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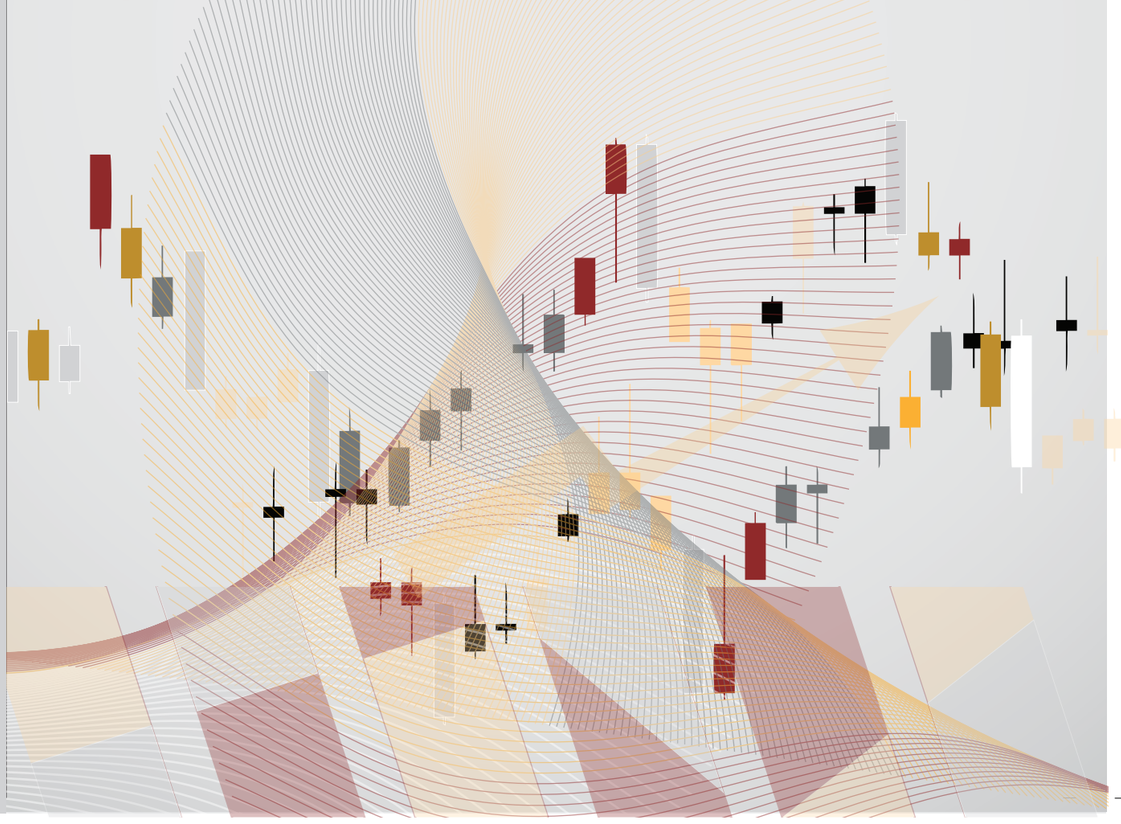
Digest of Decisions on Capital Markets

CAPITAL MARKETS AUTHORITY
Promoting the Integrity and Growth of the Capital Markets

KENYA LAW
Where Legal Information is Public Knowledge

DIGEST OF DECISIONS ON CAPITAL MARKETS



Digest of Decisions on Capital Markets

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EDITOR'S NOTE

Kenya Law and the Capital Markets Authority came together to develop this digest focusing on capital markets, as there was a clear need to track jurisprudence in this specialized area of commercial law in Kenya. The development of this publication would not have been possible without the support and partnership from the Capital Markets Authority.

Kenya's judicial system lays emphasis on previous decisions as a guide to the resolution of future similar disputes. The cataloguing and tracking of these decisions is therefore a critical aspect of Kenya's legal traditions and systems especially currently when there are numerous judgments, decisions and opinions that are issued by the courts of record. The practice of law is increasingly becoming specialized as the legal environment continues to develop and expand and there is a need to provide public legal information that is specific to the various practice areas.

It is in this regard that Kenya Law and the Capital Markets Authority collaborated to develop this digest, which contains judicial decisions on several of aspects of the regulation of capital markets.

These decisions highlight the trajectory of the development of this important area of law and demonstrate the exponential growth of capital markets in the country and the concomitant growth of jurisprudence from the Courts as capital markets disputes are brought forth to be resolved.

This publication is aimed at monitoring, tracking and documenting the jurisprudence on Capital Markets for the purpose of aiding the legal fraternity and other interested persons in identifying the current developments in Capital Markets. It highlights judicial decisions that provide guidance on the interpretation of capital markets laws and procedures and the resolution of disputes arising from regulation of Capital Markets by the courts.

The digest has been modelled as a quick and ready guide to track the emerging jurisprudence on Capital Markets. It is our hope that the Digest will prove useful to judicial officers, legal practitioners and all the different players who interact with capital markets.

Long'et Terer,
CEO/Editor,
Kenya Law

FOREWORD

This Digest of decisions highlights some of the key milestones on capital markets jurisprudence in Kenya. As the country seeks to position itself as an International Financial Centre in line with the Vision 2030 and as the capital markets take on an ever more critical role in financing economic development and transformation, the continuous development and deepening of relevant judicial precedent provides a critical reference for market development and regulatory consistency.

Kenya's national development blue print (the Vision 2030) identifies the capital markets as central to mobilizing savings and enhancing investments to support economic development. The success of capital markets sector in delivering on this role is highly dependent on, among others, the confidence of investors in the markets and the overall regulatory environment. This improved confidence will inevitably lead to the sustainable growth and stability of these markets and broaden access to long term finance for the economy as a whole. As Kenya seeks to become the "Heart of capital Markets Financing in Africa" in line with the 10-year Capital Markets Master Plan 2014-23, the Judiciary will only grow in its importance as a critical pillar of our robust, reliable and globally competitive capital markets.

The Digest therefore draws together decisions from the Courts in Kenya that provide guidance on the interpretation of capital markets laws and procedures as well as inform the range and exercise of administrative powers vested in the Capital Markets Authority (CMA) under the Capital Markets Act, Chapter 485A. The Digest is expected to serve as a critical reference point in guiding all players in the capital markets, especially legal practitioners, Judges and Judicial Officers on how disputes arising from regulation of Capital Markets have been dealt with by our Courts. The digest will serve as an important tool for sensitization of stakeholders on the operation and regulation of capital markets given their dynamism.

It is envisaged that the Digest will be regularly updated and re-issued as local jurisprudence on the operation and regulation of capital markets continues to grow and evolve. I am confident that the Digest will help, not only in the crystallization of the law and principles guiding capital markets operation and regulation in Kenya, but also contribute to deepening understanding of the unique legal and regulatory environment in which the capital markets operate globally.

I commend this digest to all the market players, legal practitioners, Magistrates, Judges, judicial officers, law students and all other stakeholders in the capital markets.

Mr. James Ndegwa
Chairman
Capital Markets Authority

ACKNOWLEDGEMENT

The capital markets, both domestically and globally, are highly specialized and governed by distinct statutes, rules, regulations, best practices and procedures that are continuously evolving to promote market development and secure investor protection. The Authority trusts that this Digest will go a long way to demystifying some of the myths and misconceptions on the operations of capital markets.

The Digest is the culmination of collaborative work between the Authority and the National Council for Law Reporting (NCLR) without whose critical input and professionalism this high quality product would not have come to fruition.

I take this opportunity to extend my appreciation to the Authority's legal and enforcement teams and the research team from the National Council for Law Reporting (NCLR) for their committed efforts to provide an objective view of the state of capital markets jurisprudence in Kenya.

The Judiciary plays a critical role in ensuring the maintenance of capital market integrity, investor confidence, market development and fairness, and the overall competitiveness and attractiveness of Kenya as an investment destination. It goes without saying that without fair, prompt and effective dispensation of justice, the capital markets cannot develop nor serve their fundamental purpose in funding economic development while providing opportunities for wealth creation.

We trust that the Digest will serve as a valued reference for the bar and bench, scholars and investors, institutions and individuals and that it will stimulate the continued growth of jurisprudence in the capital markets arena.

Mr. Paul M. Muthaura, MBS
Chief Executive
Capital Markets Authority

Mareva Injunctions are Granted to Prevent Decisions of the Court from being Rendered Ineffective by Removal of the Defendants Assets from the Jurisdiction or by Dissipation

Nyaga Stockbrokers Ltd (Under Statutory Management) v Patrick Ndwiga Gakiavih (also known as Patrick Ndwiga Gakiari)

Civil Case No 229 of 2008

Nyaga Stockbrokers Ltd (Under Statutory Management) *v* Patrick Ndwiga Gakiavih (also known as Patrick Ndwiga Gakiari)

High Court at Nairobi — July 28, 2008
J Khaminwa, J

Civil Case No 229 of 2008

Civil Practice and Procedure – *interlocutory injunctions – mareva injunctions – whether the Plaintiff could be granted the prayer of attachment and sale of Plaintiff's property and order for attachment of the Defendants account with Barclays Bank Queensway No 030705101450.*
Civil Practice and Procedure – *damages – conversion – whether the Plaintiff could be granted general damages for conversion of property belonging to the Plaintiff and Plaintiff's clients/ customers.*
Word and Phrases *– definition definition of Mareva injunction – an order of the court restraining a party to the proceedings from removal jurisdiction of court or otherwise dealing with assets located with the jurisdiction and in more limited circumstances from dealing with assets located outside the jurisdiction – Halsbury Laws of England Edition Vol 3(1) page 329 – 331.*

Brief facts
The Statutory Manager applied for freezing orders of various properties belonging to the directors of the Plaintiff company (Nyaga stockbrokers) for recovery of investor funds. The Plaintiff prayed for attachment and sale of Defendant's property and order for attachment of the Defendant's account with Barclays Bank Queensway No 030705101450, an order for restitution by the Defendant of all monies found to have been fraudulently converted for his own use and general damages for conversion of property belonging to the Plaintiff and Plaintiff's clients/ customers.

Issues
i. Whether the Plaintiff could be granted the prayer of attachment and sale of Defendant's property and attachment of the Defendants bank account.
ii. Whether the Plaintiff could be granted the prayer for an order for restitution by the Defendant of all monies found to have been fraudulently converted for his own use.
iii. Whether the Plaintiff could be granted general damages for conversion of property belonging to the Plaintiff and Plaintiff's clients/customers.

Relevant Provisions of the Law

Capital Markets Act Cap 485A Laws of Kenya

Section 11-Objectives of the Authority

(1) The principal objectives of the Authority shall be—

(d) the protection of investor interests;

(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—

(t) trace any assets, including bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in securities or insider trading;

Section 33A-Powers of the Authority to intervene in management of a licence
(1) This section shall apply and the powers conferred by subsection (2) maybe exercised in the following circumstances—

(a) if a person's licence or approval is suspended under section 25(4)(c) (ii);
(b) if a petition is filed, or a resolution proposed, for the winding up of a licensed person or if any receiver or receiver manager or similar officer is appointed in respect of the licensed person or in respect of all or any part of its assets;
(c) if the Authority discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstance which, in the opinion of the Authority, warrants the exercise of the relevant power in the interests of investors:
Provided that the Authority shall give the licensed person an opportunity to be heard prior to the exercise of this power.
(2) Notwithstanding the provisions of any other written law, in any case to which this section applies, the Authority may—
(a) appoint any competent person or persons (in this Act referred to as "a statutory manager") to assume the management, control and conduct of the affairs and business of a licensed person to exercise all the powers of a licensed person to the exclusion of its board of directors, including the use of its corporate seal;
(b) remove any officer or employee of the licensed person who, in the opinion of the Authority, has caused or contributed to any contravention of any provision of this Act or any regulations made thereunder or to any deterioration in the financial stability of the licensed person or has been guilty of conduct detrimental to the interests of investors;
(c) appoint a competent person familiar with the business of the licensed person to its board of directors to hold office as a director who shall not be capable of being removed from office without the approval of the Authority other than by order of the High Court;
(d) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the licensed person in favour of any officer or employee or any other person.
(3) The appointment of a statutory manager shall be for such period, not exceeding twelve months, as the Authority shall specify in the instrument of appointment and may be extended by the High Court upon the application of the Authority if such extension appears to the Court to be justified, and any such extension shall be notified to all interested parties.
(4) A statutory manager shall, upon assuming the management, control and conduct of the affairs and business of a licensed person, discharge his duties with diligence and in accordance with sound investment and financial principles and in particular, with due regard to the interests of the licensed person's customers or investors.
(5) The responsibilities of the statutory manager shall include—
(i) tracing and preserving all the property and assets of the licensed person or of its customers;
(ii) recovering all debts and other sums of money due to and owing to the licensed person;
(iii) evaluating the capital structure and management of the licensed person and recommending to the Authority any restructuring or reorganisation which he considers necessary and which, subject to the provisions of any other written law, may be implemented by him on behalf of the licensed person;
(iv) entering into contracts in the ordinary course of the business of the licensed person; and
(v) obtaining from any officers or employees of the licensed person, any documents, records, accounts, statements or information relating to its business.
(5A) For the purposes of discharging his responsibilities, a statutory manager shall have to declare a moratorium on payment by the licensed person of its customers and other person creditors and the declaration of a moratorium shall—
(a) be applied equally and without discrimination to all classes of creditors:
Provided that the statutory manager may offset the liabilities owed by the licensed person to any creditor against any debts owed by that creditor to the licensed person;
(b) suspend the running of time for the purposes of any law of limitation of actions in respect of any claim by a creditor of the licensed person; or

(5B) A moratorium shall cease to apply upon the termination of the statutory manager's appointment, whereupon the rights and obligations of the licensed person and creditors shall, save to the extent provided in subsection (5A)(b), be the same as if there had been no declaration under the provisions of that subsection:
Provided that a moratorium declared by the statutory manager for payment shall not exceed twelve months.
(6) The statutory manager shall, once every month, furnish the Authority the shareholders of the licensed person which has been placed under statutory management and any other person whom the Authority may direct in writing with a report of his activities during the preceding month, in such form as may be prescribed by the Authority.
(7) If any officer or employee of the licensed person removed under the provisions of subsection (2)(b) is aggrieved by the decision, he may appeal to the Capital Markets Tribunal, and the Tribunal may confirm, reverse or modify the decision and make any other order in the circumstances as it thinks just; and pending the determination of the appeal, the order of removal shall remain in effect.
(8) Neither the Authority nor any officer or employee thereof nor any manager nor any other person appointed, designated or approved by the Authority under this Act shall be liable in respect of any act or omission done in good faith by such officer, employee, manager or other person in the execution of the duties undertaken by him.
(9) Where it appears to the statutory manager that it is just and equitable to do so in the interest of all interested parties, the statutory manager may after consultation with the Authority, petition the High Court for the winding-up of the licensed person.
(10) All costs and expenses properly incurred by the statutory manager shall be payable out of the assets of the licensed person in priority to all other claims.

Section 34-Other offences
(1) Any person who—
(a) contravenes any provision of this Act or any r

Held:
1. The Capital Markets Act demanded and required that such information of customers' bank dealings be disclosed and members of public be required to be assured that their investments were safe. The evidence was that since March 2007 to the time of institution of the suit large sums of money were moved from the Plaintiff's accounts to the account of the Defendant and all he said was that the information should not have been disclosed by his Bankers to CMA and also that not all money in his account was from the Plaintiff.
2. A preliminary objection commenced on a point of law which had been pleaded and arose by clear implication and which if argued as a preliminary point could dispose of the suit. The first matter related to the increasing practice of raising points which should have been argued in the normal manner, quite properly by way of preliminary objection. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was in the exercise of judicial discretion. The improper raising of points by way of preliminary objection did nothing but unnecessarily increase costs and on occasion confuse the issues. That improper practice ought to have been stopped.
3. It was not suitable to raise preliminary points as facts were not correct. Agents including company directors could be found personally liable for wrongs they themselves had committed or procured to be committed. In case of breach of a fiduciary duty, the company alone was the proper plaintiff as emphasized in the case of *Foss v Harbottle.*
4. The foundation of Courts' jurisdiction was the need to prevent judgments of the Court from being rendered ineffective whether by the removal of the Defendants assets from the jurisdiction or by

dissipation. In the instant case, the Plaintiff's prayers were for attachment and sale of Plaintiff's property and order for attachment of the Defendants account with Barclays Bank Queensway, an order for restitution by the Defendant of all monies found to have been fraudulently converted for his own use and general damages for conversion of property belonging to the Plaintiff and Plaintiff's clients/customers. The judgment of the Court would be meaningless if the orders sought were not granted.

5. The provision of order 39 of the Civil Procedure Code and the provisions of the Capital Markets Act permitted a Court to make the orders sought and the purpose was to preserve the assets of the Defendant pending the determination of the suit. The Plaintiff Company was properly and legally placed under Statutory Management. There was sufficient material exhibited to demonstrate a *prima facie* case against Defendant. It was not a case that damages could be adequate compensation.

Application allowed with costs to the Plaintiff. Interim orders listed by the Court on April 29, 2007 confirmed.

The Scope of Jurisdiction of the Capital Markets Authority over Licenced Stock Brokers

Shah Munge & Partners Ltd & 4 others v Capital Markets Authority

Civil Appeals Nos 913 & 930 of 2003

Shah Munge & Partners Ltd & 4 others *v* Capital Markets Authority

High Court at Nairobi May 14 , 2009
HPG Waweru, J

Civil Appeals Nos 913 & 930 of 2003

Jurisdiction *– jurisdiction of the Capital Markets Authority – disciplinary jurisdiction – scope of disciplinary jurisdiction – what was the scope of the Capital Markets Authority disciplinary jurisdiction over a company licensed as a stock broker and its directors – Capital Markets Act, sections 11(3) (h), 25 & 26.*
Capital Markets Law *– capital markets transactions – elements of a capital markets transaction – payment – payment by cheque – whether payment of a transaction by use of a cheque could amount to a capital markets transaction.*

Brief facts
The 1st Appellant was a stockbroker at the Nairobi Stock Exchange while the 2nd, 3rd, 4th and 5th Appellants were directors of the 1st Appellant. In June 2002 the National Social Security Fund (NSSF) forwarded to the 1st Appellant a cheque for Ksh.251,505,500/00 being the cost for purchase of a treasury bond through the secondary market. The Appellants had represented to NSSF that an appropriate security was available from the secondary market for purchase. It was alleged that no such security was available. NSSF put funds in Euro Bank, the Appellants then immediately made various withdrawals of those funds placed in the Appellants' office account.

The Respondent (the Authority) found the Appellants culpable for negligence and took disciplinary action by way of sanctions *inter alia* against them. The Appellants appealed to the Capital Markets Tribunal (the Tribunal). The Tribunal dismissed the Appellants' appeals but set aside one sanction and varied others imposed by the Authority. The Appellants aggrieved by the decision of the Tribunal brought the instant appeal.

Issues
i. What was the scope of the Capital Markets Authority jurisdiction over licenced stock brokers and their directors?
ii. What were the powers and mandate of the Capital Markets Authority?
iii. Whether the powers of Capital Markets Authority to inquire into the affairs of licenced stockbrokers could only be exercised when renewing a licence.
iv. Circumstances when the Authority could intervene in the management of a licence.
v. Whether the Capital Markets Authority Act gave the authority powers to remove directors of a Company that was licenced as a stockbroker.
vi. Whether the proceedings of the tribunal on appeal were a re-hearing of the matter or a merereview.

Relevant Provisions of the Law
Sections 11(3)(e), (h), (i), (k) and (w) *Powers of the Authority*

> *11(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions; –*
> *(e) grant a license to any person to operate as a stockbroker, dealer or investment adviser, fund manager, investment bank or authorized securities dealer, and ensure the proper conduct of that business;*
> *(h) inquire, either on its own motion or at the request of any other person, into*

the affairs of any person whom the Authority has approved or to whom it has granted a license and any public company the securities of which are traded on an approved securities exchange;

(i) give directions to any person whom the Authority has approved or to whom it has granted a license and any public company the securities of which are traded on an approved securities exchange;

(j) conduct inspection of the activities, books and records of any person approved or licensed by the Authority;

(k) publish findings of malfeasance by any person approved or licensed by he Authority, or any public company the securities of which are traded on a securities exchange;

(w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.

Section 25 *Renewal of licenses*

25(1) In granting the renewal of a license, the Authority shall satisfy itself that the licensed person is in compliance with the provisions of this Act and the rules and regulations made thereunder.

(2) In considering an application for a license renewal, the Authority may extend an existing license for a period of three months in order to permit an applicant to take such action as the Authority deems necessary to come into compliance with the Act and rules and regulations made thereunder.

(3) In granting an extension to any person under subsection (2), the Authority may impose any conditions or restrictions it deems appropriate on the activities of such person.

(4) Where the Authority is satisfied that a licensed person has: –

(a) acted in contravention of any provision of this act, or any rules or regulations made thereunder; or

(b) has since the grant of a license, ceased to qualify for such a license; or

(c) is guilty of malpractice or irregularity in the management of his affairs, the Authority may –

(i) direct the person to take whatever action the Authority deems necessary: –

(A) to correct the conditions resulting from any contravention of any provisions of this Act or any rules or regulations made thereunder; and

(B) to come into compliance with the provisions of this Act or any rules or regulations made thereunder; or

(ii) suspend or impose restrictions or limitations on the license granted to the person.

Section 26(1)

The Authority may under that subsection revoke a license or approval if it is satisfied that the licensed person: –

"(a) has contravened or failed to comply with any provisions of this Act or any rules or regulations made thereunder; or

(c) has ceased to be in good financial standing; or

(d) has since the grant of the license, ceased to qualify for such a license; or

(e) is guilty of malpractice or irregularity in the management of his business; or

(f) is adjudged bankrupt,

PROVIDED that the Authority shall not revoke a license or approval, other than an approval to operate as a credit rating agency, without first exercising its powers under section 33A."

Section 33A *Powers of the Authority to intervene in management of a license*

This section shall apply and the powers conferred by subsection (2) may be exercised in the following circumstances—

(a) if a person's license or approval is suspended under subsection (1) of section 26;

(b) if a petition is filed, or a resolution proposed, for the winding up of a licensed person or if any receiver or receiver manager or similar officer is appointed in respect of the licensed person or in respect of all or any part of its assets;

(c) if the Authority discovers (whether on an inspection or otherwise) or becomes aware of any fact or circumstances which, in the opinion of the Authority, warrants the exercise of the relevant power in the interests of investors:

Provided that the Authority shall give the licensed person an opportunity to be heard prior to the exercise of this power

Such intervention, notwithstanding the provisions of any other written law, may be as provided in section 33A(2)(b), to –

"Remove any officer or employee of the licensed person who, in the opinion of the Authority, has caused or contributed to any contravention of any provision of this Act or any regulations made thereunder, or to any deterioration in the financial stability of the licensed person, or has been guilty of conduct detrimental to the interests of investors.

Section 35A(4)

"Upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award, made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be".

Held:

1. The Capital Markets Act (the Act) was enacted to establish the Capital Markets Authority for the purposes of promoting, regulating and facilitating the development of an orderly, fair and efficient Capital Markets in Kenya and for connected purposes. The powers of the Authority were to be found in sections 11(3) and sections 12, 13 and 14 of the Act.
2. There was only one stock exchange in Kenya, the Nairobi Stock Exchange. The capital markets in Kenya had grown exponentially and there were 24 brokers trading at the Nairobi Stock Exchange. The capital markets transacted business worth KShs. 820 billion annually and was a huge market whose importance to the economy could not be underestimated.
3. It could not be gainsaid that the capital markets depended heavily on the confidence reposed in them by the public and other investors, especially concerning the orderliness, fairness and efficiency of trading in the stock markets. During the pendency of the judgment, that confidence had been shaken somewhat following the collapse of two or three brokerage firms as reported in the information media.
4. The 1st Appellant was a licensed stockbroker and the Authority had jurisdiction under section 11(3)(h) of the Act to inquire into its affairs. Section 25 of the Act provided for renewal of licenses where the Authority had to satisfy itself before it renewed a license that the licensed person was in compliance with the provisions of the Act as well as the Rules and Regulations made under the Act. The Authority had power to renew the license provisionally to permit the licensed person to take such action as the Authority deemed necessary to come into compliance with the Act, Rules and Regulations. The Authority also had power to impose any conditions or

restrictions it deemed necessary on the activities of a licensed person when renewing the license.

5. The Capital Markets Authority had power to deal with a licensed person who had acted in contravention of the Act, Rules or Regulations or one who since grant of the license had ceased to qualify for such license or one who was guilty of malpractice or irregularity in the management of his affairs. In such a case the Authority could inter alia suspend or impose restrictions or limitations on the license granted to the person.
6. The jurisdiction under section 25 of the Act did not have to be exercised exclusively when renewing a license and could be exercised by the Authority as a result of an inquiry under section 11(3)(h) of the Act. The Authority could not be satisfied that a licensed person had acted in contravention of the Act, Rules or Regulations, or had since the grant of a license, ceased to qualify for such a license, or was guilty of malpractice or irregularity in the management of his affairs without conducting an inquiry under section 11(3)(h) of the Act. The Authority would be within its mandate to exercise the powers conferred by section 25 of the Act after an inquiry under section 11(3)(h). It did not have to wait until the licensed person's license was due for renewal in order to act under section 25.
7. Section 33A of the Act and the proviso to section 26(1) of the Act empowered the Authority in subsection (1) thereof to intervene in the management of a licensee in certain circumstances. Such intervention, notwithstanding the provisions of any other written law was to be as provided in section 33A(2)(b), to remove any officer or employee of the licensed person who, in the opinion of the Authority, had caused or contributed to any contravention of any provision of the Act or any regulations made thereunder, or to any deterioration in the financial stability of the licensed person, or had been guilty of conduct detrimental to the interests of investors.
8. When jurisdiction was exercised upon the suspension of a person's license under section 26 (1), it would be as a consequence of an inquiry under section 11(3)(h) of the Act. Therefore, the jurisdiction provided for under the separate sections of the Act were not exclusive of each other,rather, they complemented each other. That would be an absurdity not intended by Parliament.
9. The Tribunal found that there existed an order from the NSSF to the 1st Appellant to purchase for it an appropriate treasury bond from the secondary market. The money NSSF gave to the 1st Appellant was clearly for that purpose. A treasury bond was a long-term financial instrument traded on a securities exchange, inter alia. That brought it within the meaning of a capital market instrument as defined in section 2 of the Act.
10. The fact that NSSF paid to the 1st Appellant the money by cheque did not make the transaction a bill of exchange. It was only the mode of payment that was by way of a bill of exchange. The money ended up as a deposit in a bank that was going under because it turned out that there was no appropriate treasury bond available in the secondary market for purchase as NSSF had been made to believe by the 1st Appellant and the Appellants failed to properly advise NSSF as to its investment. It was not to be forgotten that the deposit ended up in the office account of the 1st Appellant. There was no fault with the Tribunal's finding that the transaction between the 1st Appellant and NSSF was a capital market transaction.
11. The power of the Authority under section 33(1)(c) of the Act was exercisable if the Authority, whether on an inspection or otherwise, became aware of any fact or circumstance which in the opinion of the Authority warranted the exercise of the relevant power in the interest of the investors.
12. Section 33(1)(c) of the Act applied to directors of a company that was licensed as a stockbroker. It could not be expected that the Tribunal could remove the management of such company but not touch its policy makers, the directors. must have been intended by the statute that the provision would apply to all persons concerned in the affairs of a licensed person. If the Authority could

remove errant directors from the management of a company that was a licensed stockbroker, it ought also to have been able to bar such directors from the management of any other licensee or listed company.

13. The Authority was enjoined under section 11(3)(w) of the Act to do all such other acts as would be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under the Act. Those objectives, as seen in the preamble to the Act were to promote, regulate and facilitate the development of an orderly, fair and efficient capital markets in Kenya and for connected purposes. Among the principal objectives of the Authority under section 11(1)(d) of the Act was the protection of investor interests. Thus, there was a sound legal basis under the Act for the Authority's and the Tribunal's jurisdiction to impose sanctions upon the 2nd to 5th Appellants.
14. Under section 35A(4) of the Act, the Tribunal would upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to the Act, inquire into the matter and make an award thereon and every award made was to be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof as the case was.
15. The proceedings of the Tribunal on appeal were a re-hearing of the matter and not a mere review of the evidence taken or decision made by the Authority. The Tribunal regulated its own procedures. It was not like a hearing in a regular court. The Tribunal was empowered to take into consideration any evidence which it considered relevant, notwithstanding that such evidence was not otherwise admissible under the law of evidence.

Appeals of the 1st, 2nd, 3rd and 4th Appellants (Appeal No 913 of 2003) dismissed with costs to the Respondent and sanctions imposed upon them by the Tribunal confirmed.

Appeal of the 5th Appellant (Appeal No 930 of 2003) partly allowed and sanctions imposed upon him lifted.

