. The costs of the application will abide the outcome of the Petition.
43. It is so ordered.

Dated, Delivered and Signed on this 14th day of ***October***, 2020


GRACE L. NZIOKA
HIGH COURT JUDGE

In the presence of:

Mr. Ogada for Prof Ojienda for the Applicant/Interested Party

Mr. Mbogo for the Respondent

Robert the Court Assistant