A Licencee of the Capital Markets Authority was Responsible for the Conduct of its Employees

Dry Associates Limited v Capital Markets Authority & 2 others

Petition No 328 of 2011

Dry Associates Limited *v* Capital Markets Authority & 2 others

High Court at Nairobi
DS Majanja, J

March 2, 2012

Petition No 328 of 2011

Capital Markets Law *– Capital Markets Authority (CMA) – role of the CMA – Functions, powers and duties of CMA – powers of CMA to regulate capital markets – whether CMA had powers to conduct the investigations and take administrative actions it took against the Petitioner – Capital Markets Act, section 11; Capital Markets Licensing Requirements)(General) Regulations 2002, regulations 22(b) and 43;*
Constitutional Law *– fundamental rights and freedoms – right to fair administrative action – right to fair hearing – distinction between right to fair hearing and right to fair administrative action – right to be given proper notice of allegations and opportunity to be heard before an administrative action was taken – whether fairness in light of article 47 of the Constitution meant that the Petitioner would be entitled to a full oral hearing with all the accoutrements that go with it – whether the investigative and enforcement action taken by the Capital Markets Authority against the Petitioner was an infringement of his right to fair administrative action and right to fair hearing as provided under articles 47 and 50 of the Constitution – Constitution of Kenya, 2010 articles 47 and 50.*
Constitutional Law *– natural justice – principles of natural justice – concept and doctrine of the principle of natural justice – application of the principles of natural justice in the justice delivery system – whether the rules of natural justice were applicable in the circumstances – Whether during the preliminary investigations CMA was required to apply the rules of natural justice and whether the manner they acted constituted a breach of the rules of natural justice – Constitution of Kenya, 2010 articles 47 and 50.*
Constitutional Law *– fundamental rights and freedoms – right of access to information – meaning and import of the right to access to information – whether the decision by the Capital Markets Authority to impose penalties allegedly without giving audience to the petitioner was in breach of the Petitioner's right of access to information and therefore unconsitutional – Constitution of Kenya, 2010 article 35.*
Civil Practice and Procedure *–sub judice – where Capital Markets Authority (CMA) was not a party to the High Court proceedings – whether the investigation and decision by the CMA were sub judice in so far as there were civil proceedings pending in the High Court.*

Brief facts

The case concerned the issue of commercial paper by the Interested Party (Crown Berger (K) Limited), to raise the sum of Kshs 300,000,000.00 from the open market. Under the Commercial Paper Programme, Capital Markets Authority (CMA) licenced the Interested Party to raise money by issuing unsecured promissory notes of different denominations with a maturity period to be purchased by investors. At the date of maturity, the Interested Party would redeem the notes and pay the investor with interest. Under that programme, the Petitioner was the arranger, placement agent and registrar. Its role was to source investors who would purchase the commercial notes and advise them on the investment opportunity. The Interested Party did not have direct contact with the investors.

The Petitioner averred that; in April 2011, it discovered that one of its employees (former employee) was involved in fraud and theft of investors' funds, thus the employee was summarily dismissed

and CMA duly informed; that the former employee was also charged with various counts of theft in two cases, which cases were still ongoing; that on several occasions, it implored CMA to exercise its powers to trace and freeze the former employee's assets but as no action was forthcoming the Petitioner, and other investors instituted civil proceedings in the High Court where the High Court granted orders freezing various assets of the employee and the CMA was duly notified; that it has been frustrated by the inaction of the CMA in tracing and freezing of assets belonging to the former employee.

In December 2011, CMA wrote to the Petitioner a letter raising several concerns about the commercial paper programme, informing them that it was bound to comply with the provisions of Regulation 43 of the Capital Markets (Licensing Requirement) (General) Regulations, 2002 (the Regulations) and that as the employer and principal of the employee, it was responsible for the actions of its former employee, among other sanctions and penalties.

Aggrieved by CMA's action, the Petitioner filed a Petition claiming that the CMA infringed on its rights and fundamental freedoms including, right to fair administration action, presumption of innocence, fair hearing and right to the presumption of innocence.

Issues

i. Whether during the preliminary investigations the Capital Markets Authority was required to apply the rules of natural justice and whether the manner they acted constituted a breach of the rules of natural justice.
ii. Whether article 47 and 50 of the Constitution protected the same rights that gave effect to the rules of natural justice and could be applied interchageably.
iii. Whether article 50 of the Constitution on fair hearing was applicable in the circumstances.
iv. What was the criteria that the Capital Markets Authority used to ensure that the fund manager was conducting its business as statutory required.
v. What was the role, powers and duties of the Capital Markets Authority?
vi. Whether fairness in light of article 47 of the Constitution meant that the Petitioner would be entitled to plurality of hearings or representations.
vii. Whether the Petitioner, was a licencee responsible for the criminal conduct of its employee under the Capital Markets Authority Act.
viii. Whether the criminal charges against the errant employee, being pursued by te state affected the statutory authority of Capital ~Markets Authority.
ix. Whether the Court had the jurisdiction to issue injunctory, mandatory and prohibitory orders in the circumstaces.

Relevant Provisions of the Law
The Constitution of Kenya, 2010
Article 27

27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

Article 35

35(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

Article 47

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Article 48

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 50(1)

50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The Capital Markets Act

Section 11(1)

(a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises;

(b) to facilitate the existence of a nationwide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;

(c) the creation, maintenance and regulation, of a market in which securities can be issued and traded in an orderly, fair, and efficient manner, through the implementation of a system in which the market participants are self regulatory to the maximum practicable extent;

(d) the protection of investor interests;

(e) the operation of a compensation fund to protect investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations; and

(f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

Held:

1. The purpose of the procedure enacted in article 22 of the Constitution was to enforce fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in part 2 of chapter 4 of the Constitution.
2. That jurisdiction was a special jurisdiction that was to be used for the specific purpose provided and it was not intended for determination of general questions of fact or law which were not germaine or incidental to the enforcement of those rights and fundamental freedoms.
3. Since enforcement of the Bill of Rights was a special jurisdiction, it followed that a party who invoked that special jurisdiction under article 22 of the Constitution to enforce the Bill of Rights

had a duty to set out clearly the sections or provisions it was claimed to have been infringed or violated and show how those sections were infringed in relation to him.

4. Reference to the preliminary matters or general provisions relating to the Bill of Rights set out in part 1 of chapter 4 applied to the interpretation of the Bill of Rights. Similarly, the values set out in article 10(2) of the Constitution were by virtue of article 10(1) applicable to the Court in handling the task of applying and interpreting the Constitution. The Court was also required to apply the provisions of article 259 of the Constitution.
5. Articles 47 and 50(1) of the Constitution protected separate and distinct rights which should not be conflated. Although the two rights embodied and gave effect to the general rules of natural justice, they applied to different circumstances. Article 50(1) applied to a court, impartial tribunal or a body established to resolve a dispute while article 47 applied to administrative action generally. Article 50(1) dealt with matters of a civil nature while the rest of the article dealt with criminal trials. Article 47 was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law or judicial review under the Law Reform Act but was to be measured against the standards established by the Constitution.
6. Article 50 of the Constitution was not applicable to the circumstances of the case. The Petitioner did not contend that it was entitled to a public hearing as required by article 50(1) nor was an accused facing a criminal trial for article 50(2) to apply. The Court considered the matter as one brought to enforce the provisions of article 47 of the Constitution.
7. There was an implicit flexibility in article 47 of the Constitution. The primary consideration was whether the procedure adopted was fair. Fairness, however, did not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy ought not be too easily sacrificed. That was the reason why article 47 of the Constitution not only had the element of procedural fairness but also provided that administrative action had to be expeditious, efficient, lawful and reasonable. All those elements were relevant and ought to have beeen considered to give effect to the provisions of the Constitution.
8. In order to determine whether the Petitioner's rights protected under article 47 of the Constitution had been breached, it was important to understand the role of CMA. Capital markets in any country played an important role in mobilising money for investment. Ordinary citizens, local and international corporations alike, invested in capital markets on the understanding that their money will be safe. The important role of capital markets in Kenya was recognised in the objectives of the CMA set out in the CMA Act.
9. CMA was a statutory corporation endowed with regulatory authority under the CMA Act to regulate the capital markets in Kenya. Its objectives were set out in section 11(1) of the CMA Act.
10. In order to carry out its functions, CMA was granted a wide range of functions, powers and duties which were set out in section 11(3) of the CMA Act. CMA promoted the creation, maintenance and regulation of a market in which securities could be issued and traded in an orderly, fair, and efficient manner. That was achieved through the implementation of a system in which the market participants were self regulatory to the maximum practicable extent, and as such, the risk management and internal controls were largely left to the individual firms who had to conduct their business efficiently, honestly and fairly, with the integrity and professional skills appropriate to the nature and scale of activities in accordance with regulations 22(b) as read with regulation 43 of the Regulations.
11. In considering whether the fund manager was conducting its business as required, regulation 22(2) provided that CMA gave due regard to the management and organizational structure,

reporting principles and procedures, internal audit procedures, procedures for compliance with the securities laws and risk management policies which the fund manager had adopted or proposes to adopt for its business.

12. As seen via the provisions of section 11 of the CMA Act, CMA had powers to regulate capital markets as it dealt with huge amounts of money. That, coupled with the sophistication of technology and the fact that capital markets were weaved into international commerce meant that the CMA had to have the flexibility within its regulations to deal with matters that could dent or diminish investor and public confidence in the capital markets. It was in exercise of those wide ranging powers that an investigation was launched into the Interested Party's commercial paper after complaints were lodged by investors, concluding by CMA issuing of the letter to the Petitioner.
13. The former employee was involved in some form of fraud regarding the commercial paper issued by the Interested Party. He had been charged and the nature and extent of the fraud was a matter within the competence of the criminal court. Liability had to be determined from a reading of the statute governing the conduct impugned.
14. The CMA Act and regulations made thereunder particularly regulation 22 imposed an obligation on the Fund Manager to ensure its systems risk management and internal controls were up to the standard required by the regulations. As a licencee of CMA, the Petitioner was fully responsible for the conduct of its employee under the statute. What the Petitioner was attempting to do was to shift its burden to a third party. To allow that would have diminished the efficacy of the regulatory system to the detriment of the investors and the public.
15. CMA was not party to the civil proceedings pending in the High Court, hence the *sub judice* argument was devoid of merit. To uphold it would mean that the regulatory authority of CMA would be stultified by a party implicated in wrongdoing filing suits in which CMA was not party and impleading those suits as a defence to regulatory investigation. The mere existence of High Court civil suits could not prevent CMA from carrying out its statutory duties.
16. The charges against the former employee were not initiated by the CMA as complainant but specific investors who claimed that the former employee had stolen their money. The criminal charges were being pursued by the State which did so in public interest. Charging the former employee did not affect the statutory authority of CMA. CMA had wide discretion in the manner it used the various tools in its arsenal. There was no basis for the complaint that CMA refused to pursue the former employee as requested by the Petitioner.
17. After conducting internal investigations, CMA wrote a letter to the Petitioner, setting out certain irregularities which in the view of CMA, entitled it to take regulatory action and asking the Petitioner and the Interested Party to show cause why certain regulatory action should be taken against them. The letter was written after a meeting between CMA, the Petitioner and the Interested Party and the letter to the Interested Party was copied to the Petitioner. Thus, both the Interested Party and the Petitioner were informed of the allegations against them and given the opportunity to respond.
18. Regarding the Petitioner's complains that CMA exchanged correspondence with the Interested Party without copying the same to the Petitioner, none of the correspondence made adverse comments against the Petitioner.Notably, CMA was investigating both the Interested Party and the Petitioner and was entitled to communicate to either party independently. For purposes of a fair administrative process, it was not necessary to copy all correspondence to all the parties to the investigation, it was a matter of discretion. To insist that CMA should copy each and every correspondence to a third party to the party being investigated would be unduly burdensome. What was important was that at the appropriate stage the Petitioner was given notice of the facts and circumstances that constituted the charge against it to enable it defend itself. The

correspondence was sufficient to fulfil the fairness requirement.

19. The investigation, which by law CMA was entitled to carry out, was done in a fair and professional manner. There was no evidence of concealment or neglect to consider the Petitioner's evidence or that the Petitioner was denied an opportunity to present its case or that it ignored or selectively used information. It also did not find any evidence of a witch hunt, malice, bad faith, unreasonableness or bias in the manner the investigation was conducted.
20. The Court did not delve into resolving the factual matters on which liability of the Petitioner for regulatory infractions were based because doing so would have meant assuming the authority of CMA. The inquiry to be conducted in determining whether there had been a breach of article 47 of the Comstitution was not intended to give the court jurisdiction to assume the role of a regulator.
21. When considering whether the action taken was reasonable, the Court had to give due deference to the statutory authority having regard to the fact that CMA was equipped with the technical expertise and had a statutory mandate to discharge. That was not to say that the Court could not intervene in an appropriate case but on the basis of the material before the Court, the instant case was not a matter where a case for such intervention had been made out. On the whole, had CMA conducted itself in a manner consistent with the dictates of article 47 of the Constitution.
22. Fairness in light of article 47 of the Constitution had to be taken in the context of the case which included a determination of the nature of the proceedings and the statutory regime or architecture. The Petitioner was not entitled to a full oral hearing with all the accoutrements that go with it namely; witnesses, statements, evidence in chief, cross examination of witnesses and oral submissions.
23. The process did not violate the Petitioner's fundamental rights hence the exercise of the powers by the CMA under section 11 of the Act did not infringe the Constitution. Further, section 11 of the CMA Act, contained the objectives of the Act and wide range of powers donated by the legislature to CMA to fulfil its important role. In addition, there were rules and regulations which had been promulgated subject to the Act. Unless a specific provision, rule or regulation was shown to infringe a specific right or fundamental freedom protected by the Constitution, the Court rejected the prayer seeking a declaration that section 11 of the CMA Act was invalid to the extent that it denied, violated and infringed the Petitioner's fundamental rights to the presumption of innocence and right to fair hearing based on the rules of natural justice.
24. The Court could not issue injunctory, mandatory or prohibitory orders against CMA it could not assume the role of the CMA. The prayers sought to immunise the Petitioner from regulatory authority. There had been no breach of fundamental rights and freedoms.
25. The action to impose sanctions which was authorised by section 11(3) of the Act was not arbitrary in its application and the CMA was not authorised to impose sanctions and penalties that would run afoul of article 40(2) of the Constitution.
26. It was not necessary to for purposes of article 47 or article 40(2) of the Constitution to have meeting after meeting as that would defeat not only the objects of the statute itself but also the obligation to provide an efficient administrative system.
27. The case against the Petitioner was for failing to have proper risk management systems and internal controls that led to loss of investors' funds. The obligation to maintain a safe investment environment for investors was a statutory obligation imposed on the Petitioner by Regulation 43 and enforcement of those regulations in the circumstances of the case was not discriminatory as alleged or at all.

28. Right to Equality and freedom from discrimination was set out in article 27 of the Constitution. Article 27 as a whole had different elements. It had not been demonstrated by evidence or

argument how the Respondents had breached that right. As a result, the Court did not find any infringement of article 27.

29. The right of access to information is to be found at Article 35 of the Constitution. The Court did not find any allegation that the Petitioner had been denied any information which it requested from the state or CMA to enable it enforce its fundamental rights and freedoms in relation to the matter. CMA had been candid in the proceedings and provided substantial information including internal memorandum that would in certain instances, attract privilege. Thus, the Court found that the right to access to information had not been breached.
30. Granting of a permanent injunction against CMA would be impeding the work of a statutory body by restraining it from conducting its statutory mandate. Further, article 35(2) of the Constitution was not intended to interfere with normal regulatory and adjudicatory processes. The right to correction or deletion of untrue or misleading statements was also achieved through the normal forensic processes established by law.
31. CMA was charged with the responsibility of determining whether information was true or misleading. Further, the CMA Act provided for a right of appeal against any such decision that could be made. To grant the injunction would have disabled the work of the CMA in a matter where no basis had been laid for such an order.
32. The right of access to justice was to be found at article 48 of the Constitution. Apart from quoting the article, no case had been made to substantiate breach of the said article.
33. Access to justice was a broad concept that defied easy definition. It included the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.
34. The Petitioner, apart from having the opportunity to move the Court to protect its fundamental rights and freedoms, was entitled to other remedies under the CMA Act. Those remedies had not been denied or impeded by the Respondents, thus the Petitioner's right of access to justice had not been infringed. The Petitioner did not demonstrate how the actions of the DPP in the criminal trial of the former employee had infringed its rights.
35. It was true that the office of the DPP was an independent office under the Constitution and in accordance with article 157 of the Constitution, the office was entitled to act either directly or through delegated authority. In that respect, the authority to prosecute had been delegated and such delegation was a matter of discretion for the DPP. The Court could intervene in appropriate circumstances but the instant case was not one of them.
36. The Petitioner failed to discharge it's burden of satisfying the Court that for purposes of proceedings under article 22 of the Constitution, its rights and fundamental freedoms had been violated by the acts of the DPP notwithstanding the fact that specific allegations had not been traversed.

Orders

i. The petition lacked merits, thus it was dismissed.

ii. Since the case was a matter of enforcement of fundamental rights and freedoms, the Court did not award costs to the Respondents but awarded costs to the Interested Party who was brought into the proceedings by the Petitioner.

Power of the Capital Markets Authority to Recommend the Appointment of an Interim Board to Run the Affairs of a Public Listed Company in order to Restore Investor Confidence

Peter Muthoka v CMC Holdings Limited & 12 others

Civil Case No 154 of 2012

Peter Muthoka *v* CMC Holdings Limited & 12 others

High Court at Nairobi May 24, 2012
D Musinga, J

Civil Case No 154 of 2012

Capital Markets Law *– Capital Markets Authority – powers of the Capital Markets Authority – regulation of public listed companies – making recommendations in respect of a public listed company's corporate governance – whether the Capital Markets Authority had the power to recommend the appointment of an interim board to run the affairs of a public listed company – Capital Markets Act, section 11*
Civil Practice and Procedure *– injunctions – interlocutory injunctions –granting of interlocutory injunctions – what were the principles to be considered in granting an interlocutory injunction*
Civil Practice and Procedure *– injunctions – interlocutory injunctions – application for interlocutory injunctions – whether an application seeking orders of injunction could be brought under the inherent jurisdiction of the High Court – Civil Procedure Rules, 2010*
Jurisdiction *– jurisdiction of the High Court – jurisdiction to order reinstatement of an employee – where the employee's employment was unlawfully terminated – whether the High Court could issue an order for the reinstatement of an employee whose employment was unlawfully terminated*

Brief facts

The Plaintiff was appointed to the Board of Directors of the 1st Defendant in March 2006 and served in that capacity until March 12, 2012 when he was removed from the Board. In meetings held on February 21 and 22, 2012 between the 2nd Defendant's Board and the Board of the 1st Defendant, a consensus was reached that it would be in the best interest of the 1st Defendant and its shareholders that an interim Board be appointed. Aggrieved by his removal from the 1st Defendant's Board of Directors, the Plaintiff filed the instant suit. The suit was in March 2012 seeking a multiplicity of orders including various interlocutory orders of injunction pending *inter partes* hearing of the Application. However the Court was not inclined to grant any *ex parte* orders.

The 2nd, 10th, 11th and 12th Defendants filed a cross application in April 2012 and sought several orders including; that pending the hearing and determination of the suit an injunction be issued restraining the Plaintiff and 3rd to 9th Defendants from refusing to facilitate, preventing or obstructing the 2nd Defendant from appointing the 10th to 12th Defendants or any other of the 2nd Defendant's appointees or nominees as interim directors of the 1st Defendant and/or the 2nd Defendant's appointees from discharging their functions, responsibilities and powers as interim directors of the Board of Directors of the 1st Defendant among other orders.

Issues

i. Whether the Capital Markets Authority (CMA) had the power to recommend the appointment of an interim board to run the affairs of a public listed company in order to restore investor confidence.
ii. Whether the removal of the Plantiff as a firector of a public listed company was unprocedural.
iii. What were the principles to be considered in granting an interlocutory injunction.
iv. Whether an application seeking orders of injunction could be brought under the inherent jurisdiction of the High Court.
v. Whether the High Court could issue an order for the reinstatement of an employee whose employment was unlawfully terminated.

Relevant Provisions of the Law
Capital Markets Act
Section 11 – *Objectives of the Authority*

(1) The principal objectives of the Authority shall be—

(a) The development of all aspects of delete Capital Markets with particular emphasis on the removal of the impediments to, and the recreation of incentives for longer term investments in, productive enterprises.

(b) to facilitate the existence of a national wide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market.

(c) creation, maintenance of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self regulatory to a maximum practicable extent;

(d) protection of investor interests;

(e) the facilitation of a compensation fund to protect the investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations;; and

(f) the development of a framework to facilitate the use of electronic commerce for the development of Capital Markets in Kenya.

Held:

1. The principles considered in an application for orders of interlocutory prohibitory injunction were well settled. The Applicant had to first demonstrate that he had a *prima facie* case with a likelihood of success. Secondly, he had to show that he was likely to suffer irreparable loss or such loss as could not be compensated by an award of damages unless the orders sought were granted. If the Court was in doubt as regards those two tests it would decide the matter on a balance of convenience.
2. Section 11 of the Capital Markets Act (the Act) was very elaborate, the Legislature did not exhaustively stipulate each and every thing that the 2nd Defendant was empowered to do in the discharge of its mandate and that was why section 11(w) stated that the 2nd Defendant could do all such acts as could be incidental or conducive to the attainment of the objectives of the 2nd Defendant or the exercise of its powers under the Act. Section 11(w) was comparable to sections 3 and 3A of the Civil Procedure Act which saved the inherent jurisdiction of the Court to make such orders as could be necessary for the ends of justice or to prevent abuse of the process of the Court.
3. Apart from the findings related to the Plaintiff in the forensic investigation report by Webber Wentzel, it was also established that there were various other weaknesses in the 1st Defendant's corporate governance structure. The recommendation by the 2nd Defendant to appoint an interim Board to run the affairs of the 1st Defendant so as to restore investor confidence was within its mandate.
4. The Plaintiff did not adduce any evidence to suggest that there were no meetings held and that no consensus was arrived ator that it would be in the best interest of the 1st Defendant and its shareholders that an interim Board be appointed.
5. The 2nd Defendant did not recommend the removal of the Plaintiff from the Board of the 1st Defendant. His removal and that of Mr Kivai was as a result of disagreement in the Board as to how the Interim Board was going to be constituted. When members of a Board were unable to reach consensus on an issue, the only other option was to vote on the same. The majority of the members resolved to nominate the 3rd, 4th , 5th , 6th , 7th , 8th and 9th Defendants as the 7

nominees to the interim Board as recommended by the 2nd Defendant. *Ipso facto*, the Plaintiff and Mr. Kivai ceased to be directors of the 1st Defendant.

6. Although the removal of the Plaintiff and Mr. Kivai from the 1st Defendant's Board appeared to have been merely as a result of the 1st Defendant's Board resolution, one of the recommendations made by Webber Wentzel in their report was that the two directors who were also associated with Andy Forwarders Services Limited, a company in which the Plaintiff was its Chief Executive Officer, be suspended from taking part in any of the business dealings and governance of the 1st Defendant pending further investigations of issues raised by Price Waterhouse Coopers.
7. The Plaintiff had not demonstrated that his removal from the 1st Defendant's Board of Directors was done unlawfully. The provisions of the 1st Defendant's Memorandum and Articles of Association regarding appointment and removal of directors had to be read together with the relevant portions of the Act and in particular section 11 which had set out the powers of the 2nd Defendant.
8. Had the 1st Defendant not been a public listed company his removal from the Board would have been unprocedural but since it was a listed company its operations were by law subject to the regulatory framework established by the Act and if circumstances so warranted the 2nd Defendant could give specific guidelines and/or recommendations in respect of a company's corporate governance or any other relevant issue, so long as the act or recommendation was made in good faith and in furtherance of the 2nd Defendant's mandate.
9. The 2nd Defendant was the public watchdog in so far as the conduct of public listed companies was concerned and it was by law mandated and expected to take all necessary steps within the confines of its statutory mandate to protect the interests of investors in the companies' securities. It would have failed in its duties if it did not take the steps that it did in the instant case.
10. Assuming that the Plaintiff's removal was to found to have been unlawful, his remedy would have been payment of damages for lost emoluments. Such damages could easily have been quantified and paid by the 1st Defendant. His case was similar to that of a person who alleged that he had been dismissed from his employment unlawfully. Other than in a claim filed before the Industrial Court where such a person could be reinstated to his position, in a case before the Court the only known remedy for wrongful dismissal was award of damages to compensate a Plaintiff for what he would have been entitled to if his employment had not been unlawfully terminated. The Court had no power to order reinstatement. Any loss which the Plaintiff could suffer was not irreparable
11. The 2nd, 10th, 11th and 12th Defendants Application was not properly founded in law. An application seeking orders of injunction could not be brought under the inherent jurisdiction of the Court when there were specific provisions of the Civil Procedure Act that governed injunctions. Furthermore, the Applicants did not allege that the Plaintiff and the 1st and 3rd to 9th Defendants refused and/or prevented the 10th, 11th and 12th Defendants from participating in the affairs of the 1st Defendant's Board of Directors. The 10th, 11th and 12th Defendants had already been appointed to the Board of the 1st Defendant and their names submitted to the Registrar of Companies.

Plaintiff's Application dismissed with costs to the Defendants (except the 13th Defendant), 2nd, 10th, 11th and 12th Defendants Application dismissed with costs to the Plaintiff and the 1st and 3rd to 9th Defendants.

Criteria for Grant of Conservatory Orders

Andy Forwarders Services Ltd v Capital Markets Authority

Petition No 216 of 2011

Andy Forwarders Services Ltd *v* Capital Markets Authority

High Court at Nairobi — August 2, 2012
I Lenaola, J

Petition No 216 of 2011

Constitutional Law *– Bill of Rights – fundamental rights and freedoms – protection of right to property – property rights of shareholders – the limitation of fundamental rights and freedoms.*
Capital Markets Law *– public listed companies – convening of extraordinary general meeting on requisition – rights of shareholders to convene an Extra General Meeting (EGM) – power of the court to restrain exercise of shareholder rights – Companies Act Cap 486, Laws of Kenya (Repealed), section 132.*
Capital Markets Law *– capital markets – role and mandate of The Capital Markets Authority vis a vis the rights of shareholders of a listed company – Capital Markets Authority Act, Cap 485A, Laws of Kenya.*
Civil Practice and Procedure *– conservatory orders – criteria for grant of conservatory orders under transitional Clauses in the 6th schedule and under the "Gicheru Rules".*

Brief facts
The Petitioners requisitioned for an Extra General Meeting (EGM) after directors of CMC failed to convene one in exercise of rights granted under section 132(1) of the Companies Act, Cap 486, Laws of Kenya (Repealed). The express purpose of the EGM was to remove certain directors of CMC and replace them with others. CMA sought to stop the meeting from ever taking place. The Petitioners stated that the Authority had acted in excess of its jurisdiction. According to the Petitioner, there was no provision in the Capital Markets Act, Cap 485A Laws of Kenya permitting the Respondent to stop shareholders from holding an EGM.

The Petitioner sought an injunction to restrain the Respondent by itself, its agents or employees, or howsoever from interfering with or in any sense attempting to stop any meeting of Shareholders of CMC in accordance with section 132(1) of the Companies Act, Cap 486, Laws of Kenya (Repealed). On the other hand the Respondent sought conservatory orders to maintain the *status quo* as regards CMC Holdings Company Ltd and the composition of its board of directors and to stop the directors of CMC from holding an EGM.

The Respondent submitted further that it was trying to maintain *status quo* pending a resolution to the pending issues involving directors of CMC which were also subject of investigations by the Respondent.

Issues
i. Whether the Court could grant conservatory orders to maintain the *status quo* on the composition of the board of directors and further stop the directors of CMC from holding an EGM.
ii. Factors to be considered when seeking a conservatory order.

Relevant Provisions of the Law
Companies Act, Cap 486, Laws of Kenya (Repealed)
Section 132 – *Convening of extraordinary general meeting on requisition*

> *1) The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company,*

or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionist

Held:

1. A party seeking a Conservatory Order required to show:
   a) That he had a *prima facie* case with a likelihood of success and that unless the Court granted the conservatory orders, there was a real danger that he would suffer prejudice as a result of violation or threatened violation of the Constitution.
   b) That the situation required conservation so as to maintain the *status quo* pending the hearing of the Petition.
2. A change in the *status quo* in CMC would radically have altered the situation and rendered the questions for determination in the Petition moot. Therefore, the Court would be inclined to maintain the *status quo*.
3. Shareholder's rights were not absolute and they could be limited by the Court. For instance, a shareholder rights could be limited by judicial orders if it would be unjust to act so.

Application allowed.

An Issue not Raised in a Petition cannot be Raised in an Interlocutory Application in the same Case

Andy Forwarders Services Limited v Capital Markets Authority & 6 others

Petition No 216 of 2011

Andy Forwarders Services Limited *v* Capital Markets Authority & 6 others

High Court at Nairobi — August 2, 2012
I Lenaola, J

Petition No 216 of 2011

Civil Practice and Procedure *– injunctions – interlocutory injunctions – issues raised in interlocutory applications – where the issue was not raised in a petition in the same case – whether an issue which was not raised in a petition could be raised in an interlocutory application in the same case.*
Capital Markets Law *– Capital Markets Authority – powers of the Capital Markets Authority – regulation and protection of public listed companies – where a trial court ordered maintenance of the status quo of a public listed company – whether an order by a trial court to maintain a public listed company's status quo extended to and included any act by the Capital Markets Authority to protect the Company.*

Brief facts
The Applicant filed a petition seeking certain orders relating to its requisition of an Extraordinary General Meeting (EGM) of the 1st Applicant/Interested Party's (CMC) shareholders which was stopped by the Respondent (CMA). The Petitioner concurrently filed an Application seeking for a temporary injunction restraining CMA from stopping them from requisitioning for the EGM. CMA filed a cross-application seeking a conservatory order maintaining the status *quo* as regards CMC and an order restraining the Petitioner from proceeding with its requisition for convening an EGM before hearing and determination of the Petition.

The Trial Court dismissed the Petitioner's Application and allowed the Respondent's Cross – Application. In February 2012, the Chairman of CMA wrote to the Chairman of CMC referring to meetings held between the two entities in which it was agreed among others that an interim Board of the CMC would be established. In March 2012 the Chairman of CMC wrote back to the CMA Chair informing him that 7 directors had been nominated to join the interim board and that 2 directors were removed. Aggrieved by the above actions the Petitioner filed the instant Application praying that the CMA, CMC, Kung'u Gatabaki, Joel Kibe, Paul Wanderi Ndung'u, Ashok K Shah, Charles Njonjo, Andrew Hamilton, William Lay and Bill Ngige be committed to civil jail for breach of the Trial Court's orders.

Issues
i. Whether an issue which was not raised in a petition could be raised in an interlocutory application in the same matter.
ii. Whether an order by the Trial Court to maintain the Company's status *quo* extended to and included any act by the Capital Markets Authority (CMA) to protect the Company.

Held:
1. The original Prayer on maintenance of s*tatus quo* in the CMA's Cross Application had two facets to it as regards the 1st Applicant/Interested Party (CMC) and the composition of its Board of Directors. The Trial Court granted only one facet of the prayer and said nothing of the second facet, composition of the Board of Directors of CMC which was the subject of the proceedings for contempt. In the Trial Court's Ruling reference was made to the substance of the Petition.
2. The issues raised by the Petition related to the holding of an Extra-ordinary General Meeting

(EGM) and the agenda for the EGM was not an issue at all. Whether it related to election of new directors, removal of old directors or change in the composition of the Board generally, was not an issue to be determined within the Petition and consequently could not be an issue in any interlocutory Application, including the one before the Trial Court and the one before the Court.

3. The Trial Court in addressing the competing interests at play in the dispute found that the Applicant had not demonstrated that it had an arguable case with a probability of success and therefore the right to call for a meeting and the substance of discussion at the meeting were found wanting and the Court could not revisit the issue. From a clear reading of the Trial Court's Ruling and the orders issued, the Trial Court never intended that the Orders extend and include any act by the Respondent (CMA) to protect CMC from itself. A change of directors and the composition of the Board was not one of the matters covered by the *status quo* order.
4. The actions of the Respondent could not be in contempt of court. All other issues raised by advocates for the parties were merely academic and there was no reason to delve into them.

Application dismissed with costs.

Effect of Non-disclosure of Material Facts in Setting Aside *ex-parte* Orders

Republic v Capital Markets Authority *ex parte*
Joseph Mumo Kivai & another

Judicial Review Nos 355 & 356 of 2012

Republic *v* Capital Markets Authority *ex parte* Joseph Mumo Kivai & another

High Court at Nairobi
DS Majanja, J

December 3, 2012

Judicial Review Nos 355 & 356 of 2012

Civil Practice and Procedure *– judicial review – orders – ex-parte orders of stay – grounds for setting aside – whether non – disclosure of material facts amounted to sufficient grounds for setting aside the ex – parte orders of stay – Civil Procedure Rules, 2010, order 53.*
Jurisdiction *– High Court – ex-parte orders of stay – where there's an application for discharge – setting aside – whether the Court had jurisdiction to set aside the ex-parte orders of stay.*

Brief facts

The matter arose from investigations carried out by the Respondents (the Capital Markets Authority) into the affairs of the CMC Holdings Limited (CMCHL). In its report titled, *Report and Resolutions of the Board of Directors of the Capital Markets Authority Regarding the Investigations carried out into the affairs of CMC Holdings Limited,* the Respondents made certain findings against the *ex-parte* Applicants.

The *ex-parte* Applicants were accused by the Respondent of several regulatory infractions. The Respondents found the *ex parte* Applicants culpable and levied certain sanctions against them pursuant to section 25A(1)(c)(I) of the Capital Markets Act.

A leave for the *ex-parte* Applicants to apply for judicial review and for such leave to operate as a stay of the decisions made by the Respondents in the Report was granted. Aggrieved by the *ex-parte* orders, the Respondents moved the Court to vacate the orders of stay issued.

Issues

i. Whether the Court had jurisdiction to set aside *ex parte* orders of stay.
ii. Whether non-disclosure of material facts by the *ex parte* Applicants amounted to sufficient grounds for setting aside the *ex-parte* orders of stay previously granted.
iii. What wee the grounds that could discharge orders of stay issued exparte.
iv. Whether previous decision by the Court were material and relevant in determining the issue on the regulatory authority of the CMA.
v. Whether failure to disclose previous rulings on the regulatory authority of CMA amounted to non-disclosure of material facts.
vi. What was the nature and effect of an order of stay.

Held:

1. By providing that leave so granted could operate as a stay of proceedings until the Court ordered otherwise, the rule contemplated that the Court had jurisdiction to vacate or vary the order of stay granted *ex-parte*. The Court had inherent jurisdiction to set aside *ex-parte* orders to do justice and to prevent an abuse of the court process. By their very nature *ex-parte* orders were provisional and could be set aside by the Court which granted it, of course, if the judge was still available to do so. If the judge who granted leave could not sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction was available to all judges of the superior Courts.
2. The jurisdiction to set aside orders of leave or stay granted *ex-parte* in Kenya was now well

entrenched and therefore the Court had jurisdiction to consider and determine the Application whether or not to discharge the orders of stay issued in September 27, 2012.

3. The principles upon which the Court exercised its jurisdiction to set aside *ex-parte* leave had been considered by the Court of Appeal before. The Court cautioned practitioners that even though leave granted *ex-parte* could be set aside on an application, that was a very limited jurisdiction and would obviously be exercised very sparingly and on very clear cut cases. Although the cases referred to an application to set aside leave, the same position applied to order of stay granted *ex-parte* under order 53 of the Civil Procedure Rules.
4. The Court was entitled to discharge orders of stay issued *ex-parte* on several grounds including the non-disclosure of material facts or that the Application was an abuse of the court process or that it was in public interest to discharge the orders.
5. The duty to disclose material facts during *ex-parte* proceedings could not be over-emphasized. However, the record in the case showed that counsel for the *ex-parte* Applicant did not appear before the court to argue the application. The Court considered the documents before it and found merit in granting leave and stay. In considering whether or not to discharge the orders of stay it was easy to weigh the reasons against the material presented and come to a conclusion one way or another. Although no reasons were proffered, such a course did not render the decision or exercise of its discretion valid. Failure to state the principles for the exercise of discretion or to give reasons for the exercise of discretion did not *per se* prove that the discretion had been wrongly exercised.
6. The case of non-disclosure in the matter had to be determined on the available material and evidence. The *ex-parte* Applicants had placed before the Court all the relevant reports and material they alleged affected them. They had also deposed how those matters affected their case and the Court considering the Application for leave and stay was entitled to come to the conclusion it did.
7. The contentions of the CMA in the Application for discharge were based on an interpretation of the material and whether a case had been made out by the *ex-parte* Applicants on an objective basis. The *ex-parte* Applicants had exercised their legal right to challenge the findings made against them and they were entitled to take a view of the evidence that would entitle them to relief. The contents of those reports would be subjected to detailed scrutiny during the hearing and the Court was reluctant to conduct an examination of the minutiae of the findings in order to determine whether the other Court would have come to a different conclusion based on an interpretation of the various facts presented.
8. Despite the fact that the litigation was material to the case, the decisions by Justice Musinga, Lady Justice Ngugi and Justice Lenaola were not annexed to the Verifying Affidavits. The rulings were material because they demonstrated and confirmed the regulatory authority of the CMA. More importantly, in the case *Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and others* HCCC No 154 of 2012, the Court had specifically declined to issue an injunction in favour of the 2nd *ex-parte* Applicant in light of the exercise of the powers by the CMA. Justice Musinga and Ngugi addressed themselves to the primacy of the CMA Act *vis-à-vis* the Companies Act which was a material consideration in the case. The fact of the decisions and the reasons propounded by them were material and ought to have been set out and disclosed by the *ex-parte* Applicants.
9. None of the cases dealt with a direct challenge of the regulatory decision that was now subject of the judicial review proceedings but all the cases were interconnected. The *ex-parte* Applicants argued that the CMA ought not to have dealt with subject matter in view of the existing cases and that was in fact the tenor of the letter dated March 30, 2012 from the 2nd *ex-parte* Applicant to the CMA. The *ex-parte* Applicants could not then approach the Court without disclosing the nature and tenor of the cases and more particularly disclosing the rulings delivered.

10. Failure by the *ex-parte* Applicants to disclose the rulings in *Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and others* HCCC No 154 of 2012 and *Andy Forwarders Service Limited v Capital Markets Authority, CMC Holdings Limited and others* Nairobi Petition No 216 of 2011 amounted to non-disclosure of material facts.
11. The purpose of an order of a stay was to preserve the *status quo* so that the Application was not rendered nugatory. The effect or implication of the stay order was a necessary consideration for the grant of stay orders.
12. A stay contemplated that an order was being implemented or carried out. In the case, it was not in dispute that both the *ex-parte* Applicants had been disqualified and the decision already communicated to the other regulatory bodies. Nothing else remained to be done about that . Granting the stay would amount to setting aside the decision and upsetting the *status quo*. The *ex-parte* Applicant argued that the stay merely suspended the action but in the particular case of disqualification the act of disqualification had already taken effect and nothing else remained to be done hence there was nothing to suspend.
13. The *ex-parte* Applicants argued that they were not directors of CMCHL and that they had not applied for any other directorships of any publicly listed companies and therefore the public and the CMA lost nothing. The Court orders were not bouquets of flowers, they served a purpose and if the *ex-parte* Applicants admitted that no purpose would be served by the orders then the orders had to then be discharged.
14. The matter before the Court was an application for orders of judicial review. Judicial review proceedings were public law proceedings for vindication of private rights. In that respect, public interest should not have been considered as relevant consideration in granting of stay orders.
15. The CMA was the body charged with regulation of Capital Markets in Kenya. Market confidence was key to the success of the capital markets. In the case the two *ex-parte* Applicants had been subjected to an investigative process in which findings and decisions were made. Given the nature of the decisions and taking into account that the existing litigation concerning the matters concerning CMCHL, it would not be public interest to maintain the orders of stay.

Application allowed.

Orders

i. In respect of HC JR Misc. Application No 355 of 2012, the order of Hon, Justice Warsame issued on September 27, 2012 that leave do operate as a stay of the resolution to disqualify the Applicant from holding directorship in CMC Holdings Limited was thereby discharged.

ii. In respect of HC JR Misc. Application No 356 of 2012, the orders of Hon. Justice Warsame issued on September 27, 2012 that, leave do operate as a stay of the resolution to disqualify the Applicant from holding any directorship in any public company, licenced or approved person or security exchange in Kenya and leave do operate as a stay of the resolution directing the Applicant to comply with the provisions of the Capital Markets (Takeovers and Mergers) Regulations 2002 was thereby discharged.

Capital Markets Authority Mandate to Investigate and take Enforcement Action to be in Accordance with the Right to Fair Administrative Action

Jeremiah Gitau Kiereini v Capital Markets Authority & another

Petition No 371 of 2012

Jeremiah Gitau Kiereini *v* Capital Markets Authority & another

High Court at Nairobi
DS Majanja, J

August 22, 2013

Petition No 371 of 2012

Constitutional Law *– fundamental rights and freedoms – right to fair administrative action – right to fair hearing – right to be given proper notice of allegations and opportunity to be heard before an administrative action was taken – where a director in a public listed company was not given an opportunity to be heard and proper notice before the Capital Markets Authority took an enforcement action against him – Constitution of Kenya, 2010, articles 47 and 50.*
Capital Markets Law *– securities – regulation of securities – mandate of Capital Markets Authority to investigate and take enforcement actions against public listed companies – whether the investigative and enforcement action taken by the Capital Markets Authority against the Petitioner without giving him the right to be heard and no proper notice of allegations against him was an infringement of his right to fair administrative action – Constitution of Kenya, 2010, articles 47 and 50; Capital Markets Act, sections 5 and 11.*
Jurisdiction *– jurisdiction of the High Court – whether the High Court had jurisdiction to determine disputes arising out of decisions of the Capital Markets Authority – Capital Markets Act, section 35A.*

Brief facts

Following boardroom wrangles between rival directors of CMC Holdings Limited (CMCH) which spilled into the public domain, the Capital Markets Authority (CMA) took the decision to suspend the trading in CMCH's shares on the Nairobi Stock Exchange (NSE) pending investigations. Prior to intervention by the CMA, CMCH had instructed PricewaterhouseCoopers (PwC) to carry out a forensic investigation covering some specific areas of its business and table a report to it. The CMA separately commissioned Webber Wentzel, a South African firm, to conduct a forensic investigation into defined aspects of the financial operations of CMCH and its trading subsidiaries. Webber Wentzel was also asked to review the PwC Report and comment on the methodology applied and the conclusions drawn by PwC.

The CMA sent the Petitioner a copy of the Webber Report *via* a letter and notified him through the same that the Board of the Authority had resolved to appoint an *ad hoc* Committee under section 14 of the Capital Markets Act. The Committee would consist of five persons with a majority of independent members. The Petitioner was requested to appear before the Committee. However through his advocate the Petitioner wrote a letter to the Committee stating that he would not appear before it as participating in its proceedings would occasion grave prejudice to him and to Court proceedings on the same subject matter, which were either pending or were likely to be instituted.

The Committee conducted its investigations and upon conclusion submitted its recommendations to the CMA Board. The CMA subsequently issued a press release announcing that it had taken an enforcement action against executive and non-executive directors allegedly found to have flouted the capital markets' legal and regulatory requirements in relation to the affairs of CMCH. Further that the Petitioner had been disqualified from any appointment as director of any listed company or licensed or approved person, including a securities exchange in the capital markets in Kenya.

Issues

i. Whether the High Court had jurisdiction to determine disputes arising from decisions by the Capital Markets Authority (CMA) in light of section 35A that established the Capital Markets Tribunal.

ii. Whether the investigative and enforcement action taken by the CMA against the Petitioner without granting him the right to be heard or without proper notice of allegations against him was an infringement of his right to fair administrative action and right to fair hearing as provided under article 47 and 50 of the Constitution.

iii. Whether the investigation and decision by the CMA were *sub judice* in so far as there were civil proceedings pending in the High Court on the same subject matter.

Relevant Provisions of the Law

Constitution of Kenya, 2010

Article 47

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

Article 50

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
(i) an offence in Kenya; or
(ii) a crime under international law;
(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

Held:

1. The High Court had been called upon to intervene in what the Petitioner alleged was a breach of his fundamental rights and freedoms and a contravention of the constitutional provisions by the Respondents. That was within the jurisdiction of the High Court by virtue of article 165(3) (b) and 3(d)(ii) of the Constitution. The Capital Markets Tribunal had no such mandate.
2. The Petitioner sought to invoke article 50 of the Constitution on the right to fair hearing whereas his case fell within the purview of article 47(1) of the Constitution. Articles 47 and 50(1) protected separate and distinct rights which should not be conflated. Although the two rights embodied and gave effect to the general rules of natural justice they applied to different circumstances. Article 50(1) applied to a court, impartial tribunal or a body established to resolve a dispute, while article 47 applied to administrative action generally. Article 50(1) dealt with matters of a civil nature while the rest of the article dealt with criminal trials. Article 47 was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law or judicial review under the Law Reform Act but was to be measured against the standards established by the Constitution.
3. The Petitioner's arguments regarding the application of the rule against double jeopardy founded on the provisions of article 50(2) had to be rejected. The double jeopardy rule strictly applied to criminal offences and not disciplinary proceedings or proceedings of an administrative nature such as the one concerning the Petitioner.
4. PricewaterhouseCoopers and Webber Wentzel were involved in carrying out forensic audits which could not be equated to a criminal process and which did not result in finding the Petitioner guilty of an offence. The fact that there were previous investigations did not preclude the CMA from appointing the Committee to test the veracity of the issues emanating from the forensic report or affording the persons mentioned in the report an opportunity to respond to the allegations. What was important was that even where there have been previous investigations, the process adopted by the CMA had to be fair and whether such a process was fair depended on the circumstances of each case.
5. The Capital Markets Authority was a statutory body created pursuant to section 5 of the Capital Markets Act. The objectives of the Authority as set out under section 11 of the Capital Markets Act, which included developing the capital markets, facilitating participation of the general public in the stock market, imposing 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 the protection of investor interests. The conclusion to be drawn from section 11 of the Act was that the CMA was established as the chief regulator of the capital markets including protecting the investor interests in those markets. It was in public interest and in line with the principles of good governance that the capital markets be properly regulated.

6. The mere existence of High Court civil suits relating to the very subject of the investigation and by the CMA could not prevent the CMA from carrying out its statutory duties.
7. Section 11A and 14 of the Capital Markets Act permitted the CMA to delegate its functions to various persons including a Committee of the Board. The CMA was therefore within its powers in appointing an *ad hoc* Committee to consider investigations carried out on its behalf.
8. Regarding the concern that the Capital Markets Authority and the *ad hoc* Committee set up to investigate CMC Holdings could not be an independent body because it exercised both investigatory as well as enforcement action, the Authority and the Committee were exercising statutory functions conferred by the Capital Markets Authority Act. No regulator was expected to be independent in the sense that it could not investigate and prosecute and take enforcement action.
9. It was clear from the mandate of the CMA's *ad hoc* Committee that it was not entitled to take enforcement action but rather make recommendation to the Board of CMA. It was upon consideration of such recommendations that the CMA Board would then take enforcement action.
10. The Petitioner was indeed given an opportunity to be heard during the investigation by the *ad hoc* Committee but he waived this right by letter through his advocate. However that waiver applied only to the proceedings before the Committee and not the entire process. The Committee's mandate was purely investigative. After investigation, it would make recommendations to the Board, which would then consider the recommendations and thereafter take enforcement action. The Petitioner could not have waived his right to appear or make representations before the Board when such an opportunity had not been provided.
11. Although the process of investigation and imposition of sanctions was a continuous process, it was clear that the two stages were separated by the mandate imposed on the *ad hoc* Committee and the ultimate authority of the CMA Board to impose sanctions for infractions of the Capital Markets Act. The fact that the Committee and the Board were entitled to keep material reflecting opinions and deliberations confidential and privileged under section 13 of the Capital Markets Act did not discharge the obligation to the Petitioner to inform him of the charges before taking enforcement action against him.
12. Once the Committee made the recommendation for enforcement action against the Petitioner, he was entitled to be informed of the formal findings against him or the charges which he was to face and given adequate opportunity to make representations on those findings before an enforcement action would be preferred. The CMA therefore breached the Petitioner's right to fair administrative action by failing to accord him a fair opportunity to respond to the findings made by the *ad hoc* Committee before taking enforcement action and before the same were made public.
13. It was no defence that the Petitioner knew of the allegations against him or that an opportunity to be heard had been presented to the Petitioner earlier on before the *ad hoc* Committee, before a determination on the sanctions was ultimately made by the Board. The mandate of the *ad hoc* Committee before which the Petitioner was supposed to appear was one whose mandate did not include taking enforcement action. Whether or not the adverse allegations against the Petitioner were in fact true or fictitious was irrelevant. It was also no defence that there were no statutory provisions that expressly required an opportunity be given to an affected party to respond before adverse publications following an inquiry were made against them.

Petition partly allowed

i. *A declaration that the Petitioner's rights under article 47(1) of the Constitution were violated by the Capital Markets Authority when it took enforcement action against the Petitioner in the letter dated August 3, 2012.*
ii. *The Report and Resolutions by the Capital Markets Authority dated August 3, 2012 regarding the investigation into the affairs of CMC Holdings Limited in as far as they related to the Petitioner including the enforcement action taken thereon and more particularly set out in the letter dated August 3, 2012 issued by the Capital Markets Authority quashed.*
iii. *The 1st Respondent to pay the Petitioner's costs of the Petition.*

Factors to be Considered by the Court in Granting Leave to Institute Judicial Review Proceedings

Public Interest is an Essential Consideration for Grant of Judicial Review Orders Vania Investments Pool Ltd v Capital Markets Authority & 6 others

Misc. Appl. No 139 of 2014

Public Interest is an Essential Consideration for Grant of Judicial Review Orders Vania Investments Pool Ltd *v* Capital Markets Authority & 6 others

Vania Investments Pool Ltd *v* Capital Markets Authority & 6 others

High Court at Nairobi
DS Majanja, J

April 17, 2014

Misc. Appl. No 139 of 2014

Judicial Review *– Nature of judicial review proceedings – conditions for grant of leave to commence judicial review proceedings – whether the Court could grant leave to the Applicant to commence judicial review proceedings.*
Capital Markets Law – *capital markets – alternative remedies – pursuit of alternative remedies before commencing judicial review – whether the Applicant should have first pursued alternative remedies by filing an Appeal under the Capital Markets Tribunal before instituting judicial review proceedings – Capital Markets Act, Cap 485A Laws of Kenya, section 35A.*

Brief facts

The Application before the Court related to the legal implication of the Capital Markets (Take – Overs and Mergers) Regulations, 2002 (the Regulations) issued under the Capital Markets Act (Chapter 485A of the Laws of Kenya) (the Act) in respect of directions issued by the CMA in on the take-over of Rea Vipingo Plantations Limited (RVPL). The Applicant's case was that CMA implemented a timetable for the takeover of RVPL based on an administrative direction that it gave contained in the Notice that stopped new offers being made or existing offers being amended after February 28, 2014.

The Applicant argued that the Notice was in breach of regulation 13. It contended that the Regulation permitted the offeror of the competing offer to serve or issue all documents required but that it was not required to fit into the time lines provided by the preceding regulations. It argued that the offeror of the competing offer was then required to serve the competing take – over document at least 10 days prior to the closure of the offer period set by the 1st offeror and that that period applied to the revision that could be made to the competing offer. As a result of adoption of Notice, the Applicant contended that it had been blocked from amending its offer to take over shares in RVPL as such it would be effectively shut from improving its bid.

The Applicant argued that the Notice was *ultra vires* the Regulations and therefore void. It also argued that it was made in excess of jurisdiction and it was unreasonable and inimical to fair procedure. The Applicant further argued that the Notice was based on irrelevant considerations and it was in breach of rules of natural justice as the Applicant was not heard.

Issues

i. What were the factors to be considered by the Court in granting leave to the Applicant to commence judicial review proceedings.
ii. Whether the leave granted to commence judicial review proceedings could operate as a stay.
iii. Under what circumstances could the Court reject an application for grant of leave to commence judicial review proceedings
iv. Whether the Applicant should have first pursued alternative remedies by filing an Appeal under the Capital Markets Tribunal before instituting judicial review proceedings.
v. Whether undue and inordinate delay was a factor that affected grant of leafe to initiate review proceedings.

v. What was the rationate for the requirement to file for judidcial review proceedings?
vi. Whether the timelines in the Regulations were a relevant consideration when determining the issue of delay in filing judicial review proceedings.

Relevant Provisions of the Law
Capital Markets Act, Cap 485, Laws of Kenya
Section 11w – *Objectives of the Authority*

The principal objectives of the Authority shall be—
do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.

Section 35 – *Appeals from action by Authority*

(1) Any person aggrieved by any direction given by the Authority to such person or by a decision of the Authority or by the Investor Compensation Fund Board—
may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations, suspension or removal, as the case may be, within fifteen days from the date on which the decision was communicated to such person.

Section 35A – *Establishment of the Capital Markets Tribunal*

(4) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.
(5) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

Capital Markets (Take-overs and mergers) Regulations, 2002
Regulation 13(1)

Provides that where a decision has been reached to competing take-over offers, all provision in the Regulations relating to the take-over procedures shall apply mutatis mutandis except the notice period to the competing offer.

Held:
1. The principle upon which the Court acted to grant leave was well enunciated in that the test whether leave should be granted to an applicant for judicial review was, without examining the matter in any depth, whether there was an arguable case that the relief sought might be granted on the hearing of the substantive application. A Court would refuse to grant leave if it was clear from the facts that the intended application was frivolous, or that it was so hopeless or weak that it could not possibly succeed.
2. The reference to an arguable case was not that the issue was arguable merely because one party asserted one position and the other took a contrary view. The duty of the Court to consider the issue was not lessened by the mere fact that the application was one for leave. The Court could only come to the conclusion that the case was frivolous, or that leave was underserved by examining the facts. Indeed, if leave was to be considered a matter of right then the purpose for which leave was required would be rendered otiose.
3. Apart from considering whether the Applicant presented an arguable case, it had to always be recalled that the grant of leave was, as were judicial review remedies, still discretionary. The Court could reject the application on the ground that there was an alternative remedy available or that the Applicant had failed to disclose material facts or that the conduct of the Applicant was such

that it was undeserving of discretion or that there had been undue or unreasonable delay or that hardship would result to third parties or that good administration or public interest would be affected. The list of factors was neither exhaustive nor closed and at the end of the day, the decision to grant leave depended on a judicious application of those principles to the peculiar facts and circumstances of the case.

4. Judicial review was a remedy of last resort and parties aggrieved by the administrative actions of public or statutory bodies should have first pursued alternative remedies before instituting judicial review proceedings unless it could be demonstrated to the satisfaction of the Court that judicial review was more convenient, beneficial and efficacious than the alternative remedy available to the Applicant.
5. The Tribunal was established under section 35A of the Act and it had jurisdiction to hear appeals from any person aggrieved by any direction given by the CMA to such a person in respect of any direction, refusal, limitation and the like within 15 days from the date which the communication was made. The matter in issue, which the Applicant proposed to challenge, was a technical matter relating to the take – over of a listed company which the legislature had entrusted to the CMA for determination subject to the right of appeal to the Tribunal.
6. The Capital Markets Tribunal ought to have been the first port of call. The Applicant argued that the Tribunal was not quorate but there was nothing that prevented it from filing its appeal within the time provided by the Act. In the event the matter could not have been dealt with, the Applicant would be at liberty to seek appropriate relief from the Court. Permitting the matter to proceed to substantive hearing would be to impose on the Court the mandate of the Tribunal contrary to the general principle previously cited.
7. The issue of failure to invoke alternative remedies was intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings had to be made promptly as soon as grounds giving rise to the need for judicial review became known. Undue and inordinate delay in applying for judicial review was a major factor for consideration. It had repeatedly been acknowledged that applications in such cases should have been brought as speedily as possible.
8. Public interest in good administration required that public authorities and third parties not to be kept in suspense for any longer period than was absolutely necessary in fairness to the person affected by the decision. But decisions as to whether a Petition should be dismissed on the ground of delay were made in the light of the circumstances in which time was allowed to pass. It was, of course, the case that judicial review proceedings ought normally to be raised promptly and it was also undeniable that the Petitioners let some months pass without starting those proceedings. Nonetheless, in considering whether the delay was such that the Petitioners would not be allowed to proceed, the Court took into account the situation in which time was allowed to pass.
9. Under section 35 of the Act, the period for challenging a decision by CMA was fifteen days from the date when the decision was communicated. What the Applicant sought to impugn was the Notice published on February 5, 2014. Its right of appeal under the Act to challenge the Notice at the Tribunal would have expired on February 21, 2014. The inference drawn there was that by filing the application on April 8, 2014, the Applicant was well beyond the statutory limit intended by the Legislature to challenge decisions of the CMA.
10. The deadline of February 28, 2014 contained in the Notice provided ample time for any person, who was interested in making a new offer or vary an existing offer, to do so. The Applicant had sufficient time to challenge the power of the CMA either before the Tribunal or at the material time in court if the Tribunal could not be moved for whatever reason. The Applicant was well aware of those processes given the fact that it was an active participant in the process beginning December 2013 through its related company.

11. The timelines in the regulations were a relevant consideration when considering the issue of delay. A take-over transaction relating to a publicly listed company was not a trifling matter. It was a time bound process as illustrated by regulations which imposed 24 hour, 5 day, 10 day, 14 day and a maximum of 30 day limits for doing certain acts. A period exceeding 30 days in the context of matters dealing with take – overs was inordinate. Those time limits, including the 15 day limit imposed for moving the Tribunal, were not idle, they were necessary due to the fact that the business of capital markets was always time sensitive and a minute, day, week or month lost imposed a heavy cost on the market participants.
12. The Applicant, according to the affidavit of Dilesh Somchand Bid, continued to engage the CMA even after February 28, 2014 deadline had passed. Even if the Court took a favourable view of the Applicant's case, the last letter written by CMA to the Applicant reiterating its decision to reject the amended offer was dated March 19, 2014. Why the Applicant waited until 9th April 2014 to move the Court was not explained and such delays in the matter could not be countenanced.
13. The issue of time and delay were important in the overall scheme of take-overs and the duty of the CMA to develop an orderly, efficient and fair capital markets. Take -overs were time sensitive transactions given that market dynamics were subject to changes at any time. CMA had stopped the trading of RVPL shares at the NSE and the effect of further court proceedings would have had a deleterious effect on the confidence of investors and shareholders who would have to wait until the matter was finalized. The scheme of the Act in providing for a dispute resolution process and timelines for specific actions to be taken under the regulations was to ensure that matters were dealt with expeditiously and efficiently in line with the objects of the Act.
14. The take-over process did not involve the Applicant alone, the 1st and 2nd Interested Parties had invested substantial time, money and effort in complying with the Regulations and directions issued by the CMA. The Applicant, on the other hand has had the advantage of increasing its proposed offer soon after the February 28, 2014 deadline after it has had knowledge of competing offers. It would be gaining an unfair advantage over its competitors by not complying with the directions of CMA. To permit it to validate its offer through the Court would distort the market and undermine a level playing field offered by the regulations and direction issued by CMA.
15. The shareholders of the offeree were entitled to have the process come to an end so that they could make decisions regarding their shares. At the end of the day, they were entitled to accept or reject the offers made. Permitting those proceedings to go ahead would cause considerable doubt on the process already underway. The Court noted the concerns of the 3rd, 4th, 5th and 6th Interested Parties whose wish was to have the best price on the table for consideration. Such a price could only be achieved within the framework of the regulations and directions set by the CMA and not by an open ended process that stifled their decision making and denied them the opportunity to assess the information available to make their choices. Holding the matter in abeyance while it was being litigated would have caused hardship to third parties and the public at large.
16. The matters outlined fortified the element of public interest which was a necessary consideration in matters of judicial review as judicial review was a public law remedy. The Court was required to weigh the Applicant's interest and the public interest and in light of what it outlined, it was not in the public interest for the Court to sanction a situation that could dent or diminish investor and public confidence in the Capital Markets. A situation that could throw the take – over that had been in the works since November 2013 into doubt and undermined the entire process of take-overs.
17. The Applicant did not invoke the alternative remedy provided under the Capital Markets Act. It filed the Application before the Court after undue and unreasonable delay in the circumstances

and the grant of leave would cause hardship to third parties and would not be in the public interest.

Application dismissed.

Orders

i. *Chamber Summons dated April 8, 2014 was dismissed with costs to the Respondent and 1st and 2nd Interested Parties.*

A Court Order on Maintenance of *Status Quo* meant that the Circumstances as at the time when the Order was made had to be Maintained

Republic v Cabinet Secretary, Ministry of National Treasury & 4 others ex parte Centum Investments Co Ltd

Misc App. No 179 of 2014

Republic *v* Cabinet Secretary, Ministry of National Treasury & 4 others *ex parte* Centum Investments Co Ltd

High Court at Nairobi June 12, 2014
W Korir, J

Misc App. No 179 of 2014

Statutes *– interpretation of statutory provisions – section 35(A) 17 of the Capital Markets Act – interpretation of status quo – what was expected of parties under a Court order of maintaining status quo – Capital Markets Act, Cap 485A, Laws of Kenya, section 35(A), 17.*
Jurisdiction *– jurisdiction of the High Court – unlimited original jurisdiction of the High Court – taking over processes – whether the High Court had jurisdiction to hear matters on taking over processes.*
Civil Practice and Procedure *– Inherent jurisdiction of the court – when could inherent jurisdiction of the court be invoked especially in judicial review proceedings.*
Words and Phrases – *definition – status quos – definition of status quo – state in which that is the situation that currently exists – Black's Law Dictionary, 9th Edition.*
Words and Phrases – *definition – status quos – definition of status quo – the existing state of affairs: things as they are – Ballentine's Law Dictionary*
Words and Phrases – *definition – status quos – definition of status quo – the state in which things are, were – A Concise Law Dictionary*

Brief facts

The Applicant and R.E.A Trading Limited were interested in taking over the R.E.A Vipingo. The takeover process started in November, 2013. According to the Applicant, the 3rd Respondent (the Capital Markets Authority) approved the revised Offer Document by the 2nd Interested Party, the Applicant's competing offer and the 2nd competing offer by an entity identified as V.I.P.

The Applicant claimed that the approval was done notwithstanding the fact that part of the consideration of the offer by the 2nd Interested Party was contingent upon the sale of the 1st Interested Party's property on an unspecified date at a specified price. The Applicant argued that that was uncertain and predicated on assistance through the 1st Interested Party's property contrary to the provisions of the Companies Act, Cap. 486 (Repealed). The Applicant was aggrieved by the decision of the 3rd Respondent and appealed to the Capital Markets Tribunal.

The Applicant subsequently discovered that the Tribunal was not quorate and moved to Court to apply for the order of mandamus. The Applicant contended that notwithstanding the filing of the appeal before the Tribunal and the existence of those proceedings, the 3rd Respondent and the interested parties had manifested the intention to proceed with the takeover bid. The Applicant contended that the 3rd Respondent's action was in clear contravention of section 35A(17) of the Capital Markets Act (Act) which provided that upon any appeal being filed before the Tribunal the *status quo* of any matter or activity, which was the subject of the appeal, would be maintained until the matter was determined.

Issues

i. What was the jurisdiction of the Capital Markets Tribunal in determining appeals from the Capital Markets Authority.
ii. Whether the requirement for maintenance of the *status quo* once an appeal was filed was statutory or discretionary.

iii. What was the nature and purpose of an order maintaining the *status quo*
iv. Circumstances when the inherent jurisdiction of the Court could be invoked especially in judicial review proceedings?
v. Whether the Capital Markets Tribunal had jurisdiction to hear take over matters under section 35(A)(4) of the Capital Markets Act.
vi. Whether the continuance of the take over process after the Appeal had been filed was in contravention of the provisions of the Capital Markets Act.

Relevant Provisions of the Law

Capital Markets Act, Cap 485, Laws of Kenya

Section 35A(4) – *Establishment of the Capital Markets Tribunal*

> *The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.*

Section 35A(17) – *Establishment of the Capital Markets Tribunal*

> *Upon any appeal to the Tribunal under this section the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.*

Held:

1. Judicial review in the traditional sense was neither civil nor criminal in nature but a special jurisdiction governed by sections 8 and 9 of the Law Reform Act and order 53 of the Civil Procedure Rules. Whether article 23 of the Constitution had changed the rules were not a matter for discussion in the ruling. It was sufficient to consider the application within the traditional context. Ordinarily, where judicial review rules did not provide for the making of a particular application, an applicant could invoke the inherent jurisdiction of the Court for the Court had jurisdiction to do that which was just.
2. The inherent powers of the Court could be invoked in judicial review applications. The Application sought to invoke the inherent powers of the Court since it was an application not provided for by the rules governing judicial review proceedings. The 3rd Respondent and the 2nd Interested Party suggested that the Applicant's intention was to stop the takeover proceedings and the remedy lay in private law which was not so.
3. The Applicant had approached the Court not only seeking to protect the appeal at Tribunal but also to protect the proceedings. The Applicant had knocked on the right door and was entitled to a hearing. The Application before the Court was not an application for stay as envisaged by order 53 rule 1(4) of the Civil Procedure Rules, 2010 (CPR). It was a different application altogether and the said provision was therefore not applicable. The Court had jurisdiction to entertain the Application.
4. After taking a cursory look at the Capital Markets Act, it appeared that the Tribunal had jurisdiction to handle the appeal. The Act gave both limited and unlimited jurisdiction to the Tribunal. That led to the issue of *status quo*. Therefore when a Court of law ordered or a statute ordained that the *status quo* be maintained, it was expected that the circumstances as at the time when the order was made or the statute took effect had to be maintained. An order maintaining *status quo* was meant to preserve existing state of affairs. Where for example there was a dispute between a tenant and a landlord and there was an order for maintenance of *status quo*, if the tenant was in occupation it meant he retained the occupation. If on the other hand he was not in occupation, it meant he remained out unless the order was for the maintenance of *status quo ante. Status quo* had to therefore be interpreted with respect to existing factual scenario and in

the case with respect to the purpose of what was intended which was the hearing of the Appeal by the Tribunal. At the conclusion of the Appeal, the Tribunal was empowered to *inter alia*, confirm, set aside or vary the order or decision granting the EIA licence. If it were to set aside the order granting the licence, it would mean that the project in question would not carry on or would not carry on in the same manner in which it was being undertaken. For the project to continue while the appeal was being determined would defeat the whole idea behind the maintenance of *status quo*.

5. There was no persuasion from the submission by the 3rd Respondent that maintenance of *status quo* meant that its decision could be implemented as the decision of the Tribunal was awaited. Maintenance of *status quo* in reference to the takeover proceedings was that the decision of the 3rd Respondent remained in force but that decision could not be implemented pending the hearing and determination of the Appeal filed by the Applicant at the Tribunal. That was to say that the decision of the Tribunal remained in limbo awaiting the determination of the Appeal. Any other interpretation would defeat the intention of Parliament.
6. The Applicant asserted that even after the Appeal had been filed, the 3rd Respondent continued with the takeover process and the evidence of that continuation was an email communication to the Applicant asking for the shareholders circular and independent advisers circular for the takeover proceedings. That statement was not rebutted. In continuing with the takeover process after the Appeal had been filed, the 3rd Respondent was acting in contravention of the clear provisions of the Act.
7. It was in the interests of the shareholders and all the parties therein that the takeover process be completed within the statutory timeframe. However, Parliament in its wisdom had provided for an appeal mechanism whose effect was to stop further action pending the hearing and determination of any appeal filed by an aggrieved party. The law ought to be complied with. Even if Parliament had not provided for maintenance of *status quo*, that was a case that required the stay of the takeover process least the Applicant's appeal was rendered nugatory. The Applicant's grievances needed to be addressed before the process could go ahead. The first port of call for those aggrieved by the decisions of the 3rd Respondent was the Tribunal. Which was what the Applicant had done. The Applicant was entitled to the protection of the law.
8. In respect of order 53 rule 1(3) of the CPR, conditions as to costs and security could be imposed on an applicant at any time before the matter was heard and determined. If the Applicant's application was premised on order 53 of the CPR, the 2nd Interested Party's application for provision of security was not misplaced. However, the Applicant's application was not premised on order 53 of the CPR. It was not related to the grant of leave to commence judicial review proceedings. The provision of order 53 CPR cited by the 2nd Interested Party was therefore not applicable.
9. The question as to whether conditions should be imposed remained unanswered. The requirement for maintenance of the *status quo* once an appeal was filed was statutory. It was not discretionary. Conditions could not be imposed on what was decreed by statute if the statute itself did not provide that conditions could be imposed. Such an order would amount to putting hurdles on the intentions of Parliament. For that reason, the 2nd Interested Party's application failed.

Application allowed; costs to be in the cause.

Capital Markets Authority's Power in the Regulations of the Capital Markets

Cementia Holding Ag & another v Capital Markets Authority & 3 others

Petition No 110 of 2014

Cementia Holding Ag & another *v* Capital Markets Authority & 3 others

High Court at Nairobi
I Lenaola, J

July 4, 2014

Petition No 110 of 2014

Jurisdiction *– High Court – where there are ongoing investigations – whether the High Court had jurisdiction on the matter when the 1st Respondent's investigations were ongoing.*
Capital Markets Law *– capital markets – objectives of the Capital Markets Authority – what was the extent of the 1st Respondent's powers under section 11 on the principal objectives under the Capital Markets Act – Capital Markets Act, section 11.*

Brief facts

The Application was based on the last Annual General Meeting (AGM) of East African Portland Cement Company Ltd (EAPCC) (Interested Party) held on December 17, 2013 where certain Resolutions were passed. Dr. Wilson Songa wrote to the 1st Respondent (Capital Markets Authority) raising certain issues about the manner in which the AGM had been conducted. The 1st Respondent wrote to the Attorney General stating that it had issued a directive to the Interested Party requiring that registration of the resolutions with the Registrar of Companies and any implementation of the same by the company be held in abeyance, pending resolution of the complaints by the shareholders. The Registrar of Companies wrote to the 1st Applicant stating that the Resolutions passed by the Interested Party at its AGM were null and void. The Nairobi Securities Exchange Ltd (3rd Respondent) issued an undated notice in which it had suspended implementation and application of the Resolutions passed at the AGM pursuant to a directive from the 1st Respondent.

The Petitioners (Cementia Holding Ag and Didier Tresarrieu) were then aggrieved by the Respondents' decision contained in the letters dated December 18, 2013 and December 20, 2013 purporting to suspend the Resolutions passed by the Interested Party at its 81st AGM, CMA's letter dated December 20, 2013 addressed to the 3rd Respondent directing it to give notification of the suspension of the Resolution passed by EAPCC at its 81st AGM, the Registrar of Companies' letter dated December 24, 2013 stating that the Interested Party's Resolutions at the 81st AGM were null and void and the 3rd Respondent's undated notice stating that the application of the Resolutions passed by the Interested Party at its 81st AGM had been suspended.

Issues

i. Whether CMA had powers to inquire, either on its own motion or at the request of any other person, into the affairs of any person that had been licenced by the Authority.
ii. Whether CMA could prescribe rules and regulations on corporate governance of a company whose securities had been issued to the public.
iii. Whether the High Court had jurisdiction on the matter when the 1st Respondent's investigations were ongoing
iv. What was the extent of with regard to the reaquest or lack of, for a poll at the AGM, CMA's powers on the principal objectives under section 11 of the Capital Markets Authority Act?

Relevant Provisions of the Law
Capital Markets Act, Cap 485, Laws of Kenya
Section 11(1) – *Objectives of the Authority*

(a) The development of all aspects of Capital Markets with particular emphasis on the removal of the impediments to, and the recreation of incentives for longer term investments in productive enterprises;
(b) to facilitate the existence of a nation wide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;
(c) creation, maintenance of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self regulatory to a maximum practicable extent;
(d) protection of investor interests;
(e) the facilitation of a compensation fund to protect the investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations; and;
(f) the development of a framework to facilitate the use of electronic commerce for the development of Capital Markets in Kenya

Held:

1. CMA was a creature of the Capital Markets Act. The preamble to that Act stated that it was established for the purpose of promoting, regulating facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes. Under section 11(2) (cc) the Authority was empowered to 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.
2. The Authority could order a person to remedy or mitigate the effects of any breach of the Regulations. Section11(3)(h) empowered the Authority to inquire, either on its own motion or at the request of any other person into the affairs of any person including a company which the Authority had approved or to which it had granted a licence and any public company the securities of which were traded on an approved securities exchange. It was under that regulation that M/s. Webber Wentzel were instructed by the Authority to conduct the investigations and prepared a report.
3. The Authority was empowered to give directions to any person who it had approved or to which it had granted a licence and any public company the securities for which were traded in the stock market. Whenever such directions were given they had to be complied with. The Authority could also prescribe rules or guidelines on corporate governance of a company whose securities had been issued to the public.
4. Section 11 of the Capital Markets Act was very elaborate, the Legislature did not exhaustively stipulate each and every thing that the Authority was empowered to do in the discharge of its mandate and that is why section 11(w) stated that the Authority could do all such acts as could be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under the Act. That provision was comparable to sections 3 and 3A of the Civil Procedure Act which saved the inherent jurisdiction of the Court to make such orders as could be necessary for the ends of justice or to prevent abuse of the process of the Court.
5. The provisions of section 11 indicate that CMA had the powers to regulate capital markets generally and it also had powers to ensure that the security market was orderly, fair and efficient. It was the best judge of the operations of those it had licensed and to confirm whether the licensees were acting in accordance with the regulations as laid down. Even if the material before the Court was sufficient to determine the dispute before the Court with regard to whether there was a request for a poll or not, at the 81st AGM, the Court was constrained not to proceed

and determine that issue for good reason. The CMA was still seized with the matter and was conducting an investigation in that regard.

5. The Court did not have the benefit of the outcome of the meeting referred to above as none of the parties alluded to it and whether there were ongoing discussions relating to the dispute at hand. Even if the Court had jurisdiction to determine a violation of fundamental rights and freedoms, it had to give an opportunity to other relevant bodies established by law to deal with a dispute as provided in the relevant statute. It seemed to be plain beyond argument that the jurisdiction of the High Court could only be invoked if the Minister refused to give a direction or in purporting to do so, arrived at a decision which was grossly unfair or perverse. His decision could be challenged by an application to the High Court for a writ of *certiorari* because under the relevant section, the decision was to be made on a fair and equitable basis.
6. There was considerable merit that where there was clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed. The Capital Markets Act reserved for CMA certain functions and mandates at the first instance including investigating the specific issue whether a poll was demanded and whether it was denied or not at the 81st AGM of the Interested Party. It had, with tremendous respect to the Petitioners, begun an investigation on that issue and had sought their input as it had sought the input of other parties. What wrong had it committed by doing so? What illegality had it committed? What illegalities had the other Respondents committed by stating that the Resolutions of the 81st AGM of the Interested Party should not have been implemented until the CMA initiated investigations were completed and a finding made one way or the other? How could it be said that the Respondents had been denied a hearing when they had been asked to submit themselves to the investigations?
7. It was obvious that whereas the Interested Party could have been undergoing internal turmoil and whereas its management could not have been pulling all in the same direction (the Company Secretary's position was particularly interesting as the previous and present holders of the office had different views on a number of issues), regarding the crucial issue of the poll, only the 1st Respondent could properly resolve that issue at the first instance under the Capital Markets Act and then the Court could thereafter be properly seized of the dispute on appeal as was provided for under the Capital Markets Act. To do otherwise would have been to usurp the statutory mandate of CMA and delve into a dispute that had not properly matured.
8. In the event, the position as articulated by Counsel for CMA and the Interested Party was correct and the case as articulated would have led the Court to the conclusion that the CMA ought to have expeditiously concluded its investigation on the issues raised by noting the fact that putting it on hold any longer had implications on the affairs of the Interested Party and its expectant shareholders.
9. The Court was not ready to assume jurisdiction at the stage and there was nothing more to say on the substance of the Petition so as not to have prejudiced CMA's investigations. The Petition stood dismissed and the Petitioners were at liberty to apply, once the CMA investigations were concluded one way or the other.

Petition dismissed; each party to bear its own costs.

Capital Markets Authority has the Dual Mandate to Investigate and take Enforcement Actions against Directors of Public Listed Companies

Capital Markets Authority v Jeremiah Gitau Kiereini & another

Civil Appeal No 9 of 2014

Capital Markets Authority *v* Jeremiah Gitau Kiereini & another

Court of Appeal at Nairobi — November 7, 2014
PN Waki, W Karanja & JW Mwera, JJ A

Civil Appeal No 9 of 2014

Constitutional Law *– fundamental rights and freedoms – right to fair administrative action – right to fair hearing – right to be given proper notice of allegations and opportunity to be heard before an administrative action was taken – whether the investigative and enforcement action taken by the Capital Markets Authority against the 1st Respondent without giving him the right to be heard and no proper notice of allegations against him was an infringement of his right to fair administrative action and right to fair hearing as provided under articles 47 and 50 of the Constitution – Constitution of Kenya, 2010 articles 47 and 50.*

Capital Markets Law *– Capital Markets – securities – regulation of securities – mandate of Capital Markets Authority to investigate and take enforcement actions against public listed companies – whether the investigative and enforcement action taken by the Capital Markets Authority against the 1st Respondent without giving him the right to be heard and no proper notice of allegations against him was an infringement of his right to fair administrative action – Constitution of Kenya 2010 article 47; Capital Markets Act sections 5 and 11.*

Jurisdiction *– jurisdiction of the High Court – whether the High Court had jurisdiction to determine disputes arising out of decisions of the Capital Markets Authority Tribunal – whether the issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication – Constitution of Kenya, 2010, articles 47, 165(3)(b) and (d)(ii); Capital Markets Act section 35A.*

Brief facts

The Capital Markets Authority (CMA) suspended the trading in CMC Holdings (CMCH) Limited shares on the Nairobi Stock Exchange (NSE) after boardroom wrangles between rival directors of CMC Holdings Limited spilled into the public domain, pending investigations. Prior to intervention by the CMA, CMCH had instructed Price Waterhouse Coopers (PWC) to carry out a forensic investigation covering some specific areas of its business and table a report to it. The CMA separately commissioned Webber Wentzel, a South African firm, to conduct a forensic investigation into defined aspects of the financial operations of CMCH and its trading subsidiaries. Webber Wentzel was also asked to review the PWC Report and comment on the methodology applied and the conclusions drawn by PWC.

The CMA sent the 1st Respondent a copy of the Webber Report *via* a letter and notified him through the same that the Board of the Authority had resolved to appoint an *ad hoc* Committee under section 14 of the Capital Markets Act. The Committee would consist of five persons with a majority of independent members. The 1st Respondent was requested to appear before the Committee. However through his advocate the 1st Respondent wrote a letter to the Committee stating that he would not appear before it as participating in its proceedings would occasion grave prejudice to him and to Court proceedings on the same subject matter, which were either pending or were likely to be instituted.

The Committee conducted its investigations upon conclusion of which it submitted its recommendations to the CMA Board. The CMA subsequently issued a press release announcing

that it had taken an enforcement action against executive and non – executive directors allegedly found to have flouted the capital markets' legal and regulatory requirements in relation to the affairs of CMCH. Further that the 1st Respondent had been disqualified from any appointment as director of any listed company or licensed or approved person, including a securities exchange in the capital markets in Kenya. Consequently, the 1st Respondent filed a Constitutional Petition and the High Court held, *inter alia*, that the CMA was in breach of the 1st Respondent's right to fair administrative action under article 47 of the Constitution. The High Court set aside the decision of the CMA taking enforcement action against the 1st Respondent, hence the instant appeal.

Issues

i. Whether the High Court had jurisdiction to determine constitutional issues from disputes arising out of decisions by the Capital Markets Authority (CMA) in light of section 35A that established the Capital Markets Tribunal.
ii. What was the extent of the powers of the Capital Markets Authority.
iii. Whether CMA had acted ultra vires its powers in appointing an *ad-hoc* committee to investigate the 1st Repondent.
iv. Whether the *ad-hoc* committee appointed CMA to conduct investigations against the 1st Repondent had powers to enforce sanctions.
v. Whether there were any constitutional violations with the summary imposition of sanctions and other penalities before giving the 1st Respondent an opportunity to be heard in mitigation.

Held:

1. The objection on jurisdiction before the Court of Appeal, as it was before the High Court, was that there was nothing constitutional about the matter placed before the High Court, which was no more than a merit appeal against the decision of the CMA. As such Parliament had enacted in sections 35 and 35A of the Capital Markets Act, an alternative remedy of a Tribunal to resolve the issues raised. The High Court considered the objection and found that it was being called upon to intervene in a matter where a party alleged breach of his fundamental rights and freedoms and that the issue squarely fell within the jurisdiction of the High Court by dint of article 165(3)(b) and (d)(ii) of the Constitution. No other adjudicative body, including the Tribunal, had that mandate. Therefore, there was express jurisdiction flowing from the supreme law itself.
2. The Court of Appeal could not fault the Trial Court for resorting to the Constitution itself in resolving, *inter alia,* the allegation on violation of fair administrative action under article 47 of the Constitution placed before it. The existence of an alternative remedy, in the instant case the Tribunal, would not be efficacious because the High Court did not share with the Tribunal the powers under article 165 of the Constitution. The issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court. The issue arose from the pleadings and the evidence before the Trial Court and was not raised by the Court *suo motu*. Thus the appeal relating to jurisdiction failed.
3. Under section 11(3) of the Capital Markets Act, no less than twenty nine (29) wide 'powers, duties and functions' of the Authority (also referred to as "the Board") established under section 5 of the Act were listed. Section 11(3)(w) made such powers unlimited as the Board could do all other acts incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under the Act. Those were very wide powers and therefore the reason for caution in the manner of exercising them to avoid abuse.
4. It was evident from the diverse provisions in the sections of the Capital Markets Act that the Board should make a choice of the form and nature of delegation of its powers and functions. Although the Trial Court held that the CMA was within its powers to appoint the *ad hoc* Committee under sections 11A and 14 of the Act, with respect, that was not entirely correct.

It was only so in so far as the general power existed. The Board ought to go further and specify which provision of the Act was invoked.

5. From the examination and evaluation of the specified functions of the Committee, its main function was to verify, by calling further evidence, the investigation report and findings of the Webber report. It was to carry out further investigation. Beyond that, it would give recommendations to the Board on actions to be taken, if any.
6. It was difficult to say that it was the Committee which carried out the entire process; firstly because the Court had no record of the Committee's report and recommendations. Secondly, there was no specification by the Board of delegation of its function of imposition of sanctions under section 11(3)(c) of the Act, additional sanctions under section 25A, or offences and penalties under section 34A of the Act. All those functions remained reposed in the Board throughout.
7. What was clear from the record was that CMA indicated what it would do with the report once it was submitted to the Board. In all probability therefore, CMA envisaged a stage after investigations by the Committee, when it would notify the 1st Respondent about the findings of the committee and record any mitigating circumstances from him before exercising its coercive power of sanctions and other penalties.
9. The Committee carried out investigations only and the power of enforcement was not delegated to the Committee. Such power should have been delegated expressly in line with the provisions of the Act if that was the intention. The Committee was not given a *carte blanche* (meaning: complete freedom to act as one wishes or thinks best) by CMA so that it would supplant the Board in the entire process of investigation and enforcement.
10. The 1st Respondent did not have a legitimate expectation that he would have a full second hearing before the Board since he was given the opportunity to appear and be heard before the Committee on the specific allegations that were made against him. He made a conscious decision not to appear before the Committee. The proceedings before the committee were therefore valid as were the findings which were unchallenged.
11. The finding of the Trial Court that the Committee's findings were not set aside and the Order quashing all the findings of the Committee and requiring CMA to hear the 1st Respondent on all the evidence that led to those findings was contradictory and hence the Trial Court was in error in that respect. The Order had to be interfered with to accord with the finding. The finality of the process before the Committee gave rise to an appeal if the affected party so desired, in accordance with the Act and not to a challenge of the process before the High Court.
12. What deserved a constitutional challenge was the summary imposition of sanctions and other penalties before giving the 1st Respondent 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. After the hearing, the Board could have arrived at the same conclusion, but it would have passed muster in complying with the law.
13. There was no express provision in the Act for a hearing before imposition of sanctions and other penalties, but the right to fair administrative action, which included fair hearing was so jealously guarded by the Constitution that the Court would apply article 10 on transparency and accountability, and article 20(3) of the Constitution to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favored the enforcement of the right or fundamental freedom.
14. Regarding considerations of public interest to override constitutional requirements of fair administrative action and fair hearing, those rights of the individual were so fundamental that they could not be limited even by public interest.

Orders

i. *Appealed allowed in as far as it questioned the process ending with the findings made by the committee on the specific allegations placed before it for investigation, and reiterated that the findings were made procedurally, and were valid until they were set aside by a lawful order on appeal. The order of the trial court setting aside the findings of the committee, which were accepted by the Board as listed in the letter dated August 3, 2012 set aside.*

ii. Appeal dismissed in so far as it questioned the finding of the trial court that article 47 of the Constitution was breached since the 1st Respondent was not given the opportunity to be heard before sanctions and other penalties were imposed on him.

iii. The sanctions, penalties and offences imposed by the Capital Markets Authority Act under sections 11(3)(cc), 25A and 34A set aside. CMA should be at liberty to re-impose them if they were merited only after giving the opportunity to the 1st Respondent to be heard.

iv. The disposition related only to the 1st Respondent.

v. As there had been partial success, and the matter was of public importance, each party should bear its own costs of the appeal and in the High Court.

Circumstances where Interlocutory Mandatory Injunctions can be Grated

Peter Muriuki Rwagi v Standard Investment Bank Ltd

Civil Case No 464 of 2014

Peter Muriuki Rwagi *v* Standard Investment Bank Ltd

High Court at Nairobi
F Gikonyo, J

March 5, 2015

Civil Case No 464 of 2014

Civil Practice and Procedure *– interlocutory injunctions – criteria for grant of interlocutory injunctions – criteria for grant of mandatory injunctions – whether the Applicant was entitled to an order for a mandatory injunction.*
Civil Practice and Procedure *– interlocutory injunctions a final nature – criteria for grant of permanent injunctions at an interlocutory stage – whether the Applicant was entitled to an order of permanent injunction at an interlocutory stage.*
Capital Markets Issues – *Broker & Client Relationship – Duty of a Broker to a client – Duty of a broker to conduct due diligence in a transaction involving transfer/sale of shares – Role of a stock broker in cases where it suspects a fraudulent transaction.*

Brief facts
The Plaintiff was the administrator and sole beneficiary to the estate of Yvonne Marie Lewin, who died on September 4, 1979. He was also the holder of letters of administration to the estate which was confirmed by the High Court at Nairobi.

After obtaining the Certificate of Confirmation of Grant from the High Court, the Applicant approached the Respondent to facilitate the transfer of Eighty Six Thousand Three Hundred and Twenty Eight (86,328) East African Breweries Limited (EABL) shares from the estate of the deceased to him. The shares were transferred to him and he was issued with a share certificate for 86,328 East African Breweries Limited (EABL.

He instructed the Respondent to sell Twenty Thousand Shares (20,000) at a minimum price of Three Hundred and Thirty five Shillings (Ksh 335). The shares were sold for six million five Hundred and Seventy Six Thousand Seven Hundred and Twelve shillings (Kshs 6,576,712.00), the Respondent paid to the Applicant an advance of Three Hundred Thousand Shillings (Kshs 300,000) by open cheque. He was advised to wait for three days for the balance to be deposited into his bank account. The balance was however not deposited in his account within the three days as promised and expected.

The Respondent also refused to allow the Applicant to sell, change broker or in any other way transact with the residual 66,328 East African Breweries' Shares.

According to the Respondent, it was evident from the foregoing, that there was great haste to obtain, confirm and act on the letters of administration after a lull of 33 years since the death of the deceased, which was one of the hall marks of fraudulent cases.

In light of all the above, and the suspicion aroused by all the red flags stated above, the Respondent decided not to release the proceeds of sale until the matter had been investigated. The Respondent wrote to the Capital Markets Authority but the CMA had not taken any action at the time that the Plaintiff filed the suit with the attendant application. In the said application, the Plaintiff sought orders for a mandatory injunction to compel the Respondent to release the sum of Kshs 6,276,712 to the Applicant and a permanent injunction to restrain the Respondent from interfering with the Applicant's rights of ownership which included the right to sell and/or transfer the shares.

Issues

i. Whether an order granting a major relief claimed in the suit could be granted at an interlocutory stage.
ii. Whether a manadatory injunction could be grated in an interlocutory application
ii. Cirmstances when a mandatory injunction could be granted.

Held:

1. The Application was interlocutory but seeking orders of a final nature; i.e. mandatory injunction and permanent injunction. The grant of orders sought in the Application would in fact result into granting relief in the Plaint, thus compromising almost the entire suit at the stage. The law on the subject was that an order which resulted in granting a major relief claimed in the suit, which could not be granted at final hearing, ought not to have been granted at an interlocutory stage.
2. A mandatory injunction could be granted in an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it would not normally be granted. However, if the case was clear and one which the Court thought ought to be decided at once, or if the act done was a simple and summary one which could be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction would be granted on an interlocutory application.
3. An interlocutory mandatory injunction was granted very sparingly and only in exceptional circumstances such as where the Applicant's case was very strong and straight forward. As the remedy was an equitable one, it could be denied where the Applicant's conduct did not meet the approval of a court of equity or his equity had been defeated by laches. In law, a relief of mandatory and or permanent injunction could be granted at interlocutory stage even if it could have resulted into granting the major or relief sought in the suit, thereby substantially or completely compromising the entire suit. However, such relief could only have been granted at interlocutory stage in exceptional cases which were clear, straight forward, strong or where it was clear the Defendant wanted to steal a match from the Applicant. In such instances, it would have been unfair and contrary to justice to allow a belligerent Defendant the advantage of time which ordinarily attended to a hearing. That was the test the Court would apply in the case.
4. The Respondent was expected to act where there was suspicion in a transaction for transfer or sale of shares especially because the Respondent occupied a fiduciary position and was also under obligation to be vigilant and report any suspicious transactions under the law including the Proceeds of Crime and Anti-money Laundering Act and Capital Markets Act. The Respondent accordingly reported the matter to the Regulator, CMA as well as the Directorate of Criminal Investigations (DCI). The DCI conducted investigations into the matter and gave the Respondent a report dated December 23, 2013. The report did not detect any fraud in the entire transaction.
5. The Respondent seemed not to be satisfied with the report and continued to ask the CMA to absolve them of any liability should it occur in the future that there was fraud in the acquisition of the shares in question. One, if the Respondent was as diligent and mindful not to fall for a fraud in the acquisition of shares by the Applicant as it claimed, on what basis they paid advance money to the Applicant. The entire circumstances of the acquisition of shares was known to them and the red flags too when they paid the Kshs 300,000. It was important to note that the Respondent had not claimed to have had any financing arrangement with the Applicant. The only relationship between the two was that of broker-client. Therefore, the allegation by the Respondent that they made advance payment to the Applicant was only aimed at justifying their argument that they did not hold any money for the Applicant.
6. It was curious that in the same breadth of admitting that it sold 20,000 shares and later re-bought them, the Respondent could say that it did not hold any money for the Applicant. The dishonesty on the part of the Respondent was quite clear here. The Court could ask; why did they

re-purchase the shares and on whose instructions and from which funds did they so re-purchase the shares? What did they wish to achieve? Those questions were revealing but what was clear wasthat they sold the shares for Kshs 6,576,712.00 on account of the Applicant.

7. The shares and the CDSC account were in the name of the Applicant. The Applicant was the administrator and sole beneficiary of the shares in question. Legally, the Applicant was the owner of the shares, and any proceeds of sale of those shares. The Respondent seemed to use the unfounded apprehensions it had held for so long about the shares as a way of depriving the Applicant of and access to his shares, and also not to account for the proceeds of sale of the 20,000 shares. Those things were in the plain sight of the Court and were easily discernible from the documents tendered and depositions of the parties. The Respondent stood in a very important position in the running of the Applicant's account and shares. They also held a fiduciary capacity and role in the affairs of the Applicant in the shares where trust and utmost good faith was paramount.
8. The narration of events and facts of the case revealed a very strong case that the Respondent intended only to steal a match on the Applicant. The facts were plain, clear and not obscure; the Applicant was the administrator of the estate of the deceased and the sole beneficial owner of the shares in question. It was also clear that the CDSC account on the shares was in the name of the Applicant. Similarly, there was no doubt that 20,000 shares were sold for Kshs. 6,576,712.00 and the Applicant received only Kshs 300,000 from the Respondent. And in all those things, the Respondent had not any shred of proof of fraud by the Applicant on the entire transaction. They admitted that they were not of the opinion that the Applicant was fraudulent. The Advocates confirmed that the Applicant was the administrator of the estate of the deceased and it was properly obtained from a court of competent jurisdiction.
9. The DCI did not detect any fraud and made a report in writing. In the face of all that, why was the Respondent holding on to suspicion which was based on no concrete facts or evidence. In the absence of evidence to the contrary, the Respondent had no reason of holding on to the shares or the money. They were merely seeking for a justification to hold on to the Applicant's money and shares, and perhaps conceal their actions to re-purchase shares without instructions. In that field of stock market, absolute diligence and adherence to instructions and the law had to be emphasized. Non-adherence with strict laws and rules in the stock markets had seen serious leakages in the market by stock brokers of investor funds, and also deregistration of or penalties on brokerage firms. The Court hoped the regulator, CMA would give the case a much intense scrutiny and thoroughly investigate the Respondent on the manner it handled the account of the Applicant.
10. The case presented exceptional circumstances such that the Applicant's case was very strong and straight forward. The case was clear and one which the Court thought ought to have been decided at once, as the act complained about was one which could be easily remedied. Again, taking the kind of case through the motions of a hearing would be aiding the Respondent to steal a march on the plaintiff. Moreover, the Applicant's conduct met the approval of a court of equity. That was a case falling within the limited class of cases where interlocutory mandatory and permanent injunctions would be granted.

Application allowed.

Orders

i. *The Court granted a mandatory injunction and ordered the Respondent to release the sum of Kshs 6,276,712 to the Applicant forthwith.*
ii. *The Court granted a permanent injunction and thereby restrained the Respondent whether by itself, its servants and or agents or advocates or any other person on their instructions either individually or jointly from interfering with the Applicant's rights of ownership, or of possession, or of disposing, or of selling, or of transferring or of dealing with the shares held in CDS Account No B20/B – 0000015295430/LI – 0. The restraint did not, however, affect any actions by the Respondent on the CDS Account which had taken upon express instructions of the Applicant.*
iii. *Costs to the Applicant.*

An Overlap in Functions of an Administrative Body could not be an Indication of a Reasonable Apprehension of Bias

Ernst & Young LLP v Capital Markets Authority & another

Petition No 385 of 2016

Ernst & Young LLP *v* Capital Markets Authority & another

Constitutional and Human Rights Division March 7, 2015
JM Mativo, J

Petition No 385 of 2016

Administrative Law *– administrative functions – overlap of administrative functions – where there was an overlap in the functions of an administrative decision maker – whether an overlap in the functions of an administrative decision maker could give rise to a reasonable apprehension of bias – whether a reasonable apprehension of bias was a legal standard for disqualifying judges and administrative decision makers – Fair Administrative Action Act sections 4 (2), 3(3)(a).*
Constitutional law *– natural justice – principles of natural justice – concept and doctrine of the principle of natural justice – application of the principles of natural justice in the justice delivery system – whether the rules of natural justice were applicable in the circumstances – Constitution of Kenya, 2010 article 47, 50.*
Judicial Review *–judicial review remedy – scope of judicial review remedy – claim of breach of fundamental rights and freedoms guaranteed in the Constitution – whether judicial review was available as a relief to a claim of violation of the rights and freedoms guaranteed in the Constitution – whether a party could access judicial review if the body or authority against whom it was claimed exercised a quasi – judicial function – Constitution of Kenya, 2010 article 23(3).*

Brief facts

The Petitioner, a firm of auditors duly registered as a limited liability partnership instituted the petition seeking several declarations against the Respondents. The Petitioner averred that they had received a call from the first Respondent asking for a meeting to clarify issues allegedly arising from audits undertaken by the Petitioner following a forensic audit report issued by KPMG, a firm of auditors. The Petitioner requested for a copy of the forensic audit report which was sent by the first Respondent as well as a list of issues for discussion at the meeting. The Petitioner sought to be supplied with a full and final copy of the KPMG Report to enable it to prepare and respond to the issues raised by the first Respondent but the same was not supplied. The Petitioner averred that it did not participate in the alleged inquiry nor was it given an opportunity to participate prior to the decision and issuance of the notice to show cause; neither heard nor invited for further clarification; neither was it informed that it was under inquiry or investigations nor given a fair hearing or supplied with investigations. That by asking the Petitioner to mitigate, the first Respondent had presupposed that the Petitioner was culpable without a hearing, hence a breach of the rules of natural justice. The Petitioner also claimed that the procedure adopted did not meet the constitutional threshold, hence a violation of articles 47 & 50 of the Constitution and sections 4(2), 3(3)(a) of the Fair Administrative Action Act.

Issues

i. Whether the High Court had jurisdiction to determine violation or breach of a right or a fundamental freedom.
ii. Whether during the preliminary investigations the 1st Respondent was required to apply the rules of natural justice and whether the manner they acted constituted a breach of the rules of natural justice.
iii. What was the nature and firm of the doctrine or principles or natural justice in its application in the justice delivery system.
iv. Whether an overlap in functions of administrative body could be an indication of a reasoinable

apprehension of bias.

v. What was the effect of decisions of cor-ordinate courts within the concept of judicial comity.

vi. Whether a High Court could depart from a decision of the Court of Appeal in lieu of the doctrine of *stare decisis.*

vii. Whether judicial review was available as a relief to a claim of violation of the rights and freedoms guaranteed in the Constitution.

viii. Whether a party could access judicial review if the body or authority against whom it was claimed exercised a quasi-judicial function.

ix. What was the scope of judicial review under the Constitution.

x. Whether reasonable apprehension of bias was a legal standard for disqualifying administrative decision makers.

ix. Circumstances when reasonable apprehension of bias could be raised; what was the test uded to prove reasonable apprehension of bias.

Held:

1. Article 165(1) of the Constitution had established the High Court and vested it with vast powers including the power to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened and the jurisdiction to hear any question respecting the interpretation of the Constitution.
2. Article 47 of the Constitution had codified every person's right to fair administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further there was a right to be given reasons for any person who had been or was likely to be adversely affected by administrative action.
3. The concept and doctrine of Principles of Natural Justice and its application in the Justice delivery system was not new. It seemed to be as old as the system of dispensation of justice itself. It had assumed the importance of being, so to say, an essential inbuilt component of the mechanism through which decision making process passes, in the matters touching the rights and liberty of the people. It was no doubt, a procedural requirement but ensured a strong safeguard against any Judicial or administrative order or action, adversely affecting the substantive rights of the individuals.
4. Natural Justice was an expression of English common law. The principle had to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.
5. Natural justice has been described as fair play in action of the principles and procedures which in any particular situation or set of circumstances were right and just and fair. Its rules were traditionally divided into two parts*: Audi alteram partem-* the duty to give persons affected by a decision a reasonable opportunity to present their case. *Nemo judex in cau sa sua debet esse-* the duty to reach a decision untainted by bias. Those two rules were the essential characteristics of what was often called natural justice. They were the twin pillars supporting it.
6. Generally, it was imperative that individuals who were affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They were entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which was appropriate to the statutory, institutional, and social context of the decision being made.
7. In the modern state, the decisions of statutory or administrative bodies could have a more immediate and profound impact on people's lives than the decisions of courts, and public law had been alive to that fact. While the judicial character of a function could elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what made it judicial was principally the nature of the issue it had to determine, not the formal status of the deciding body.

8. Procedural fairness had embedded in it the age old natural justice requirements that no man was to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. Effectively, procedural fairness required that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker.
9. Administrative decision makers were created for a variety of reasons to meet a variety of needs and in some instances, an overlap in functions (which was generally not permitted on account of bias) was a necessary element to fulfilling a decision maker's mandate. Provided that the particular decision-maker was not acting outside its statutory authority (and the governing statute was constitutional), an overlap in functions could not give rise to a reasonable apprehension of bias.
10. While decisions of co-ordinate courts were not binding, they were highly persuasive because of the concept of judicial comity which was the respect one court held for the decisions of another. As a concept it was closely related to *stare decisis*. The High Court could also depart from a decision of the Court of Appeal, if there was a strong reason to do so. The phrase strong reason to the contrary did not mean a strong argumentative reason appealing to the particular judge, but something that could indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed.
11. Article 259 of the Constitution enjoined the Court to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights and in a manner that contributed to good governance.
12. The High Court was obliged under article 159(2)(e) of the Constitution to protect and promote the purposes and principles of the Constitution. The Constitution ought to also be given a purposive, liberal interpretation. The provisions of the Constitution ought to be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. It gave prominence to national values and principles of governance which included human dignity, equity, social justice, inclusiveness, equality, human rights etc.
13. Judicial review was available as relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. It had expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus was no longer whether the function was public or private or by a statutory body but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under article 47 of the Constitution, or the right to natural justice under article 50 of the Constitution.
14. The Kenyan judiciary ought to guard against the development of a two-tracked system of judicial review, one that looked like the old cases influenced by the common law, on the one hand, and cases that were decided under the Constitutional principles of judicial review on the other hand. The two tracks were likely to undermine the establishment of a vibrant tradition of judicial review as required by the Constitution.
15. Judicial review was entrenched in the Constitution and ought to be reflected in the court decisions. A decision could not stand court scrutiny where the decision making process did not adhere to the constitutional test on procedural fairness.
16. The common law principles that previously provided the grounds for judicial review of public power had been subsumed under the Constitution and, insofar as they could continue to be relevant to judicial review, they gained their force from the Constitution. In the judicial review of public power, the two were intertwined and did not constitute separate concepts. They were not two systems of law, each dealing with the same subject matter, each having similar requirements and operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which was the supreme law and all law, including the common law, derived its force from the Constitution and was subject to constitutional control.

17. The entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, ought to access judicial review if the person, body or authority against whom it was claimed exercised a quasi-judicial function or a function that was likely to affect his rights. An order of judicial review was one of the reliefs for violation of fundamental rights and freedoms under article 23(3)(f) of the Constitution. Therefore, court decisions ought to show strands of the recognition of the Constitution as the basis of judicial review.
18. The Courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on that front. The courts ought to develop judicial review jurisprudence alongside the mainstreamed theory of a holistic interpretation of the Constitution.
19. Under the Constitution, judicial review orders were applicable against any private person, body or authority who exercised a judicial or quasi-judicial function by which a right or fundamental freedom of a person had been or was likely to be adversely affected. The traditional jurisprudence of judicial review restricted the ambit of judicial supervision of procedures to situations where the functions classified as judicial or quasi-judicial had been performed by a public authority. Article 165(6) of the Constitution gave the High Court the powers of judicial review over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.
20. Judicial review was no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament but was now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power were now regulated by the Constitution.
21. A body performing investigative duties as in the instant case was bound to adhere to the constitutional prescriptions of according the person affected, a process that was procedurally fair and just as clearly provided in the transformative Constitution.
22. The Petitioner moved to court too early to stop the process and as at the time of filing the petition, there was nothing to show that the steps *hitherto* taken by the Respondent were contrary to the statutory mandate of the first Petitioner nor had the Petitioner proved infringement of any fundamental right or threat to the infringement to warrant the courts intervention.
23. CMA's functions were authorized by the relevant statute and the statute authorized overlapping functions. Administrative bodies were created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature would decide that in order to achieve the ends of the statute, it was necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions was authorized by statute, then, to the extent that it was authorized, it would not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias had been sufficiently demonstrated.
24. The Petitioner feared that the CMA was the investigator, prosecutor and hangman. Hence, the reasonable apprehension of bias test was the key test. Reasonable apprehension of bias was a legal standard for disqualifying judges and administrative decision-makers for bias. Bias of the decision – maker could be real or merely perceived. The apprehension of bias ought to be a reasonable one held by reasonable and right minded persons applying themselves to the question and obtaining thereon the required information.
25. The test was what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. A reasonable apprehension of bias could be raised where an informed person, viewing the matter realistically and practically and having

thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly.

26. The simple question which required an answer on the issue of bias was if there was a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the decision-maker might well be prone to bias.
27. The Capital Markets Act ought to be read as a whole. Section 11A of the Act provided for delegation of functions where the Authority could delegate any of its functions under the Act to a committee of the Board, a recognized self-regulatory organization or an authorized person. It therefore followed that if there was a likelihood of bias or where circumstances and prudence so permitted, the Authority could delegate its duties as provided.
28. The fear of CMA being the investigator, prosecutor and hangman could be real, but the process was at the initial stage and in view of the section 11A of the Capital Markets Act, it could not be said with certainty that the first Respondent was going to perform the roles. Further, there was nothing preventing a person under investigation to ask for that section to be invoked.
29. The Petitioner moved to court rather too early acting on apprehension but the steps taken by CMA were in conformity with the law and no breach of a fundamental right or threat had taken place or had been sufficiently proved. However, for avoidance of doubt, the first Petitioner in the performance of its functions under the provisions of the Act was required to observe and accord persons under investigations and or any person likely to be adversely affected by their decision a fair process and in particular it was required to adhere to the principles of natural justice and comply with articles 50(1) and 47 of the Constitution including providing the person under investigation, in advance, with any adverse evidence that could be used against him/her.

Petition dismissed. Each Party to bear their costs.

Financial Institutions Liable for Failure to Invest Money Prudently and to Account for Interests Arising from Investments

John Kung'u Kiarie v Dyer & Blair Investment Bank Ltd & another

Civil Case No 47 of 2008

John Kung'u Kiarie *v* Dyer & Blair Investment Bank Ltd & another

High Court at Nairobi
EKO Ogola, J

March 10, 2016

Civil Case No 47 of 2008

Contract Law *– discharge of contract – frustration – whether the 1st Defendant's future obligations to invest the Plaintiff's money had been discharged by a freezing order made against an account in which the money was held – effect of failure to prove that there was a freezing order from a competent Court – whether an alleged request from the Banking Fraud Investigation Unit would be sufficient for purposes of proving frustration of contract.*
Contract Law *– breach of contract – alleged negligence in the performance of contractual duties – allegations that an investment bank failed to discharge its duty to invest money in a prudent and skilful manner and thereby occasioned a failure to yield returns.*
Civil Practice and Procedure *– institution of suits – parties to a suit – joinder of parties – cause of action founded on contract – allegations that there was no cause of action or locus standi to sue a party that was not privy to a contract – whether there was a cause of action against a third party that was allegedly involved in conduct that amounted to a breach of contract and occasioned losses.*

Brief facts
The Plaintiff's case was that he entered into an agreement with the 1st Defendant wherein he availed sums of money for the 1st Defendant to invest in securities. He stated that he gave the 1st Defendant authority to invest the money via an agreement dated April 28, 2003. The 1st Defendant invested the money with the 2nd Defendant initially in the Plaintiff's name and later under a Nomura Nominee Account No 1027. For purposes of that agreement, the Plaintiff stated that he availed Kshs 100,000,000.

The Plaintiff stated that out of that money, Kshs 88,000,000 was invested in treasury bonds while 12,000,000 was left for other investments. The bond for Kshs 88,000,000 was sold before maturity in order to invest in another bond that was being floated and it realized a capital gain of Kshs. 2,000,000 However, after the money was received the Plaintiff's account was frozen as a result of investigations by the Central Bank of Kenya (CBK) Fraud Investigation Unit. The investigations culminated in charges being preferred in Criminal Case No 1218 of 2003. The criminal proceedings ended and the result was that the money was released.

The Plaintiff also stated that apart from claiming that the account was frozen, the 1st Defendant did not explain why the money was not invested, particularly in period between April 2003 and September 2007. According to the Plaintiff if the funds were invested in the mixed funds envisaged in the agreement with prudence, competence and skill, the funds would have grown to Kshs. 465,500,000. The Plaintiff further contended that in failing to invest and realize returns, the 1st Defendant was negligent in fulfilling its professional duty. Therefore, the Plaintiff was seeking judgment for the sum of Kshs 465,500,000, interest and costs of the suit.

In response, the 1st Defendant stated that it had acted with due diligence, skill and competence in relation to the subject transaction and in the Plaintiff's interest. The 1st Defendant said that due to the freezing of the account for purposes of fraud investigations, the agreement between it and the Plaintiff was frustrated by operation of law or *force majeure*. Moreover, the 1st Defendant added

that it had fully accounted to the Plaintiff for the principal and interest and denied the projected growth of Kshs 465, 500, 000.

In its response, the 2nd Defendant explained that there was no privity of contract between it and the Plaintiff. Therefore, the 2nd Defendant said that the Plaintiff could not institute proceedings against it. The 2nd Defendant also said that it had a contract with the 1st Defendant and it was not obligated to establish the source of the funds deposited into the Nomura Nominee account. In general, the 2nd Defendant denied having an obligation to account to the Plaintiff.

Issues

i. Whether there was a freezing order whose effect was to discharge the 1st Defendant's contractual obligations to invest sums of money availed by the Plaintiff.
ii. Whether the 1st Defendant performed its duty to invest the Plaintiff's funds in a professional, prudent, competent and skilful manner in order to realise the best returns.
iii. Whether the Plaintiff had a cause of action against the 2nd Defendant given that the 2nd Defendant was not privy to the contract as pertained to the agreement between the Plaintiff and the 1st Defendant.
iv. Whether a plea of the doctrine of frustration of contract by operation of law could stand in the circumstances.
v. Whether the defence of termination has available to the 1st Dependant having pleaded frustration of the agreement by operation of the law.

Held:

1. Under the agreement between the Plaintiff and the 1st Defendant, the Plaintiff availed sums of money and the 1st Defendant was to invest and realise returns. Allegations that the contract was frustrated due to the making of a freezing order against the account in which the money was placed, were not supported by evidence of a freezing order made by a Court.
2. The 1st Defendant misinterpreted warrants to investigate the account and treated them as an order to freeze the account. Further the 1st Defendant disregarded the fact that the warrants were directed at and served on the 2nd Defendant, Stanbic Bank Ltd. It was unlawful and malicious for the 1st Defendant to freeze the account on the basis of a warrant to investigate which was not addressed to it. The account was apparently frozen following a request from the Banking Fraud Investigation Unit and not a Court order.
3. The 1st Defendant's plea of the doctrine of frustration of contract by operation of law or *force majeure* was unfounded. The doctrine of frustration of contract by operation of law or *force majeure* would be sustainable if there was an external supervening circumstance beyond the control of the parties. There was no such supervening circumstance. The alleged frustration was induced by the 1st Defendant who acted on the basis of a non – existent freezing order.
4. The 1st Defendant had obligations under an agreement it entered into with the Plaintiff in which the 1st Defendant received money for purposes of investing in shares, fixed deposits, Treasury bill and bonds. Pursuant to that agreement the 1st Defendant was to invest money availed by the Plaintiff and to pay the Plaintiff all the interest/returns on the investment. As an investment firm, the 1st Defendant had a duty to employ its skills prudently in order to realize reasonable returns on investment. However, the interest or returns would be dictated by market dynamics.
5. The agreement between the Plaintiff and the 1st Defendant allowed each party to terminate it. The 1st Defendant argued that it could only be in breach for a period of 1 year as the agreement was valid for one year and the Plaintiff could terminate it if he felt that it was breached. Having pleaded frustration of the agreement by operation of law or *force majeure*, the 1st Defendant would not have the defence of termination available to it. Further, the 1st Defendant could not argue that the agreement was valid for 1 year since it was not renewed because the 1st Defendant

held the money for 5 years. It was wrongful for the money to be held for 5 years with no returns.

6. As long as the money remained in the 1st Defendant's possession, the 1st Defendant was supposed to continually invest it in bonds and other securities while re – investing back the gains/profits realized to make it grow.
7. The compelling conclusion from the evidence by the Defendants' witnesses was that they were not sure what rate of interest was to be paid and what basis was used to calculate the same. The Defendants' witnesses offered contradictory documentary evidence, which was authored in their absence. If the said account was frozen, the balance should have been Kshs 67,500, 000/ as at 25/9/2007. If the said amount had been transferred to the call account, the balance would have been zero. Instead, the opening balance was overdrawn by Kshs 9,670,001.90. The other question arising from the statement was why the 2nd Defendant removed the money from an account that paid interest of 5.5% (on credit) and 13.75% (on debit) and transferred it to a call account which earned only 0.5% other than for purposes of profiting with the money.
8. The Plaintiff ought to have been paid 5.5% instead of 0.5%. The Defendants were liable to pay the retained interest together with interest on the same for the entire period that the money was held.
9. Expectations relating to investments and interest were not guaranteed. Occasionally business expectations fall short. The Plaintiff's expectation was not one that would succeed 100% during the 5 years in which the Defendants held the Plaintiff's money. It was appropriate for the Court to scale down that expectation by a third to cater for unexpected business turns in that period.
10. Parties were bound by their pleadings and any evidence adduced had to support the averments in the pleadings. The 2nd Defendant was not privy to the terms of the agreement between the Plaintiff and the 1st Defendant that allowed the 1st Defendant to invest the Plaintiff's money in various instruments. Furthermore, the Plaint did not contain allegations that the 2nd Defendant owed the Plaintiff any duty of care or that such duty of care was breached in terms of particulars set out and that as a result the Plaintiff suffered loss or damage. However, the 2nd Defendant was involved in machinations relating to the freeze order and it was involved in transferring the Plaintiff's funds from the investment account to a different account.
11. It was apparent that the 2nd Defendant was a conniving partner in machinations which allowed the Defendants to trade with the Plaintiff's money. When the Plaintiff sought interest, each of them claimed that it was the other Defendant who was to assess the interest due. The 2nd Defendant joined the 1st Defendant in a complicated wave of deceit whose aim was to trade with the Plaintiff's money without accounting for interests. For that reason both Defendants were liable for the Plaintiff's loss.

Judgment entered for the Plaintiff against the Defendant. (The Plaintiff was awarded Kshs 310,333,333.30, interest at 16% per annum from the 21st October and costs of the suit.)

Instance where the Statutory Mandate of Capital Markets Authority (CMA) to Approve Issuance of Bonds to an Entity Conflicts with its Mandate to Undertake Investigation and Enforcement Proceedings Against that Entity

Alnashir Popat & 8 others v Capital Markets Authority

Petition No 245 of 2016

Alnashir Popat & 8 others *v* Capital Markets Authority

High Court at Nairobi — December 19, 2016
JL Onguto, J

Petition No 245 of 2016

Jurisdiction – *subordinate courts – tribunals – jurisdiction of the Capital Markets Tribunal vis – a vis the jurisdiction of the High Court in determining disputes arising from the enforcement of the Capital Markets Authority Act – Capitals Market Authority Act, sections 5, 11, 35A.*
Constitutional Law *– fundamental rights and freedoms – rights to equality & freedom from discrimination – right to access to information – right to fair administrative action – right to fair trial – claim challenging whether the inquisitorial and enforcement proceedings the Petitioners were being subjected to by the Respondent was in violation of the Petitioners' fundamental rights and freedoms – Constitution of Kenya, 2010, articles 27, 35, 47, 50; Fair Administrative Actions Act, section 9.*

Brief facts
The Petitioners were directors of Imperial Bank Limited (in receivership). They filed the Petition challenging the administrative proceedings being undertaken by the Respondent (Capital Markets Authority) in respect of the bank's receivership. They claimed that in carrying out its investigations, the Respondent had violated or was likely to violate the Petitioners fundamental rights and freedoms, in particular the right to equality and freedom from discrimination under article 27, the right to access to information under article 35, the right to fair administrative action under article 47 and the right to fair trial under article 50 of the Constitution of Kenya, 2010.

Issues
i. Whether CMA had the authority to inquire into the affairs of any Company Licenced to trade in the Nairobi Stock Exchange (NSE).
ii. Whether disputes arising from the enforcement of the Capital Markets Act should be filed at the Capital Markets Tribunal or the High Court.
iii. Whether the inquisitorial and enforcement proceedings the Petitioners were being subjected to by the Respondent was in violation of the Petitioners' fundamental rights and freedoms as alleged.
iv. Whether the Capital Markets Tribunal could entertain appeals from CMA.
v. Whether the tribuanal had original jurisdiction or could only determine matters on appeal.
vi. Whether there were exceptional circumstances where a party could be exempted from exhausting the alternative statutory remedy.
vii. Whether the Capital Markets Tribunal had jurisdiction to determine allegation of breach of fundamental rights and freedom.
viii. Whether there was a reasonable apprehension of bias by the Respondent in the circumstances.
ix. Whether CMA could delegate its functions to other persons.

Held:
1. The Respondent (CMA) was a statutory body created under section 5 of the Capital Markets Act (the Act) to regulate the capital markets in Kenya. From its objectives under section 11(1) of the Act, there was no doubt that the Respondent had a broad statutory mandate. In order to carry out its statutory functions, CMA was endowed with wide powers under section 11(3) of the Act to enable it to undertake its statutory mandate.
2. There was no doubt that had the statutory power to regulate, promote and facilitate the development of an orderly and efficient capital market in Kenya. In doing so, section 11(3) of

the Act conferred it with various powers which included carrying out investigations and imposing sanctions for breach of the provisions of the Act. Thus, it was clear that the CMA had the power to undertake the investigations subject of the instant petition.

3. Section 11(3)(i) of the CMA Act gave the Respondent the power to inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it had granted a license and any public company the securities of which were publicly offered or traded on an approved securities exchange or on an over the counter market. That provision gave the chief regulator of the capital markets, the power to inquire into the affairs of the bank regarding to security traded at Nairobi Stock Exchange (NSE).
4. The Capital Markets Tribunal was established under section 35A(1) of the Act. Its powers were set out under section 35(1) thereof. Further, the Tribunal had further functions under section 34A(4). Thus a person could appeal to the Tribunal in regard to any decision made by the CMA in relation to any matter relating to the Capital Markets Authority.
5. CMA had the power to inquire into the affairs of any company that it had approved to trade its securities in NSE. That matter fell within the provisions of the Capital Markets Act and any person aggrieved by its decision could appeal to the Tribunal in accordance with section 35 A (4) of the Act. Likewise, CMA could itself prompt the Capital Markets Tribunal on the same matter and without dealing with it, and it would still not amount to an abdication of duty.
6. The Tribunal had original jurisdiction. The original jurisdiction could however only be prompted by the CMA or by any of its *ad hoc* committees or any other person who exercised delegated authority for and on behalf of CMA by way of a reference. Once again, such a reference could relate to any matter under the Capital Markets Act. Therefore, the Tribunal had both appellate and original jurisdiction.
7. The appellate jurisdiction was triggered by way of an appeal by any aggrieved person. The original jurisdiction was triggered by the Authority, its *adhoc* committee or any person exercising delegated authority for and on behalf of the Authority through a reference.
8. As a matter of practice in a Court of law or before any tribunal, when an inconvenient date was given, a party could appear before the body and request for an adjournment. There was no reason why such practice could not be extended and fetched upon any adjudicator or decision maker. Further, if the Petitioners were so aggrieved with the hasty manner in which the date was imposed, they ought to have set up a challenge by way of an appeal against the decision of the Authority to the Capital Markets Tribunal which would have been properly seized of the matter.
9. Section 9 of the Fair Administrative Action Act provided that generally, a party aggrieved by an administrative decision or action ought to apply for review of that decision to a tribunal with the requisite jurisdiction. The tenor and import of section 9(2) and (3) thereof was clear that where there was an alternative remedy prescribed under legislation, that procedure had to be first explored before invoking the jurisdiction of the Court. However, Section 9(3) granted special jurisdiction to the High Court in the sense that the Court could in exceptional circumstances exempt a party from exhausting the alternative statutory remedy.
10. Applying the test given above to the Petition; the Court had been called upon to intervene in what the Petitioner alleged to be a breach of his fundamental rights and freedoms by the Respondent. That would clearly be within the jurisdiction of the High Court by virtue of articles 22(1), 165(3)(b) and 3(d)(ii) of the Constitution. The Capital Markets Tribunal had no such original mandate. Further, the High Court's powers under article 165 were not shared with the Capital Markets Tribunal. Thus, as far as it concerned the allegations of violations of the Constitution, the instant matter was properly before the Court.
11. The Petitioners failed to prove that they were discriminated against by the Respondent. They also failed to prove, in the circumstances that there was arbitrary differentiation which

imposed burdens, disadvantages and obligations not imposed on others. As a matter of fact, the differentiation appeared objective.

12. Article 47 of the Constitution demanded an expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The Petitioners were sufficiently informed of the nature of the proceedings the Respondent was undertaking; they were also informed that the Respondent was undertaking enforcement proceedings against them pursuant to the provisions of section 25 and 26 of the Capital Markets Act. It thus followed that the intended enforcement proceedings were administrative in nature and article 47 of the Constitution of Kenya, 2010 applied. Therefore, the Court was unable to find any violation of article 47 of the Constitution in so far as expedition, lawfulness and reasonableness were concerned.
13. Procedural fairness was an aspect of both article 47 and article 50 of the Constitution. Procedural fairness was embedded in the age old natural justice requirements that no man could be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. Effectively, procedural fairness required that decisions be made free from a reasonable apprehension of bias by an impartial decision maker.
14. A well informed and fair minded observer given all facts would conclude that there existed a possibility of bias in the circumstances of the instant case. If the particulars as outlined in the notices to show cause were to be aligned to the statutory provisions as well as all the process that the regulator went through prior to granting its approval to a bond issue and handed over to the well informed fair minded observer, the fair minded observer would not conclude that the Respondent in the instant case would approach the decision making process with the impartiality appropriate to the decision. Thus, the circumstances denoted a reasonable apprehension of bias.
15. That notwithstanding, deference ought to always be accorded to statutory bodies with statutory mandates. Such bodies must however operate within the confines of the Constitution and article 47 of the Constitution invited procedural fairness upon such bodies as well. A complaint of premeditated bias or perceived bias would be enough to trigger the mandate of the instant court where a petitioner added that the right to an impartial adjudication process had been violated or was about to be violated.
16. In the instant circumstances, the Petitioners were not being subjected to criminal proceedings but civil proceedings. The Petitioners were being invited to appear before the Respondent's board as directors of the Bank, and in their capacity as such. They were to be heard on the circumstances prevailing before and after the Bank's bond issue and the allegations that have been attributed to them pursuant to Section 26(8) of the Act. It followed that the Petitioners' allegations as regards the violation of various rights founded on the provision of article 50(2), including the right to be informed of a charge in sufficient detail, right to be presumed innocent, right to adduce and challenge evidence presented in the trial, right to be given sufficient reasonable time to prepare their defence and right to legal representation had to be rejected as they were not applicable. All those alleged rights applied in criminal trial and not in civil proceedings or proceedings of an administrative nature as the one concerning the Petitioners.
17. There was no doubt that the Respondent was the statutorily mandated regulator of capital markets in Kenya. The nature of the administrative proceedings and enforcement proceedings to be undertaken by the Respondent had to be however distinguished from those that could be undertaken by the independent Capital Markets Tribunal. In the instant case, the Respondent as the regulator it was involved in the bond transaction. It was the body that approved the issuance of the bond. It was then conducting enforcement proceedings against the Petitioners.
18. Whereas it was clear that the Respondent had the statutory mandate to regulate the capital markets including approving securities to be listed on the NSE, under the Act it was vested with both investigative and enforcement powers in relation to the same mandate it exercises. In the

present case, the Respondent as the industry regulator approved the bond issue by approving the information contained in the final information memorandum. It had then sought to investigate the circumstances that led to the approval of the bond issue. In the notice to show cause, it stated that; "the authority had accordingly noted that there were various shortcomings with respect to the conduct of the oversight and governance role of the Board in relation to the issue of the bond".

19. Under article 50(1) of the Constitution the Petitioners would have a right to be heard in public before an independent and impartial tribunal or body. The Petitioners in the instant case were being subjected to an administrative process and thus the provisions of article 50(1) would not be applicable. Rather, the provisions of article 47 would be. The Petitioners grievances were with the administrative processes they were being subjected to and only the provisions of Article 47 were relevant and applicable.
20. Access to information was fundamental to the realization of the rights guaranteed in the Bill of Rights. Access to information was crucial to the right to freedom of expression which included the freedom to receive or impart information or ideas. For a person to enforce the right of access to information, he had to establish that he had sought the information and access to such information had been denied.
21. In the instant case, and from the evidence availed to the Court on record, the Petitioners admittedly requested for information. The Respondent provided the Petitioners with a complete list of documents that it would rely on at the hearing and provided copies thereof vide its letter of 23 May 2016. In the circumstances therefore, the Petitioners were provided with all the essential documents necessary to enable them attend the show cause hearing. In any event, the Respondent admitted that some of the documents requested were not in its possession but were in control of the CBK and KIDC. While the Respondent had powers to summon the production of those documents, it could not demand that of the Petitioners yet. The hearing was yet to commence. It was thus the Court's finding that the Respondent had not unduly hindered the Petitioner in preparation of their defence in the intended hearing by failing to provide crucial information.
22. Ultimately, the Respondent had the option of choosing whether or not to execute its mandate and over which entity. Under the Capital Markets Act, the Respondent could delegate its functions to other persons including a recognized self-regulatory organization bodies (see Section 11A). Likewise, the Respondent could file a reference to the Capital Markets Tribunal on any matter relating to the Capital Markets Act (see section 35A(4) of the Capital Markets Act). It could therefore not be argued that the Respondent's regulatory mandate would be hampered and voided where it was found, as in the instant case, that the Respondent was conflicted. There was no doubt that the legislature, in its wisdom, did not provide for delegation as well as reference by the Respondent to the Capital Markets Tribunal without reason or good cause. Instances like the present one were anticipated.

Petition partly allowed with the following orders to the extent of the success of the Petition;

i. *A declaration that the Petitioners' rights under Article 47(1) of the Constitution were under a threat of violation when the Respondent sought to undertake and proceed with the administrative and enforcement action against the Petitioners yet the Respondent who sought to execute its statutory mandate was apparently conflicted in the circumstances of this case.*
ii. *An order of certiorari to remove into the court and quash the Notice to Show Cause letters issued by the Respondent to the Petitioners on 6 May 2016.*

A Non-Member of the Institute of Public Accountants cannot Appeal against a Decision of the Institute of Public Accountants' Disciplinary Committee

Capital Market Authority v Institute of Certified Public Accountants of Kenya & 3 others

Civil Appeal No 1 of 2015

Capital Market Authority *v* Institute of Certified Public Accountants of Kenya & 3 others

High Court at Nairobi
JK Sergon, J

June 28, 2017

Civil Appeal No 1 of 2015

Appeals *– appeals from decisions of specialized tribunals – Institute of Certified Public Accountants' Disciplinary Committee – institution of appeals from decisions of the Institute of Certified Public Accountants' Disciplinary Committee – persons entitled to institute an appeal – non-members of the Institute of Certified Public Accountants – whether a non – member of the Institute of Public Accountants could appeal against a decision of the Institute of Public Accountants' Disciplinary Committee – Accountants Act, sections 33 & 34.*

Jurisdiction *– jurisdiction of the High Court – jurisdiction over specialized tribunals – Institute of Certified Public Accountants' Disciplinary Committee – whether the High Court had jurisdiction to hear and determine an appeal from the Institute of Certified Public Accountants' Disciplinary Committee – Accountants Act, sections 33 & 34.*

Brief facts

The Appellant filed a complaint to the 1st Respondent arising from a review of the audit report of Cooper Motors Corporation Holdings (CMC). The Appellant had appointed a forensic investigations firm to conduct an independent investigation into the affairs of CMC. The report arising from the investigations revealed inadequacies in the manner the books of accounts at CMC were kept and the manner the external audit was conducted. As a consequence of the complaint the 1st Respondent's Council (the Council) considered the allegations against the concerned accountant and auditors the 2nd, 3rd and 4th Respondents respectively and thereafter referred the complainant to its Disciplinary Committee. The Disciplinary Committee held that the 2nd Respondent was negligent in the conduct of his duty as the then Finance Director and that he failed to disclose material information to the auditor which was pertinent in the conduct of their duty.

The Disciplinary Committee further resolved that the member's membership be suspended for a period not exceeding 2 years and also went ahead to impose a fine of ksh 20,000 and costs of kahs 50,000 before reinstatement and with publication. No adverse orders were made against the external auditors, the 3rd and 4th Respondents, though there were some findings of breach made by the Council against them. The Appellant being dissatisfied by the decision of the 1st Respondent's Disciplinary Committee filed the instant Appeal.

Issues

i. Whether a non-member of the Institute of Public Accountants could appeal against a decision of the Institute of Public Accountants' Disciplinary Committee.
ii. Whether the High Court had jurisdiction to hear and determine an appeal from the Institute of Certified Public Accountants' Disciplinary Committee.

Held:

1. The Appellant was not a member of the 1st Respondent as provided for under the Accountants Act. The Appellant had no right of appeal against the decision of the Disciplinary Committee. The right of appeal was the preserve of a member of the Institute who was aggrieved by the determination of the Disciplinary Committee. The Accountants Act provided the regulatory framework of the 1st Respondent as a professional body.
2. An appeal to the Court only lay as per the express provisions of section 34(1) of the Accountants Act (the Act) and only limited itself to the decisions under section 33(2) of the Act. The Disciplinary Committee being a specialized tribunal, a court was least equipped to supervise and question the technical and scientific rationale of the decisions of such specialized bodies. The role of the Court was limited to ensuring that in conducting their affairs such bodies adhered to the regulatory framework and observed legal controls and directions obtaining in constitutive Acts of Parliament.
3. The Appellant moved the Court under the provisions of section 34 of the Act therefore the orders sought to be granted could not by law be granted by the Court but by the Council upon the determination of an appeal brought under section 33(3) of the Act. The instant Appeal concerned the decision and orders of the Disciplinary Committee of the 1st Respondent and not on the decision of the Council of the 1st Respondent.
4. Any person aggrieved by the decisions made by the Council to refer the matter to the Disciplinary Committee and questioned whether and what evidence the Council of the 1st Respondent considered in making a decision to refer the matter was not appealable to the Court and could not therefore form the basis of the Appeal. The Court had no jurisdiction to hear and determine the Appeal.

Appeal struck out with costs to the Respondents.

The Capital Markets Authority has Discretion in Discharging its Wide Statutory Functions and Objectives in Development of an Orderly, Fair and Efficient Capital Markets

Martin Henry Forster v Capital Markets Authority

Constitutional Petition No 299 of 2015

Martin Henry Forster *v* Capital Markets Authority

High Court at Nairobi
EC Mwita, J

November 29, 2017

Constitutional Petition No 299 of 2015

Constitutional Law *– Bill of Rights – right to a fair administrative action – whether the Respondent's violated the Petitioner's rights under article 47(1) of the constitution had been violated on the claim that all allegations, determinations, resolutions, sanctions, penalties and offences imposed against him were illegal, unconstitutional and invalid – Constitution of Kenya, 2010, article 47.*
Statutes *– interpretation of statutory provisions – definition of the terms audit and auditor under the Capital Markets Act – what was the definition of the terms audit and auditor under the Capital Markets Act – Capital Markets Act.*
Jurisdiction *– jurisdiction of the High Court – capital markets – matters under the Capital Markets Tribunal – whether the Court had jurisdiction to hear the matter claimed to be out of the Tribunal's mandate – Capital markets Act Cap 485 Laws of Kenya, section 35A.*
Capital Markets Law *– capital markets – objectives of the Capital Markets Authority – appointment of auditors – whether the appointment of the Forensic Investigator instead of an auditor specifically was lawful under the mandate of the Tribunal – Capital markets Act Cap 485 Laws of Kenya, section 11.*
Capital Markets Law *– capital markets – delegation of functions of the Capital Markets Authority – appointment of an ad hoc committee – whether the Respondent acted ultra vires powers of the its Board on appointment of an Ad hoc committee not within the Board – Capital markets Act Cap 485 Laws of Kenya, section 11A, 14.*

Brief facts

The Petitioner was the Group Managing Director and Chief Executive Officer of CMC Holdings Limited (CMCH), a motor vehicle dealer and assembly company formerly listed in the Nairobi Securities Exchange, and regulated by the Respondent. After his departure, there ensued wrangles and disputes within the Board of Directors of CMCH pitting directors against one another amid allegations of non–compliance with corporate governance guidelines, conflict of interest and fraud. In view of the said wrangles, the Respondent intervened and took administrative actions including suspending CMCH's shares from trading in the Nairobi Securities Exchange (NSE). The Respondent further appointed Webber Wentel, a South African Law firm to conduct forensic investigations into certain aspects of financial operations of CMC. Webber Wentel carried out investigations and submitted its report to the Respondent which raised various allegations against the Petitioner and other directors of CMCH which led the Respondent to take administrative actions against the Petitioner prompting the Petition.

Issues

i. Whether the High Court had jurisdiction to hear the matter claimed to be out of the Tribunal's mandate.
ii. Whether the appointment of the Forensic Investigator instead of an auditor specifically was lawful under the mandate of the Tribunal.
iii. Whether the CMA acted ultra vires powers of the its Board on appointment of an *Ad hoc* committee not within the Board.
iv. Whether the Respondent's violated the Petitioner's rights under article 47(1) of the Constitution had been violated on the claim that all allegations, determinations, resolutions, sanctions, penalties and offences imposed against him were illegal, unconstitutional and invalid.

v. What was the definition of the terms audit and auditor under the Capital Markets Act.
vi. Whether CMA acted ultra vires its powers in appointing a forensic investigator which was allegedly not contemplated in the Capital Markets Act.
vii. Whether the existence of an alternative remedy would have been efficatious in the determination of the issue which which was constitutional in form and substance.
viii. Whehter the South African law firm appointed to undertake investigations on the activities of CMC was in violation of section 11(3)m of the Capital Markets Act because it was not an audit firm.
ix. Whether CMA could delegate its functions to an *ad hoc* committee to consider a forensic report.
x. Whether the Petitioner's right to fair hearing had been violated in the circumstances.

Relevant Provisions of the Law
Fair Administrative Act No 4 of 2015
Section (2) – *Interpretation*

In this Act, unless the context otherwise requires – interpretation
"administrative action" includes –
(i) the powers, functions and duties exercised by authorities or quasi – judicial tribunals; or
(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Section 7(1) – *Institution of proceedings*

Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to:
(a) a court in accordance with section 8; or
(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Section 9 – *Procedure for Judicial Review*

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Capital Markets Act Cap 485 Laws of Kenya
Section 11 – *Objectives of the Authority*

(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—
(h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market;
(m) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;

Section 11A – *Delegation of functions*

(1) The Authority may delegate any of its functions under this Act to—
(a) a committee of the Board;

(b) a recognized self regulatory organization; or
(c) an authorized person.

(2) The Authority may, at any time revoke a delegation made under this section.

(3) A delegation made under this section shall not prevent the Authority from performing the delegated function.

Section14 – *Committees*

(1) The Authority may appoint committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority, and may delegate to any such committee such of its powers as the Authority may deem appropriate.

Section 35A – *Establishment of the Capital Markets Tribunal*

(4) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.

Held:

1. A reading of section 35A of the Capital Markets Act (the Act) would have seemed to suggest that the actions targeting the Petitioner were outside the ambit of the tribunal given that the section dealt with shares in the Stock Exchange. However there was section 35A(4) which was more general and gave the tribunal mandate to deal with appeals from the decisions of the Respondent, its officers and or committees. It was clear that the Tribunal had power to deal with appeals from such decisions as the Respondent or its committees could make without any distinction.
2. In the instant case the Petitioner complained that the actions by the Respondent were invalid and illegal and further that his rights under article 47(1) of the constitution had been violated. In the context of section 35A, of the Act the tribunal could not deal with issues of legality, validity and or constitutionality of actions either of the Respondent, its officers or committees which was the mandate of the Court. Looking at the Petition, the Petitioner alleged breach of his fundamental rights and freedoms and also questioned the fairness, validity, legality and constitutional propriety of the Respondent's administrative action. It was for that reason that the Court had been called upon to intervene. For that reason therefore, that was a proper case for the Court to assume jurisdiction and investigate the alleged violations bearing in mind the above provisions.
3. There was then a thin difference between judicial review and constitutional petitions given the express constitutional provision in article 23(3) that one of the remedies the Court could grant when considering applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights was judicial review.
4. The Court had unlimited original jurisdiction in civil and criminal matters in terms of article 165(3) of the Constitution and not least 165(3)(b) which gave the court jurisdiction to determine a question of whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened. The Petitioner had in effect alleged that by taking those administrative actions, the Respondent had violated his fundamental freedoms. For the above reasons, the Petition was properly before the Court for adjudication.
5. The existence of an alternative remedy, in the case, the Tribunal, would not have been efficacious because the High Court did not share with it the powers under article 165 of the Constitution. The issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court.

6. The Petitioner contended that the appointment of Webber Wentel a South African law firm to carry out forensic investigations on the activities within CMC was in violation of section 11(3)(m) of the Act because it was not an auditor or audit firm. The Act neither defined the word auditor nor audit which left the issue in the hands of the Respondent. What was important however was that the section stated that the Respondent could appoint an auditor to carry out specific audit of financial dealings of a publicly listed firm.
7. CMA appointed a forensic investigator to do the work it wanted done. The Petitioner did not adduce evidence to show that Webber Wentel did not possess the requisite experience to undertake the work it was assigned to do. For the Petitioner to succeed, he would have had to show through evidence that CMA took an action that was prohibited by law and not merely that it appointed a forensic investigator as opposed to an auditor.
8. The Petitioner relied on the dictionary definitions of the words auditor, audit, and Forensic investigation to argue that CMA acted *ultra vires* its powers in appointing a forensic investigator, which in his view, was not contemplated by the Act. However, in a case like that which called for interpretation of provisions of a statute, one had to look at the wider purpose of the Act or statutory provision rather than give a section of a legislation a dictionary interpretation which could most likely have distorted the meaning of the provision thus the intention of the legislature. One of the canons of statutory interpretation was a holistic approach. No provision of any legislation should be treated as stand-alone. An Act of Parliament should be read as a whole, the essence being that a proposition in one part of the Act was by implication modified by another proposition elsewhere in the Act.
9. The oft repeated statement that the words and expressions used in a statute had to be interpreted according to their ordinary meaning was the statement that they had to be interpreted in the light of their context. It could be useful to stress two points in relation to the application of the principle. The first was that the context as used was not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted.
10. Often, of importance was matter of the statute its apparent scope and purpose and within limits of its back ground. The statute or statutory provision should be given a purposive interpretation by looking at the entire statute in order to ascertain the true legislative intent in enacting that particular legislation. A statute was best interpreted when it was known why it was enacted. With that knowledge, the statute had to be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute was looked at, in the context of its enactment, with the glasses of the statute – maker, provided by such context, its scheme, the sections, clauses, phrases and words could take colour and appear different than when the statute was looked at without the glasses provided by the context. With those glasses the Act had to be looked at as a whole and discover what each section, each clause, each phrase and each word meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute could be construed in isolation. Statutes had to be construed so that every word has a place and everything was in its place.
11. The Court should examine every word of a statute in its context and had to use context in its widest sense. Applying the principles flowing from the above decisions, it behoved the Court to give the statute a holistic examination including looking at its preamble to the Act to discern the legislative intent of enacting the Act. The preamble to the Act stated that the Act established a Capital Markets Authority for the purpose of promoting regulating and facilitating the development of an orderly, fair and efficient capital Markets in Kenya and for connected purpose.
12. Taking the preamble into context as well as the objectives of CMA under the Act, section 11(3)(m) gave the CMA the mandate to appoint an auditor to check the financial dealings of a listed public company, the object being to establish whether the financial institution complied with

regulations if such action was deemed to be in the best interest of the investors. Furthermore, section 11(3)(w) gave the CMA mandate to do all other acts as could be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its power under the Act.

13. Section 13B of the Act was wide enough for it allowed the Respondent whether on its own motion or upon a complaint, and if it had reason to believe that there could have been an offence or malfeasance committed in a regulated company, to appoint a suitably qualified person to conduct investigations into the matter on behalf of the Authority. With that in mind, CMA took action to establish whether CMC, a listed company, was conducting its affairs in conformity with the law regulating listed companies following the revelations that all could not have been well within that Company. To that extent, therefore, the CMA acted within its mandate and there would be no basis to hold that her action was *ultra vires*, illegal or invalid simply because it appointed a forensic investigator as opposed to an auditor.
14. CMA, while exercising its mandate under section 11 in general and section 11(3)(m) of the Act in particular, and taking into account section 11(w), the appointment of a forensic investigator was deemed to be suitable and for the best interest of investors and it would have been improper to take a narrow interpretation of the word auditor to exclude a forensic investigator bearing in mind that CMA's overall mandate was to promote regulate and facilitate the development of an orderly, fair and efficient capital Markets in the Country.
15. CMA did nit violate section 11(3)(h) or (m) of the Act when it appointed Webber Wentel to undertake forensic investigations in the affairs of CMC. Its actions were not *ultra vires* either, because the law allowed the Authority to take actions that were deemed to be in the best interest of investors, for that was why CMA existed. In the circumstances, there were also no sufficient grounds to persuade the Court to hold that the appointment of Webber Wentel to conduct forensic investigations was unreasonable under the Wednesbury principle as contended by the Petitioner since that was an action CMA was allowed by statute to take and there was nothing unreasonable about it.
16. Sections 25A and 26 of the Act had allowed the CMA to impose sanctions against employees, director or listed companies form breach of provisions of the Act, regulations or guidelines made thereunder. According to CMA's Ad Hoc Committee Rules of Procedure, the relevant terms of reference for the Committee were in summary to consider the Webber Wentel investigation findings and determine the validity of the allegations against directors of CMC, to give a fair and reasonable opportunity for the past and current Directors (whether executive or non executive) of CMC and any other person the committee could have deemed necessary to be heard and defend themselves on the allegations attributed to them, the ad hoc committee was to give recommendations to the Board of the Authority on action to be taken, if any, against the past or current directors of CMC (both executive an nonexecutive) or any other person, on ways to improve the Capital Markets. The recommendations of the ad hoc committee were to be considered by the Board for enforcement or other appropriate action.
17. The Committee's role was to consider the allegations, give the parties adversely affected a hearing and make recommendations to CMA for possible enforcement. The *ad hoc* committee was not to take and did not take enforcement action. It was upon consideration of the recommendations that CMA would then take enforcement action if any. Indeed after the Respondent received the recommendation of the ad hoc committee, they issued the Petitioner with the enforcement action.
18. The Petitioner's contention that all allegations, determinations, resolutions, sanctions, penalties and offences imposed against him were illegal, unconstitutional and invalid was too general to be correct. Such a general finding would in effect invalidate the Court's earlier finding that the appointment of the forensic investigator (Webber Wentel) was properly done and therefore, its investigations and the report were valid. The appointment of Webber Wentel to carry out forensic

investigation was within the mandate of the Respondent and was therefore lawful and valid.

19. Section 14(1) of the Act gave CMA mandate to appoint a committee to deal with general or specific functions specified by CMA. From a reading of the section, the Committee did not necessarily have to be that of the Board because the section was clear that CMA could appoint a committee of its own or otherwise. That meant members of the Committee could be from within or without. If the Legislature's intention was that members of the Committee had to be from within the Board only, nothing could have been easier than saying so. That was, the Legislature could not have used the words, The Authority may appoint committees, whether of its own members or otherwise.
20. A reading of sections 11A(l) and 14(1) of the Act was clear that the two sections gave CMA leeway to delegate its functions to various persons including a Committee either of the Board or otherwise to perform functions on behalf of the Respondent. CMA was within its mandate when it appointed the *ad hoc* Committee. The Court also unable to fault CMA for delegating its functions to the *ad hoc* committee to consider the forensic investigations report submitted by Webber Wentel by invoking its statutory powers under the Act. In enacting sections 11 A and 14, the legislature had to have been conscious of the fact that for the Respondent to effectively have discharged its wide statutory functions of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market, it was necessary to give it discretion to appoint *ad hoc* committees from within and without and delegate its functions to such committees for effective discharge of the delegated functions, otherwise CMA on its own would be overwhelmed in the performance of those duties. Such discretion would have enabled the Respondent to call on persons with relevant expertise to perform some tasks on its behalf for purposes of fulfilling its wide mandate under section 11(3) of the Act.
21. In that respect, interests of investors were paramount and CMA had to bear in mind those interests when taking such actions. There was nothing wrong in CMA's decision to appoint some persons from outside the Board into the *Ad hoc* committee and such an appointment could not have been illegal, invalid or unconstitutional in so far as CMA acted pursuant to powers conferred to it by the Act.
22. The appointment was within the law and the Respondent exercised its mandate as required by statute hence there was no illegality. Section 13B of the Act was also wide enough to cover CMA's actions. The *Ad hoc* Committee was also properly constituted and the Petitioner's suggestion that the constitution of the Committee was done *ultra vires* the Board's mandate was without basis. There could not have been generalization of all actions taken by CMA and term them illegal and invalid.
23. The requirement for fair administrative action was now a constitutional right pursuant to article 47(1) of the Constitution. Article 47(1) provided that every person had the right to administrative action that was expeditious, efficient, lawful, and reasonable and procedurally fair. The purpose of article 47(1) was to subject administrative actions by administrative bodies to constitutional test of speed, efficiency, lawfulness, reasonableness and procedural fairness in order avoid administrative bodies applying caprice or surprise when taking administrative action against those under them.
24. Article 47(1) of the Constitution marked an important and transformative development of administrative justice for, it not only lay a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenched the right to fair administrative action in the Bill of Rights. The right to fair administrative action was a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies were now subjected by article 47(1) to the principle of

constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.

25. Article 47 of the Constitution was intended to subject administrative processes to constitutional discipline hence relief for administrative grievances was no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but was to be measured against the standards established by the Constitution. The right of hearing was of fundamental importance to the system of justice and even when they were not expressed specifically in any law the supreme position of the Constitution had to be implied in every Act especially, the right to due process and it could not be taken away. Constitutional rights could not be taken away without due process.
26. The Constitution itself had conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause had the effect of constitutionalizing what had previously been common law grounds of judicial review of administrative action. That meant that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action or adjudication of a refusal of a request to provide reasons for administrative actions involved the direct application of the Constitution.
27. The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) of the Constitution was dependent on the character and limits of the administrative discretion conferred on the administrator by the Constitution or law and its application to the facts of the case. So, when article 47(2) was considered together with the role of JSC under article 165(4), it was clear that JSC was not required to keep a detailed official record of the proceedings nor did it have a legal duty to provide its internal working documentation to CMA. It followed that the request for the full report, recommendations and reasons for the decision, was misconceived in the circumstances of the case. Furthermore, the right to be given written reasons under article 47(2) arose, if the right had been or was likely to be adversely affected by the administrative action. In other words, the administrative action had to have adversely affected the right or was likely to adversely affect the right.
28. The investigating body was under a duty to act fairly; but that which fairness required depended on the nature of the investigation and the consequences which it could have on the persons affected by it. The fundamental rule was that, if a person could be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should have been told the case against him and be afforded a fair opportunity of answering it. The investigating body was however the master of its own procedure. It needed not hold a hearing. It could do everything in writing. It needed not allow lawyers. It needed not put every detail of the case against a man. Suffice it if the broad grounds were given. It needed not name its informants. It could give the substance only.
29. The Petitioner was given an opportunity to be heard and that in terms of article 47(1) of the Constitution, CMA acted expeditiously, lawfully and fairly. The notice given to the Petitioner was also reasonable given that the Petitioner was aware of the allegations and indeed appeared before the *ad hoc* Committee and made submissions which were considered by the Committee. The Petitioner could not claim that he was not given a hearing. In any case, if the Petitioner felt that the notice requiring him to appear before *ad hoc* Committee was too short, he could have appeared before it and asked for an adjournment since the matter was then in the hands of that Committee. As regards the issue of an inconvenient date, it was a matter of practice even in a court of law or before any tribunal for that matter, when an inconvenient date was given, a party could have appeared before the body and request for an adjournment. There was no reason why such practice could not have been extended and fetched upon any adjudicator or decision maker.

That was not or would not have been so difficult to the Petitioners or their counsel.

30. CMA acted in accordance with the provisions of the Act when it appointed the forensic investigator Webber Wentel hence its report was valid and legal. Further, the appointment of the *ad hoc* Committee by CMA was done in compliance with the provisions of the Act. The Petitioner was accorded an opportunity to be heard and indeed appeared before the *ad hoc* Committee which gave him a hearing and he even made written submissions in so far as could be seen from depositions in CMA's officers' affidavits. The right to be heard had to be determined according to the statutory scheme which set out the duties of the statutory corporation and the rights of the subject. That was followed.

Petition dismissed with costs.

Former Directors are Liable for the Regulatory Infractions during their Tenure

Republic v Capital Markets Authority *ex-parte* Joyce Ogundo

Miscellaneous Application No 606 of 2016

Republic *v* Capital Markets Authority *ex-parte* Joyce Ogundo

High Court at Nairobi — January 16, 2018
GV Odunga, J

Miscellaneous Application No 606 of 2016

Statutes – *interpretation of statutes – interpretation of section 2 of the Companies Act (repealed) – definition of directors – whether the word director applied only to serving directors or also encompassed former directors – Companies Act (repealed), cap 486 Laws of Kenya, section 2.*
Company Law *– sanctions and penalties – Imposition of sanctions and penalties – whether former directors of a corporation could be held criminally liable for the actions of the corporation as provided by the Act – Capital Markets Act, section 25A, Penal Code, section 23.*

Brief facts
The Applicant was previously a director of Uchumi Supermarkets Limited (USL).

On August 31, 2016, the Respondent Capital Markets Authority (CMA) brought allegations against the Applicant that, by reason of having sat in USL board meetings, she had violated certain provisions of the Capital Markets Act (the Act), the Capital Markets (Securities) (Public Offers Listing and Disclosures) Regulations (the Regulations) and the Capital Market Guidelines on Corporate Governance by Public Listed Companies (the Guidelines).

The Respondent issued a Notice to Show Cause (NTSC) calling upon the Applicant to appear before it and show cause why sanctions could not be issued against her in accordance with sections 25A and 11(3)(cc) of the Act**.**

The NTSC alleged that the Applicant sat as a member of the Board of Directors of USL when certain decisions were allegedly taken which according to the Respondent violated certain provisions of the Act as well as some regulations and guidelines made thereunder.

Despite objections from the Applicant, the Respondent summoned her to appear before it on December 7, 2016 for hearing which hearing, if allowed would not only have violate her fundamental rights and freedoms but would have also been illegal and *ultra vires.*

The Applicant was constrained to institute the proceedings to protect her interests lest she was subjected to irreparable damage.

Issues
i. What was the scope of Judicial Review Proceedings?
ii. Whether the Wednesbury test of unreasonableness was met in the findings by CMA?
iii. Whether the word director applied only to serving directors or also encompassed former directors.
iv. Whether the decision by CMA met the thresherd of irrationality inorder to justify the interference by a judicial review court.
v. Whether the word director under the statute applied only to serving directors or also encompassed former directors.
vi. Whether the manner in which the Applicant was treated offended the rules of natural justice.
vii. Whether former directors of a corporation could be held liable for the actions of the corporation as provided by the Act.
viii. Whether the Notice to show cause (NTSC) issued by CMA asking the Applicant to show cause why santions could not be issued against her violated section 4 of the Govenment Proceedings

Act which immunized civil servants from liability while in employment.

ix. Whether the overlap of functions of CMA exposed it to a reasonable possibility of bias in the dealings.

x. Whether the sanctions imposed on the Applicant for contravening repealed laws were illegal and *ultra vires* the Capital Markets Authority.

Relevant Provisions of Law

Interpretation and General Provisions Act, Cap. 2, Laws of Kenya

23 – *Provisions respecting amended written law, and effect of repealing written law*

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not –

(f) revive anything not in force or existing at the time at which the repeal takes effect; or

(g) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(h) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(i) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(j) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

Companies Act, Cap 486 Laws of Kenya

Section 2 – *Interptretation*

Director – director includes any person occupying the position of director by whatever name called

Capital Markets Act, No 17 of 1989

Section 11(3) – *Objectives of the Authority*

(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—

(a) advise the Minister on all aspects of the development and operation of capital markets;

(b) implement policies and programmes of the Government with respect to the capital markets;

(c) employ such officers and servants as may be necessary for the proper discharge of the functions of the Authority;

(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non – compliance with the Authority's requirements or directions, and such sanctions may include….

h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a license and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market;

25A. *Imposition of additional sanctions and penalties*

Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)

26. *Suspension or revocation of a license*

(8) The Authority shall, in all cases where the Authority takes action under sections 25 and 26, give the person affected by such action an opportunity to be heard.

Penal Code, Cap 63 Laws of Kenya

Section 23 – *Offences by corporations, societies, etc.*

23. Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002

Section 6 – *Issuer to publish Prospectus*

(2) The issuer shall, before the time of publication of the prospectus, obtain approval of the Authority that the Information Memorandum complies with these Regulations and shall deliver a copy thereof to the Registrar for registration.

19. *Continuing obligations*

(3) The information required to be disclosed under these Regulations shall be disclosed within twenty – four hours of the event, simultaneously to the Authority, the securities exchange at which the issuer's securities are listed, if applicable, and to the public during nontrading hours of the relevant market segment.

Section 30(D)(1)(a) –*Criminal Liability for a defective prospectus*

1) A person who—

(a) makes a false, misleading or deceptive statement in a prospectus; or

……..

commits an offence and shall be liable on conviction—

in the case of an individual, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both; and

*(ii) in the case of a company, to a fine not exceeding thirty million shilling*s.

Held:

1. Judicial review was not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose was to ensure that the individual was given fair treatment by the authority to which he had been subjected and not to ensure that the authority, after according fair treatment reached on a matter which it was authorized by law to decide for itself, a conclusion which was correct in the eyes of the Court. Therefore, judicial review was a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It did not allow the court of review to examine

the evidence with a view of forming its own view about the substantial merits of the case. It could be that the tribunal whose decision was being challenged had done something which it had no lawful authority to do. It could have abused or misused the authority which it had. It could have departed from procedures which either by statute or at common law, as a matter of fairness, it ought to have observed.

2. It was clear that the aforesaid grounds challenged the merit findings by CMA. Accordingly, the said grounds fell outside the ambit of the judicial review jurisdiction. Whereas in certain cases the Court was entitled to delve into limited merit investigations in order to determine whether the decision was Wednesbury unreasonable, it was trite that it was not mere unreasonableness which could justify the interference with the decision of an inferior tribunal. Unreasonableness was a subjective test and therefore to base a decision merely on unreasonableness placed the Court at the risk of determination of a matter on merits rather than on the process. To justify interference, the decision in question had to be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law could have arrived at such a decision. Such a decision ought to have been deemed so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided could have arrived at it.
3. Whereas the Court was entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness was met, it was only when the decision was so grossly unreasonable that it could have been found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. The Courts could only interfere with the decision of a public authority if it was outside the band of reasonableness. CMA's decision, in respect of the aforesaid grounds, did not meet the threshold of irrationality in order to justify interference by a judicial review Court.
4. The sanctions imposed by CMA were for the alleged contravention of the Guidelines, which laws had since been repealed by The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015. The Applicant therefore contended that she was being sanctioned for contravening repealed laws which action was not only illegal but was also *ultra vires* the Capital Markets Authority**.**
5. Under section *2* of the Interpretation and General Provisions Act, a written law was defined to include any subsidiary legislation for the time being in force. Therefore, the Guidelines fell within the definition of a written law and as the alleged culpability arose during the subsistence of the 2002 Guidelines, the applicable law was the one comprised in the said Regulations. Therefore, nothing turned on that issue. It was the Applicant's case that sanctions could only be imposed upon a sitting director and as she was no longer a director of USL, CMA's action of imposing sanctions against her had no legal basis.
6. The question was whether the word director applied only to serving directors or also encompassed former directors. In order to answer the issue, it was necessary to restate the principles guiding statutory interpretation. It was an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute had to be considered as a whole and sections of an Act were not to be read in isolation and that when a question arose as to the meaning of a certain provision in a statute, it was not only legitimate but proper to read that provision as a whole. All the constituent parts of a statute were to be taken together and each word, phrase or sentence was to be considered in light of the general purpose of the Act itself hence the words, phrases occurring in a statute were to be taken not in isolation or in a detached manner dissociated from the context, but were to be read together and construed in the light of the purpose and object of the Act itself.
7. Under section 2 of the Act, director had the meaning assigned to it in the Companies Act (Cap

486) while under section 2 of the Companies Act, director included any person occupying the position of director by whatever name called. What that meant was that the word director was not restricted to persons occupying the position of director. Section 25A of the Act had to be read together with section 11(3)(cc)(i) thereof which empowered CMA to 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 could include levying of financial penalties, proportional to the gravity or severity of the breach, as could be prescribed.

8. It was noteworthy that section 25A of the Act was expressed to be without prejudice to any other provision of the Act which clearly meant that section 25A could not be read in isolation to section 11(3)(cc)(i) which was expressed in very wide terms as opposed to the literal reading of section 25A.To subject section 11(3)(cc)(i) to section 25A could have the effect of negating the objective of the Act and render it a dead letter of the law since directors could simply evade the penal sanctions by simply stepping aside as it were when faced with imminent action.
9. Former directors were culpable if what was complained of occurred under their watch. As to whether that was the position was a matter within the powers of CMA and not the Court sitting as a judicial review Court. Going by the said definition, an alternate director was a director for the purposes of the section since the section described a director as including any person occupying the position of director by whatever name called. An alternate director was clearly a director and had to be held responsible for his or her actions, while acting as such.
10. It was not alleged that an alternate director had no power to make independent decisions other than those which he or she had been directed to make by the substantive director. It was in that respect that article 84 of the USL'S articles of association had to be understood when it provided that every person acting as an Alternate Director had to be an officer of the Company and he could not be deemed to be the agent of the Director by whom he was appointed. Therefore, article 85 of the USL Articles of Association properly provided that an alternate director could be entitled to receive notices of all meeting of the Board and to attend and vote as a director at any such meeting at which the director appointing him was not personally present and to perform all the functions of his appointer as a director in his absence, including that of being counted as part of a quorum at any such meeting.
11. With respect to the allegation that the NTSC violated section 4 of the Government Proceedings Act which immunized Civil Servants from liability while in the ordinary course of employment, it was not contended that the appointment of the Applicant as an alternate director was by virtue of her position in the civil service. In the absence of such allegation it had to be presumed that the *ex parte* Applicant's role as a director of USL was separate from her role as a Civil Servant in her capacity as the Director of Trade in the Ministry of Trade and Industry. That was evidenced by the fact that she earned separate Board allowances for her role as a Board Member of USL which allowances were distinct from her salary as a civil servant. It was contended that by purporting to impose sanctions and penalties for alleged commissions of criminal offences by USL (acting through its Board of directors) under sections 30D (1)(a) and 34(b) of The Act, CMA purported to exercise an original criminal jurisdiction which was reserved solely for the High Court and Magistrate's Court under article 165(3) of the Constitution and section 6 of the Magistrate Courts Act, 2015.
12. Section 11(3)(cc)(i) of the Act was clear in its terms. It expressly empowered CMA to 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 could include levying of financial penalties, proportional to the gravity or severity of the breach, as could be prescribed. As to whether such a provision was constitutional, it was not within the ambit of the proceedings for the Court to make such a determination since no such relief was sought in

the proceedings.

13. CMA's functions were authorized by the relevant statute and the statute authorized overlapping functions. Administrative bodies were created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature could decide that in order to achieve the ends of the statute, it was necessary to allow an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping was authorized by statute, then, to the extent that it was authorized, it would not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias had been sufficiently demonstrated
14. Though CMA claimed to derive jurisdiction to issue the NTSC and proceed with its hearing from section 11(3)(cc) as read with section 25A of the Act, section 11(3)(cc) gave the Respondent jurisdiction to impose sanctions for breach of the provisions of the Act, or regulations made thereunder or for non – compliance with the authority's requirements or direction. According to the Applicant, that section made it clear that CMA could only issue sanctions where the following conditions were fulfilled; to wit, where a provision of the said Act, or regulations made thereunder has been breached (or where any directions or requirements given by CMA) had been breached (which was not relevant for the purposes of the case).
15. No breach of a statute or legislative instrument was possible where the legislative provisions alleged to have been breached did not exist and the legislative provisions alleged to have been breached did not impose any duty whatsoever capable of being breached on the person alleged to have breached it as was the position in the case. To make a finding in the manner submitted by the applicant Could amount to the Court sitting on a merit decision of CMA, and that was not the function of a judicial review Court.
16. As regards the question whether the manner in which the Applicant was treated offended the rules of natural justice, it was clear that the Applicant was being called upon to show cause before the decision was arrived at. It was not in doubt that under section 26(8) of the Act CMA had powers to entertain the NTSC. Section 26(8) which guaranteed the opportunity to be heard was clearly quoted in the NTSC dated August 31, 2016. The Petitioner was clearly required to respond in writing within 14 days from the date of the letter. The letter contained specific allegations which the Petitioner was required to respond to. The Petitioner was given up to September 14, 2016 to respond but instead of responding on September 15, 2016 he filed the Petition. The Petitioner moved to court too early to stop the process and as at the time of filing the petition, there was nothing to show that the steps taken by CMA were contrary to the statutory mandate of the first Petitioner nor had the Petitioner proved infringement of any fundamental rights or threats to the infringement to warrant the courts intervention.
17. As to whether the directors of a corporation could be held liable for the actions of the corporation the law was clear. Directors owed a fiduciary duty to the company which fiduciary duties were broadly defined to include a duty of loyalty and a duty of care whose main elements included
    (i) That the directors had to remain within the scope of the powers which had been conferred upon them.
    (ii) That directors had to act in good faith in what they believed to be in the best interest of the company.
    (iii) That they had to not fetter their discretion as to how they acted.
    (iv) That they could not put themselves in a conflict of interest situation out of a transaction with the company, out of the director's personal exploitation of the company's property, information or opportunities, or out of receipt from a third party or benefit for exercising their directorial functions in a particular way.
18. The Applicant admitted that at the material times she was an alternate director of USL representing the PS and she had not contended that she was not charged with, or concerned or

acting in, the control or management of the Company. Even if she did so, that was an issue for determination by CMA. She however claimed that other persons were also involved in the said management hence she ought not to have been selectively charged. It would have been upon the Applicant to show that through no act or omission on her part, she was not aware that the offence was being or was intended or about to be committed, or that she took all reasonable steps to prevent their commission at the time she was called upon to show cause. Whether or not she did so and whether or not she could be believed could not be a ground for judicial review as opposed to an appeal. The directors were not absolutely immune from culpability for their actions, though to prove them culpable, certain conditions had to be met. As to whether the same would be met was not within the scope of judicial review proceedings.

19. CMA countered that all former directors of USL and some senior managers were issued with Show Cause Letters; subjected to show cause hearing and after an objective assessment of their submissions CMA determined the culpability and issued them the appropriate enforcement sanctions. Therefore, the Court could not conclusively determine that the Applicant was being unfairly subjected to a selective process.
20. The Applicant had not disclosed the role if any played by the other directors of USL in the subject transaction in order to justify the Court in finding that by not levying charges against the said Directors, a position CMA's denied, the charges levied against the Applicant was selective. Unless the Respondent's decision was shown to violate the provisions of the Constitution in the manner in which persons were being selected to face charges, the CMA's decision could not be faulted merely on the basis that some directors were allegedly left of the hook. Based on the material placed before the Court in the proceedings, the Court could not say that the roles played by the persons whom the State intended to call as its witnesses in the subject transaction in Okungu's Case were the same or similar as the role, if any, played by the other directors of USL.
21. CMA, as long as its decision did not violate the letter and the spirit of the Constitution was entitled to determine whom to charge, based on its own review of the evidence and the mere fact that it made one decision and not the other was not a ground for interference. In this case, the Court could not be seen to make adverse comments against the said directors for the obvious reason that they were not parties to the proceedings. To expect the Court to make adverse determinations against the said persons could amount to a violation of the rules of natural justice which the Court was sworn to protect. It was clear that the said regulations did impose an obligation on the issuer which could well be a basis of an action under the Act whether against the Company itself or its directors as appropriate.
22. While the NTSC alleged that the Applicant (or USL Board) had breached sections 30D(1)(a) and 34(b) of the Act, the particulars of charges levelled against the Applicant in the NTSC itself indicated that the Applicant was accused of breaching totally different laws which actually did not exist, whether in The Act itself or elsewhere in the Laws of Kenya. although section 30D(1)(a) of the Act provided that a person who made a false, misleading or deceptive statement in a prospectus committed an offence, the offence with which the Applicant was charged with in the NTCS was that of facilitating or omitting to prevent the provision of misleading or deceptive statement in the information memorandum which was not outlawed by the same or any other provision.
23. While section 34(b) of the Act criminalized furnishing or publishing information or return the content of which were known to be untrue, incorrect or misleading because of material omission, the crime with which the Applicant was charged and for which she was required to show cause was that of facilitating and/or omitting to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading, an offence not outlawed by the said section.
24. CMA contended that since the Applicant was yet to show cause, that application was premature.

Despite the patent defect in the charge, CMA urged the Court to allow the process however defective to continue. To permit the proceedings in question to proceed in the circumstances of the case was, likely to violate the Applicant's fundamental rights.

25. It was clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi criminal proceedings in respect of an act which did not in law constitute an offence or an offence under the legal provisions he was charged. Where public authorities abused their powers, acted unfairly or irrationally the Court was empowered to intervene and bring to an end such action. The impugned proceedings ought not to have been permitted to proceed in the manner contemplated.

Application allowed

Orders

i. An order of Certiorari removing into the Court for the purposes of quashing the Notice to Show Cause dated August 31, 2016 which Notice was quashed.

ii. An order of prohibition restraining the Respondents by themselves, their agents or employees from proceeding with the Notice to Show Cause dated August 31,2016.

iii. As the merits of the allegations had not been determined, there was no order as to costs.

It is an Abuse of Power to Subject a Person to Criminal or Quasi Criminal Proceedings in Respect of an Act which in Law is not an Offence or an Offence under Legal Provisions he is Charged

Republic v Capital Markets Authority *ex parte* James R Murigu and Barth Ragalo

Misc. Application No 607 of 2016

Republic *v* Capital Markets Authority *ex parte* James R Murigu and Barth Ragalo

High Court at Nairobi
GV Odunga, J

January 16, 2018

Misc. Application No 607 of 2016

Company Law *– directors – sanctions and penalties – Imposition of sanctions and penalties – whether former directors of a corporation could be held criminally liable for the actions of the corporation as provided by the Act – Capital Markets Act, section 25A, Penal Code, section 23.*

Brief facts

The Applicants were at one time directors of Uchumi Supermarkets Limited (USL). on August 31, 2016, the Respondent brought allegations against the Applicants that, by reason only of having sat in USL board meetings, they had violated certain provisions of the Capital Markets Act (the Act), the Capital Markets (Securities) (Public Offers Listing and Disclosures) Regulations (the Regulations) and the Capital Market Guidelines on Corporate Governance by Public Listed Companies (the Guidelines). Accordingly, the Respondent issued a Notice to Show Cause (NTSC) calling upon the Applicants to appear before it and show cause why sanctions could not be issued against them in accordance with sections 25A and 11(3)(cc) of the Act.

Despite objections from the Applicants, the Respondent proceeded with the NTSC and purported to issue punitive sanctions against the Applicants and then proceeded to sanction them by fining them Kshs 660,000 and Kshs 855,000 respectively as well as banning them from holding office as directors and/or key officers of a public Listed Company and/or issuers, licensees or any approved institutions of the Capital Markets Authority.

The Applicants therefore contended that they were being sanctioned for contravening repealed laws which action was not only illegal but was also *ultra vires.*

Issues

i. What was the scope of jurisdiction of the judicial review court.
ii. Whether the manner in which the Applicants were treated offended the rules of natural justice.
iii. Whether the directors of a corporation could be held criminally liable for the actions of the corporation.
iv. Whether the Respondent's decision met the threshold of irrationality in order to justify interference by a judicial review Court.
v. Whether the Applicants were being sanctioned for contravening repealed laws which action was illegal and also *ultra vires* the Capital Markets Authority

Relevant Provisions of Law

Interpretation and General Provisions Act, Cap 2, Laws of Kenya

23 – *Provisions respecting amended written law, and effect of repealing written law*

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not –

a) revive anything not in force or existing at the time at which the repeal takes effect; or

b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

Capital Markets Act, No 17 of 1989

Section 11(3) – *Objectives of the Authority*

(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—

(a) advise the Minister on all aspects of the development and operation of capital markets;

(b) implement policies and programmes of the Government with respect to the capital markets;

(c) employ such officers and servants as may be necessary for the proper discharge of the functions of the Authority;

(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non – compliance with the Authority's requirements or directions, and such sanctions may include….

h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a license and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market;

Companies Act, Cap 486 Laws of Kenya

Section 2 – *Interptretation*

Director – director includes any person occupying the position of director by whatever name called

25A. *Imposition of additional sanctions and penalties*

(1) Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)

26. *Suspension or revocation of a license*

(8) The Authority shall, in all cases where the Authority takes action under sections 25 and 26, give the person affected by such action an opportunity to be heard.

Penal Code, Cap 63 Laws of Kenya

Section 23 – *Offences by corporations, societies, etc.*

23. Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable

to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002

Section 6 – *Issuer to publish Prospectus*

(2) The issuer shall, before the time of publication of the prospectus, obtain approval of the Authority that the Information Memorandum complies with these Regulations and shall deliver a copy thereof to the Registrar for registration.

19. *Continuing obligations*

(3) The information required to be disclosed under these Regulations shall be disclosed within twenty – four hours of the event, simultaneously to the Authority, the securities exchange at which the issuer's securities are listed, if applicable, and to the public during nontrading hours of the relevant market segment.

Section 30(D)(1)(a) –*Criminal Liability for a defective prospectus*

1) A person who—

(a) makes a false, misleading or deceptive statement in a prospectus; or

……..

commits an offence and shall be liable on conviction—

(i) in the case of an individual, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both; and

(ii) in the case of a company, to a fine not exceeding thirty million shillings.

Held:

1. Judicial review was not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose was *inter alia* to ensure that the individual was given fair treatment by the authority to which he had been subjected and not to ensure that the authority, after according fair treatment reached on a matter which it was authorized by law to decide for itself a conclusion which was correct in the eyes of the Court.
2. Judicial review was a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It did not allow the Court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It could be that the tribunal whose decision was being challenged had done something which it had no lawful authority to do. It could have abused or misused the authority which it had. It could have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself, it could be found to be perverse, or irrational, or grossly disproportionate to what was required. The decision could be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker was required to apply. While the evidence had to be explored in order to see if the decision was vitiated by such legal deficiencies, it was perfectly clear that in a case of review, as distinct from an ordinary appeal, the Court could not set about forming its own preferred view of the evidence.
3. The duty of the Judicial Review Court was to check the Respondent's impugned decision for any illegalities, unreasonableness or procedural improprieties, that was non – compliant with the rules of natural justice.
4. It was clear that the aforesaid grounds challenged the merit findings by the Respondent. The said

grounds fell outside the ambit of the judicial review jurisdiction. Whereas in certain cases the Court was entitled to delve into limited merit investigations in order to determine whether the decision was Wednesbury unreasonable, it was trite that it was not mere unreasonableness which could justify the interference with the decision of an inferior tribunal. Unreasonableness was a subjective test and therefore to base a decision merely on unreasonableness placed the Court at the risk of determination of a matter on merits rather than on the process. To justify interference, the decision in question ought to have been so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. Such a decision had to be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided Could have arrived at it.

5. Whereas the Court was entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness was met, it was only when the decision was so grossly unreasonable that it could have been found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. The courts could only interfere with the decision of a public authority if it was outside the band of reasonableness. The Respondent's decision, in respect of the aforesaid grounds, did not meet the threshold of irrationality in order to justify interference by a judicial review Court.
6. It was the Applicant's case that the sanctions imposed by the Respondent were for the alleged contravention of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya of 2002 which laws had since been repealed by The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015. The Applicants therefore contended that they were being sanctioned for contravening repealed laws which action was not only illegal but was also *ultra vires* the Capital Markets Authority. It was however contended by the Respondent that the 2002 Guidelines were in force at the time when the ex parte Applicants committed the regulatory breaches and were hence the applicable Guidelines to the allegations facing the *ex parte* Applicants. It was explained that the 2015 Guidelines were gazetted on March 4, 2016 vide Gazette Notice No. 1420 while the events forming the basis of the allegations against the *ex parte* Applicants took place before the 2015 Guidelines came into effect. It was therefore contended that the 2015 Guidelines could not form the basis of the allegations put to the Ex parte Applicants as to do so would be to give the 2015 Guidelines retrospective effect, which laws abhorred.
7. Under section *2* of the Interpretation and General Provisions Act, a written law was defined to include any subsidiary legislation for the time being in force. Therefore, the Guidelines fell within the definition of a written law and as the alleged culpability arose during the subsistence of the 2002 Guidelines, the applicable law was the one comprised in the said Regulations. Therefore, nothing turned on that issue.
8. It was the Applicants' case that sanctions could only be imposed upon a sitting director and as they were no longer directors of USL, the Respondent's action of imposing sanctions against them had no legal basis. The question here was whether the word director applied only to serving directors or also encompassed former directors. In order to answer that issue, it was necessary to restate the principles guiding statutory interpretation.
9. It was an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute had to be considered as a whole and sections of an Act were not to be read in isolation and that when a question arose as to the meaning of a certain provision in a statute, it was not only legitimate but proper to read that provision as a whole. All the constituent parts of a statute were to be taken together and each word, phrase or sentence was to be considered in light of the general purpose of the Act itself hence the words and phrases occurring in a statute were to be taken not in isolation or in a detached manner dissociated from

the context, but were to be read together and construed in the light of the purpose and object of the Act itself.

10. Under section 2 of the Act, a director had the meaning assigned to it in the Companies Act (repealed), Cap 486 while under section 2 of the Companies Act, director included any person occupying the position of director by whatever name called. What that meant was that the word director was not restricted to persons occupying the position of director. Section 25A of the Act had to be read together with section 11(3)(cc)(i) thereof which empowered the Respondent to 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 could include levying of financial penalties, proportional to the gravity or severity of the breach, as could be prescribed. It was noteworthy that section 25A was expressed to be *without prejudice* to any other provision of the Act which clearly meant that section 25A could not be read in isolation to section 11(3)(cc)(i) which was expressed in very wide terms as opposed to the literal reading of section 25A.
11. To subject section 11(3)(cc)(i) to section 25A could have the effect of negating the objective of the Act and render it a dead letter of the law since directors would simply evade the penal sanctions by simply stepping aside as it were when faced with imminent action. former directors were culpable, if what was complained of occurred under their watch. As to whether that was the position was a matter within the powers of the Respondent and not the Court sitting as a judicial review Court.
12. It was contended that by purporting to impose sanctions and penalties for alleged commissions of criminal offences by USL (acting through its Board of directors) under sections 30D (1) (a) and 34(b) of the Act, the CMA had purported to exercise an original criminal jurisdiction which was reserved solely for the High Court and Magistrate's Court under article 165(3) of the Constitution and section 6 of the Magistrate Courts Act, 2015. Section 11(3)(cc)(i) of the Act was clear in its terms. It expressly empowered the Respondent to 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 could include levying of financial penalties, proportional to the gravity or severity of the breach, as could be prescribed. As to whether such a provision was constitutional, it was not within the ambit of those proceedings for the Court to make such a determination since no such relief was sought in those proceedings.
13. The Applicants averred that though the Respondent claimed to derive jurisdiction to issue the NTSC and proceeded with its hearing from section 11(3)(cc) as read with section 25A of the Act, section 11(3)(cc) gave the Respondent jurisdiction to impose sanctions for breach of the provisions of the Act, or regulations made thereunder or for non – compliance with the authority's requirements or direction. That section made it clear that the Respondent could only issue sanctions where the following conditions were fulfilled; to wit, where a provision of the said Act, or regulations made thereunder had been breached (or where any directions or requirements given by the Respondent) had been breached (which was not relevant for the purposes of the case). No breach of a statute or legislative instrument was possible where the legislative provisions alleged to have been breached did not exist and the legislative provisions alleged to have been breached did not impose any duty whatsoever capable of being breached on the person alleged to have breached it as was the position in the case. To make a finding in the manner submitted by the Applicants could amount to the Court sitting on appeal against the decision of the Respondent, and that was not the function of a judicial review Court.
14. The Applicants were called upon to show cause before the decision was arrived at. It was not in doubt that under section 26(8) of the Act the Respondent had powers to entertain the Notice to Show Cause.

15. Directors owed a fiduciary duty to the company, which fiduciary duties were broadly defined to include a duty of loyalty and a duty of care whose main elements included;
    (i) That the directors had to remain within the scope of the powers which had been conferred upon them.
    (ii) That directors had to act in good faith in what they believed to be in the best interest of the company.
    (iii) That they could not fetter their discretion as to how they acted.
    (iv) That they could not put themselves in a conflict of interest situation out of a transaction with the company, out of the director's personal exploitation of the company's property, information or opportunities, or out of receipt from a third party a benefit for exercising their directorial functions in a particular way.
16. The Applicants admitted that at the material times they were directors of USL and they had not contended that they had not been charged with, or concerned or acting in, the control or management of the Company. They however claimed that other persons were also involved in the said management hence they ought not to have been selectively charged. It was upon the Applicants to show that through no act or omission on their part, they were not aware that the offences were being or were intended or about to be committed, or that they took all reasonable steps to prevent their commission at the time they were called upon to show cause. Whether or not they did so and whether or not they believed, could not be a ground for judicial review as opposed to an appeal. The directors were not absolutely immune from culpability for their actions, though to prove them culpable certain conditions had to be met. As to whether the same were met was not within the scope of judicial review proceedings.
17. The Respondents countered that all former directors of USL and some senior managers were issued with Show Cause Letters, subjected to show cause hearing and after an objective assessment of their submissions CMA determined the culpability and issued them the appropriate enforcement sanctions. Therefore, based on the material before the Court, it could not conclusively determine that the Applicants had been unfairly subjected to a selective process.
18. The Applicants had not disclosed the role if any played by the other directors of USL in the subject transaction in order to justify the Court in finding that by not levying charges against the said Directors, a position the Respondents had denied, the charges levied against the Applicants was selective. Unless the Respondent's decision was shown to violate the provisions of the Constitution in the manner in which persons were being selected to face charges, the Respondent's decision could not be faulted merely on the basis that some Directors were allegedly left off the hook. based on the material placed before the Court in the proceedings, that the roles played by the persons whom the State intended to call as its witnesses in the subject transaction were the same or similar as the role, if any, played by the other Directors of USL. The Respondent, as long as its decision did not violate the letter and the spirit of the Constitution was entitled to determine whom to charge, based on its own review of the evidence and the mere fact that it made one decision and not the other was not a ground for interference.
19. The Court could not be seen to make adverse comments against the said Directors for the obvious reason that they were not parties to the proceedings. To expect the Court to make adverse determinations against the said persons could have amounted to a violation of the rules of natural justice which the Court was sworn to protect.
20. An issue was taken as regards whether regulations 6(2) and 19(3) of the Regulations imposed a duty that could be performed/breached by a director. It was clear that the said regulations did impose an obligation on the issuer which could well be a basis of an action under the Act, whether against the Company itself or its Directors as appropriate.
21. While the NTSC alleged that the Applicants (or USL Board) had breached sections 30D(1)(a)

and 34(b) of the Act, the particulars of charges levelled against the Applicants in the NTSC itself indicated that the Applicants were accused of breaching totally different laws which actually did not exist, whether in the Capital Markets Act itself or elsewhere in the Laws of Kenya.

22. Although section 30D(1)(a) of the Act provided that a person who made a false, misleading or deceptive statement in a prospectus committed an offence, the offence with which the Applicants (or USL Board) were charged with in the NTSC was that of facilitating or omitting to prevent the provision of misleading or deceptive statement in the information memorandum which was not outlawed by the same or any other provision. Similarly, while section 34(b) criminalized furnishing or publishing information or return the content of which were known to be untrue, incorrect or misleading because of material omission, the crime with which the Applicants were charged and of which they had been convicted was that of facilitating and/or omitting to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading, an offence not outlawed by the said section.
23. It was therefore clear that what was prohibited under the said section was the making of a false, misleading or deceptive statement in a prospectus as opposed to the facilitation or omission to prevent the provision of misleading or deceptive statement in the information memorandum.
24. Again there was no question of facilitation and/or omission to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading constituting an offence under the said section.
25. It was therefore clear that whereas the actions of the Applicants could well have constituted an offence under other statutes or provisions of the law, they were certainly not candidates for a charge pursuant to which they were required to show cause. They were therefore found culpable of actions which strictly speaking were not contemplated by sections 30(D)(1)(a) and 34(b) of the Act.
26. It was clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi criminal proceedings in respect of an act which did not in law constitute an offence or an offence under the legal provisions he was charged. Where public authorities abused their powers, acted unfairly or irrationally the Court was empowered to intervene and bring to an end such action.
27. The charge sheet contained four charges. The first two, could not stand as they were strictly not the kind of offences contemplated under the Act. However, the sentences were in respect of all the four charges cumulatively. Accordingly, the sentences could not stand.

Orders

i. An order of Certiorari removing into the Court for the purposes of quashing the Respondent's decisions dated November 17, 2016 and November 18, 2016 which decisions were quashed.
ii. An order of prohibition restraining the Respondents by themselves, their agents or employees from enforcing the decisions dated November 17, 2016 and November 18, 2016.
iii. The sums deposited as a condition for stay to be released to the Applicants.
iv. As the merits of the allegations had not been determined, there would be no order as to costs.

The Capital Markets Authority's Obligation to meet the Threshold of Fair Administrative Action as Contemplated under the Fair Administrative Action Act

Republic v Capital Markets Authority & another *ex parte*
Jonathan Irungu Ciano

JR Misc Application 588 of 2016

Republic *v* Capital Markets Authority & another *ex parte* Jonathan Irungu Ciano

High Court at Nairobi — April 9, 2018
GV Odunga & P Nyamweya, JJ

JR Misc Application 588 of 2016

Constitutional Law *– rights – bill of rights – fair administrative action – Whether the CMA's impugned decision was tainted with bias; and/or violated article 47 of the Constitution – Constitution of Kenya, 2010, article 47, Fair Administrative Act, section 4.*

Brief facts

The *ex parte* Applicant was a former Chief Executive of Uchumi Supermarkets Limited (USL), the Interested party. On June 15, 2015, the Board of USL terminated his services due to alleged Gross Misconduct and Gross Negligence.In the same month, the Board of directors of USL, concerned of potential fraud and misconduct in the financial operations of USL and its subsidiaries commissioned KPMG, an independent firm of auditors to conduct a forensic audit of financial operations of USL and its subsidiaries for the period between June 1, 2013 and May 31,2015.

Based on the said allegations, the Board of the Interested party lodged a complaint with the Respondent. After receipt of the complaint, the Respondent commenced an investigation into the affairs of USL and the *ex parte* Applicant's possible involvment in financial mismanagement, financial impropriety and regulatory infractions. After the investigation, the ex parte Applicant was issued with a Notice to Show Cause requiring him to respond to allegations against him.

The *ex parte* Applicant appeared before the Board of the Respondent for the hearings on October 25, 2016. The Board found the *ex parte* Applicant culpable of the allegations set out against him and issued him with sanctions and penalties prompting the proceedings before the Court.

Issue

i. Whether the manner in which CMA conducted its proceedings met the threshold of a fair administrative action as contemplated under section 4(3)(a) and (g) of the Fair Administrative Action Act.

Relevant Provisions of Law

Fair Administrative Action Act, No 4 of 2015

Section 4(3)(a) and (g) – *Administrative action to be taken expeditiously, efficiently, lawfully.*

> *(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –*
>
> *(a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
>
> *(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

Held:

1. Article 47 of the Constitution as read with section 4(3) of the Fair Administrative Action Act had to be prior to the decision, adequate and disclose the nature and reasons for the proposed administrative action.

2. Notice was a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings had to be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action would be.
3. Fair hearing had to be meaningful for it to meet the constitutional threshold. The Applicants contended that their right to be heard was violated as they were not given appropriate notice in order to enable them adequately prepare their case.
4. For a notice to be worthy of its purpose, it had to neither be vague nor leave room for speculation. If possible the notice could draw the addressee's attention to the legal provision, if any, under which it was being issued and even spell out the consequences that could follow for non-compliance. It was these particulars that could distinguish a notification of intent from the decision itself. Where the decision was expressed in a manner suggesting that a decision had already been made, such a notice could fail to meet the purpose for which the notice was prescribed. A notice that vaguely referred to the complaint without particularising the same and which did not expressly call upon the person to be adversely affected to respond thereto could not amount to an adequate notice.
5. One of the documents which was crucial in the conduct of the impugned proceedings was the KPMG Forensic Report. It was that report that the *ex parte* Applicant contended he received on the eve of his appearance before the Board. CMA however averred that the *ex parte* Applicant had confirmed that he had received the same report a week preceding his appearance before the Board and that the Applicant did not apply for more time to prepare for his submission.
6. Whereas it was true that it would have been prudent for the Applicant to seek more time to adequately deal with the issues facing him if he thought that the time given to him was too short, the then status of the law placed the onus on an administrative body or authority to furnish the person against whom allegations were made with the information, materials and evidence to be relied upon in making the decision or taking the administrative action. it was not upon the Applicant to ask to be supplied with the same as the right to be furnished with the same was imposed on the administrator by law.
7. The Court was not satisfied that the manner in which CMA conducted its proceedings met the threshold of a fair administrative action as contemplated under section 4(3)(a) and (g) of the Fair Administrative Action Act.

Application allowed

Orders

i. An Order of Certiorari removing to the Honorable Court for the purposes of being quashed the decision of the Respondent in respect of the Notification of enforcement action Uchumi supermarkets made on November 17,2016, which decision was quashed.

ii. An order of prohibition, prohibiting and restraining the Respondent from acting upon the Notification of Enforcement Action Uchumi Supermarkets Limited against the Applicant made on November 17, 2016.

iii. If the Respondent was still intent on carrying out its mandate, it had to do so in strict adherence to the law, both procedural and substantive.

iv. No order as to costs.

Capital Markets Authority's Decision to Investigate, Prosecute, sit as the Jury and Convict the Petitioner was ill-advised and Contrary to Provisions of Natural Justice

Chadwick Okumu v Capital Markets Authority

Constitutional Petition No 510 of 2016

Chadwick Okumu *v* Capital Markets Authority

Constitutional and Human Rights Division May 2, 2018
JM Mativo, J

Constitutional Petition No 510 of 2016

Constitutional Law *– bill of rights – fair administrative action – whether the CMA's impugned decision was tainted with bias; and/or violated Article 47 of the Constitution –Constitution of Kenya,2010, article 47, Fair Administrative Act, section4.*
Civil Practice and Procedure *– delegation of functions – whether CMA ought to have delegated some of the functions which was clearly permitted under the Law – Capital Markets Act, section 11A.*

Brief facts
The Petitioner was a former Chief Finance Officer at Uchumi Supermarkets Limited (USL). Following allegations of financial mismanagement and impropriety at USL, the USL Board procured the services of KPMG, an independent auditor to conduct a forensic investigation into the matter. The USL Board thereafter took the decision to terminate the contracts of employment of some of its top managers including the Petitioner. The USL Board also made a complaint to its regulator, the Respondent, to take action on the former management at USL for gross misconduct.

Following the complaint from USL and its own inquiry into the matter, the Respondent issued the Petitioner with a Notice to Show Cause (NTSC) requiring him to respond to various allegations relating to the operations of USL during his tenure of office. After the conduct of the said hearing, the Respondent found the Petitioner culpable of violations of provisions of the Capital Markets Act (CAP 485A Laws of Kenya) and issued him with various penalties and sanctions. Aggrieved by the said decision, the Petitioner instituted these proceedings.

Issues
i. Whether CMA's impugned decision was tainted with bias; and/or violated Article 47 of the Constitution and the Fair Administrative Act
ii. Whether CMA's decision to investigate, prosecute, sit as the jury and convict the petitioner was ill advised.
ii. Whether CMA ought to have delegated some of the functions which was clearly permitted under the law.

Relevant Provisions of Law
Constitution of Kenya, 2010
47. Fair administrative action
(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
(b) promote efficient administration.

Capital Markets Act Chapter 485a

Section 11a – *Delegation of Functions*

(1) The Authority may delegate any of its functions under this Act to—

(a) a committee of the Board;

(b) a recognized self – regulatory organization; or (c) an authorized person.

(2) The Authority may, at any time revoke a delegation made under this section.

(3) A delegation made under this section shall not prevent the Authority from performing the delegated function.

Held:

1. The Respondent had a statutory mandate to perform the functions in question. The bone of contention was whether to avoid the likelihood of bias, where CMA was involved in the investigations, it ought to have used its discretion and allow another person to undertake the trial.
2. The question to be determined in such cases always was whether the power conferred by the use of the word "may" had, annexed to it, an obligation that, on the fulfillment of certain legally prescribed conditions to be shown by evidence, a particular kind of order had to be made. If the statute left no room for discretion the power had to be exercised in the manner indicated by the other legal provisions which provided the legal context. Even then the facts had to establish that the legal conditions were fulfilled.
3. Where the power was wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it was directory or discretionary. It was not the conferment of a power which the word "may" indicated that annexed any obligation to its exercise but the legal and factual context of it. Since grammar and dictionary meanings were merely principal (initial) tools rather than determinative tyrants, the Court had to examine the context in which the word "may" was used.
4. The contextual scene had a deeper significance in the constitutional democracy. All law had to conform to the Constitution and be interpreted and applied within its normative framework. The Constitution itself had to be understood as responding to the Country's painful history and facilitating the transformation of the society. Account had to be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement had to play and the value system articulated in article 10 of the Constitution and the bill of rights.
5. Interpreting statutes within the context of the Constitution would not require the distortion of language so as to extract meaning beyond that which the words could reasonably bear. It did, however, required that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. In addition, it would be important to pay attention to the specific factual context that triggered the problem requiring solution.
6. Also important while interpreting statutory provisions was to bear in mind what the Court would call the legislative intent. The provisions of the statute in question had to be read in the context of not one but three different imperatives. The first was to enable CMA to effectively carry out its specially identified statutory mandate. The Constitution and the Act clearly envisaged an important and active decisional role for the CMA to resolve disputes through the application of the law. The Constitution declared that everyone was entitled to a Fair Administrative Action. In as much as the decisions of the CMA affected the Petitioner, CMA was obliged not to act unfairly. The Act had to accordingly be construed so as to promote respect to the bill of rights.
7. The Constitution envisaged the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body. Put differently, it could not have been the intention of the legislature to contemplate a situation whereby CMA would act as an investigator, prosecutor, jury and the hangman.
8. Also important was the statutory context. CMA was bound by the principle of legality. Public

bodies, no matter how well-intentioned, could only do what the law empowered them to do. That was the essence of the principle of legality, the bedrock of the constitutional dispensation, which was enshrined in the Constitution. It followed that for the impugned decision to be allowed to stand, it had to be demonstrated that the decision was grounded on law. As such, the Respondents actions had to conform to the doctrine of legality. A failure to exercise that power where the exigencies of a particular case required it, could amount to undermining the legality principle which, was inextricably linked to the rule of law.

9. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, was self-evident. In that regard, CMA was constrained by that doctrine to enforce the law by ensuring that its decisions conformed to the relevant provisions of the law governing its operations. The facts of each case had to be evaluated and a decision made early enough to follow the correct legal path, so as to ensure the sanctity and integrity of the decision. The entire process, right from the investigations, the proceedings and the determination had to pass the constitutional muster.
10. The rule against bias was one of the twin pillars of natural justice. The first pillar – the hearing rule -required that people whose rights, interests and expectations could be affected by a decision had to be given sufficient prior notice and an adequate chance to be heard before any decision was made. The bias rule was the second pillar of natural justice and required that a decision – maker had to approach a matter with an open mind that was free of prejudgment and prejudice. Although the bias rule originated in the courts, and was for many centuries applied only to courts and judges, it had become a rule of almost universal application. The rule against bias applied to a vast range of decision-makers including tribunals, statutory authorities, government ministers, local councils, inquiries, and even private arbitrators.
11. As the bias rule had expanded to include a great range of decision-makers it had also become more flexible. The courts had repeatedly stressed that the bias rule had to take account of the particular features of the decision – maker and wider environment to which the rule was applied. The courts had adopted a single test to determine applications for bias – that of the fair minded and informed observer. That fictitious person provided a vessel in which the Courts could impart as little or as much knowledge as was required to provide context. In many cases the courts imbued the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision – making. That approach begged the question of whether the fair minded and informed person was a neutral observer or little more than the court in disguise.
12. The provisions of article 47(1) of the Constitution meant that every citizen had a right to fair and reasonable administrative action that was allowed by the law; and to be given reasons for administrative action that affected them in a negative way. Lawful meant that administrators had to obey the law and had to be authorized by law for the decisions they made. Reasonable meant that the decision taken had to be justifiable-there had to be a good reason for the decision. Fair procedures meant that decisions could not be taken that had a negative effect on people without consulting them first. Also, administrators had to make decisions impartially.
13. It was not in dispute that the impugned decision imposed adverse sanctions against the Petitioner, hence it fitted the above definitions. What was in dispute was whether it was arrived at in a manner that was consistent with the dictates of article 47 of the Constitution. The governing statute and the resultant decision had to be interpreted through the prism of article 47 of the Constitution. It was beyond argument that article 47 codified every person's right to fair administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Those were the elements a Petitioner was required to establish in a case of that nature. In fact, absence of one would be sufficient to invalidate the decision. Further there was a right to be given reasons to any person who had been or was likely to be adversely affected by an

administrative action.

14. The Constitution recognized a duty to accord a person procedural fairness or natural justice when a decision was made that affected a person's rights, interests or legitimate expectations. It was a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, when an order or a decision was made which could deprive a person of some right or interest or the legitimate expectation of a benefit, he was entitled to know the case sought to be made against him and to be given an opportunity of replying to it.
15. Section 4 of the Fair Administrative Act echoed article 47 of the Constitution and reiterated the entitlement of every Kenyan to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's right or fundamental freedom was likely to be affected by an administrative decision, the administrator had to give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.
16. It was noteworthy that some of those elements were mandatory while some were only required where applicable. Subsection (4) further obliged the administrator to accord affected persons an opportunity to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross – examine persons who gave adverse evidence against hearing.
17. Section 7 (2) of the Fair Administrative Action Act provided for grounds of review which included bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant had to demonstrate the above grounds. In fact, not all of them had to be proved. Even prove of one of the above was sufficient to invalidate the decision.
18. The decision complained of had to affect a person's rights. There were two ways that a decision could affect a person's rights: –
    a. The decision could deprive a person of their existing rights, or
    b. It could affect a person's right by determining what those rights were.

    Decisions that deprived someone of rights, and those that determined that that person's rights would be, were both administrative action.
19. CMA was supplied with a Report prepared by KPMG. CMA studied the report and formed the opinion that it required some explanations from the Petitioner. CMA wrote to the Petitioner seeking some details. The Petitioner replied and offered some explanations. CMA deemed it fit to invite the Petitioner to offer some explanations orally. The Petitioner appeared with his lawyer and the proceedings were undertaken in what the Respondent described as an inquisitorial manner. CMA rendered the decision which triggered the Petition.
20. It was not disputed that CMA acted as the investigator, prosecutor, judge and the executer. Counsel for CMA argued that the law permitted all those roles. In the circumstances of the case, it could be said there was a reasonable apprehension of bias. The apprehension of bias had to be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test was what could an informed person, viewing the matter realistically and practically and having thought the matter through concluded.
21. A reasonable apprehension of bias could be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, could think it more likely

than not that the decision maker could unconsciously or consciously decide the issue unfairly. Would a reasonable person in the circumstances of the case think that it was more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly?

22. The rule against bias stroke against those factors which would improperly influence a judge or a decision maker against arriving at a decision in a particular case. The basic objective of the rule was to ensure public confidence in the impartiality of the administrative adjudicatory process. Principle of Natural Justice occupies the very important place in the study of the administrative law. Any judicial or quasi-judicial tribunal determining the rights of individuals had to conform to the principle of natural justice in order to maintain the rule of law. Effectively, procedural fairness required that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker.
23. CMA performed the three roles contrary to the rules of natural justice. it was ill advised for CMA to investigate, prosecute, sit as the jury and convict. That was a proper case for CMA to invoke Section 11A and delegate its functions to an independent body. CMA ought to have delegated some of the functions which was clearly permitted under the law.
24. The Petitioner had established reasonable apprehension of bias which was a violation of Section 7 (2) of the Fair Administrative Action Act which provided for grounds of review.
25. The entire process was undertaken in total violation of the principles of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system was not new. It seemed to be as old as the system of dispensation of justice itself. It had assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passed, in the matters touching the rights and liberty of the people. It was no doubt, a procedural requirement but it ensured a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.
26. The conclusion became irresistible that the impugned decision was tainted by bias. The manner in which the entire process was conducted violated the sanctity of the rules of natural justice. No person could be a judge in his own cause. It was wrong for the Respondent to act as the investigator, prosecutor, judge and executioner. Such a decision could not pass the constitutional muster. It could not survive court scrutiny. The correct legal path, was what the Court prescribed in the case of Ernst Young. The law allowed the Respondent wide discretion to delegate its functions to avoid perceived or real apprehension of bias.

Petition allowed

Orders

i. A declaration issued that that the investigations, proceedings and/or hearing instituted by the Capital Markets Authority against the Petitioner on October 25,2016 were conducted in a manner that violated the principles of natural justice and consequently, the said proceedings and the consequential decision arising there from dated November 18, 2016 was null and void for all purposes.

ii. An order of certiorari to be issued quashing the investigations, proceedings and/or hearing conducted by the Capital Markets Authority against the Petitioner on October 25, 2016 and the subsequent determination dated November 18, 2016 and all consequential orders arising from the said decision.

iii. No orders as to costs

Parties before Investigative Committees are Entitled to a Fair Hearing before any Penalties are Imposed against them and made Public

Capital Markets Authority *v* Jeremiah Gitau Kiereini & 2 others

Civil Suit No 371 of 2014

Capital Markets Authority *v* Jeremiah Gitau Kiereini & 2 others

High Court at Nairobi
Commercial and Admiralty Division July 1, 2015
AJ Ochieng, J

Civil Suit No 371 of 2014

Constitutional Law *– fundamental rights and freedoms – right to fair administrative action – right to fair hearing – right to be given proper notice of allegations and opportunity to be heard before an administrative action was taken – whether investigative and enforcement action taken by a committee against a party without giving him the right to be heard and no proper notice of allegations against him is an infringement of his right to fair administrative action and right to fair hearing – Constitution of Kenya, 2010.*

Capital Markets Law *– securities – regulation of securities – mandate of Capital Markets Authority to investigate and take enforcement actions against public listed companies – whether investigative and enforcement action taken by an investigative committee against a party without giving him the right to be heard and no proper notice of allegations against him is an infringement of his right to fair administrative action.*

Civil Practice and Procedure *– remedies – striking out of proceedings vis-à-vis staying proceedings – breach of fair hearing – where a party brings proceedings without affording a party fair hearing therein – whether courts can strike out investigative findings of committees for failure to give a party a fair hearing before imposing penalties.*

Brief facts

By an application dated February 20, 2015, the 1st and 2nd Defendants 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. In the alternative to the dismissal of the suit, the Applicants asked the court to stay all proceedings in the case. It was the contention of the Applicants that those proceedings constituted an enforcement action. By taking steps to prosecute an enforcement action, the Plaintiff (CMA) was said to have brazenly violated the judgement of Majanja J. in the case of *Jeremiah Gitau Kiereini v Capital Markets Authority & the Attorney General,* Constitutional Petition No 371 of 2012.

According to the Applicants, the High Court had expressly stated that before any enforcement action could be undertaken, it was imperative that the 1st Defendant be given a reasonable opportunity to be heard. The Applicants' further contention was that the Court of Appeal did uphold the decision of the High Court in *Capital Markets Authority v Jeremiah Gitau Kiereini & the Attorney General* Civil Appeal No 9 of 2014. The High Court had held that the Plaintiff (CMA) had breached the 1st Defendant'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. The Court also found that the 1st Defendant had not been given proper notice, for the purposes of the Enforcement Action.

Issues

i. Whether investigative and enforcement action taken by a committee against a party without giving him the right to be heard and no proper notice of allegations against him is an infringement of

his right to fair administrative action and right to fair hearing.

ii. Whether investigative and enforcement action taken by an investigative committee against a party without giving him the right to be heard and no proper notice of allegations against him is an infringement of his right to fair administrative action.

iii. Whether courts can strike out investigative findings of committees for failure to give a party a fair hearing before imposing penalties?

Held:

1. The reliefs sought indicated that the Respondent 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. It thus followed that determination about the liability or culpability of the 1st Defendant had been made. If that was the case, yet the Court of Appeal had already upheld the findings that the 1st Defendant had had sanctions and penalties imposed upon him before he was heard in mitigation, it did appear that the Respondent had failed to heed the directions given by both the High Court and the Court of Appeal.
2. When the Respondent said that the 1st Defendant should be compelled to pay back Kshs 189 million, before he was afforded an opportunity to be heard in mitigation, that implied that mitigation would count for naught. 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.
3. 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 the 1st Defendant was heard. If those 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 Respondent had concluded to be payable, yet such an enforcement action had preceded the fair hearing which the Applicant was entitled to.
4. The Court of Appeal faulted the process because it failed to offer due protection to the 1st Defendant/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.
5. The Court agreed on the need to jealously safeguard the right to a fair trial. But it also recognized the possibility that even after giving to the 1st Defendant his right to a fair hearing, the Respondent could still arrive at findings similar to those that were arrived at earlier. It was yet possible that the Respondent could ultimately get round to prosecuting the enforcement action.
6. The striking out of the action was too drastic a step to take in the proceedings. The justice of the case demanded that the Court do balance the competing rights of the parties to the action. The right balance was struck when the proceedings therein were stayed until the Plaintiff would have given to the Applicant a fair opportunity to be heard. All further proceedings in the case were stayed until the Plaintiff complied with the orders of the Court of Appeal in Civil Appeal No 9 of 2014.

Application partly allowed; costs of the Application be borne by the Plaintiffs.

An Employee of a Company who Attends the Company's Board Meetings and who Sells his Shares is not Guilty of Insider Trading if his Decision was based on Information in the Public Domain

R v Benard Mwangi Kibaru

Criminal Case No 1337 of 2008

Republic *v* Benard Mwangi Kibaru

Chief Magistrates' Court at Nairobi — November 25, 2010
C Mutembei, CM

Criminal Case No 1337 of 2008

Capital Markets *– securities – securities transactions – offences – insider trading - What was the rationale for prohibition of insider trading.*
Capital Markets *– securities – securities transactions – offences – insider trading – where an employee attended the company's board meetings – where the meetings discussed the profitability of the company - whether an employee of a company who attended the company's board meetings where the profitability of the company was discussed and who sold his shares was guilty of insider trading for being privy of the company's performance – Capital Markets Act, section 32A(1)(a) & 33(I).*

Brief facts

The Accused was an employee of Uchumi Supermarkets Ltd (Uchumi) as the head of Buying and Merchandising Department. In that position he used to attend the board meetings of Uchumi by invitation. The company was a public company listed in the Nairobi Stock Exchange where its shares were trading. The Accused held 111,400 shares of Uchumi, he held his shares up to April 26, 2006 when he instructed Drummond Investments Bank to sell them on his behalf. After the selling of his shares the Accused was charged with the offence of insider trading.

Issues

i. What was the rationale for prohibition of insider trading?
ii. Whether an employee of a company who attended the company's board meetings where the profitability of the company was discussed and who sold his shares was guilty of insider trading for being privy of the company's performance.

Relevant Provisions of the Law

Capital Markets Act

Section 32A(1)(a)

> *No insider shall either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange on the basis of any unpublished price sensitive information*

Section 33(I)

> *A person who is, or at any time in the preceding six months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his being, or having been, connected with that body corporate he is in possession of information that is not generally available hut, if it were, would be likely materially affect the price of those securities.*

Held:

1. It was a familiar, if not a necessary, feature of a capitalist society that there should be a market in publicly quoted securities which permitted members of the public whether corporate or individual to buy or sell. The integrity of the market depended on equality of knowledge, since fair operation of the market was jeopardized if those who were in the know (market insiders) could exploit information for their personal advantage which they had obtained in the course of their professional activities when such information was unavailable to others.

2. It was unfair if an officer of a company or a professional adviser who obtained information that the prospects of a company were poor was enabled to sell securities he owned in the company so as to avoid loss which other shareholders would sustain. Conversely, it was unfair if an officer of a company or a professional adviser obtained information that the market price in securities of a company was likely to rise and was so enabled to buy in order that he could personally profit from an increase in the market price. That was what was meant by insider dealing, which distorted the orderly and fair operation of the market.
3. The Accused attended some meetings of the board to strategize on how to return the company to profitability. From the minutes of the meetings the key focus of the board and management was geared towards cutting costs in the company operations, freeing cash for operations and increasing sales. No information to contradict whatever was anticipated in the rights issue was disclosed in the minutes up to April 24, 2006, the day that the Accused last attended the board meeting before he gave instructions to sell his shares.
4. Uchumi's poor performance and the pulling out of its major shareholders was a matter that had been publicized in the newspapers. The Prosecution had not proved beyond a reasonable doubt that the Accused exploited information not generally available to the public that Uchumi was performing poorly, when he sold his shares.

Accused found not guilty and acquited on the main and alternative charges.

Discretion of the Court to Grant Leave to Operate as Stay where a Decision has been Fully Implemented should be Exercised Sparingly

R v Capital Markets Authority *ex parte* Solomon Alubala

Judicial Review Application No 251 of 2018

R *v* Capital Markets Authority *ex parte* Solomon Alubala

High Court at Nairobi — August 2, 2018
P Nyamweya, J

Judicial Review Application No 251 of 2018

Jurisdiction *– High Court – judicial review matters – where a matter was pending before an independent tribunal not properly constituted – whether the Court had the jurisdiction to entertain a matter that was pending before an independent tribunal that at the time of filing the matter before court was not properly constituted.*
Civil Practice and Procedure *– judicial review– application for leave – grant of leave to operate as stay – where a decision had been fully implemented – whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that had been fully implemented – Civil Procedure Rules, 2010 order 53 rule 1(4).*
Civil Practice and Procedure *– judicial review – application for leave– grant of leave to operate as stay-where a decision was self-executing – whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that was self-executing – Civil Procedure Rules, 2010 Order 53 rule 1(4).*
Civil Practice and Procedure *– judicial review – stay of proceedings – circumstances for grant of stay – what were the circumstances where stay of proceedings could be granted by the Court in judicial review proceedings– Civil Procedure Rules, 2010 order 53 rule 1(4).*
Capital Markets Law*-sanctions-disqualification- nature of sanction of disqualification-whether disqualification can be subject of an order for stay-public interest element in sanction of disqualification.*

Brief facts
The *ex parte* Applicant brought the Application seeking amongst others; to be granted leave to apply for Judicial Review orders and the same leave to operate as a stay to stay the decision of the Respondent made on April 3, 2018. The said decision was made pursuant to sections 11(3)(cc), 11(1)(d), 11(3)(w) and 25A of the Capital Markets Act wherein the Applicant was disqualified from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the Respondent for a period of 10 years and a financial penalty of Kshs 104,800,000 imposed upon him being the amount of benefit that, purportedly directly accrued to him.

Issues
i. Whether the Court had the jurisdiction to entertain a matter that was pending before an independent tribunal that at the time of filing the matter before court was not properly constituted.
ii. Whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that had been fully implemented.
iii. Whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that was self-executing.
iv. What were the circumstances where stay of proceedings could be granted by the Court in judicial review proceedings?
v. Whether disqualification can be subject of an order for stay.

Relevant Provisions of the Law
Capital Markets Act, Cap 485A Laws of Kenya
Section 11 – *Objectives of the Authority*

(1) The principal objectives of the Authority shall be
(d) the protection of investor interests;
(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—
(cc) impose sanctions for breach of the provisions of this 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;
(iv) suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors;
(w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.

Section 25A – *Imposition of additional sanctions and penalties*
(1) Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities, commodities or derivatives exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)—…

Held:
1. Whereas the Court's jurisprudential policy was to encourage parties to exhaust and honour alternative forums of dispute resolution where they were provided for by statute, where such an alternative remedy was unavailable to the Applicant, the Court could exempt such an applicant and entertain the matter.
2. The decision whether or not to grant a stay pursuant to leave was an exercise of judicial discretion, and that discretion had to be exercised judiciously. The purpose of stay was to preserve the *status quo* pending the final determination of the claim for judicial review. Such a stay halted or suspended proceedings that were challenged by a claim for judicial review, and the purpose of a stay was to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a court could grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in that regard were laid down in the said decision and in various decisions by Kenyan Courts.
3. Stay of proceedings should be granted where the situation could result in a decision which ought not to have been made being concluded. In judicial review applications the Court should always ensure that the *ex-parte* Applicant's application was not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order was efficacious the Court should not hesitate to grant it though it had to never be forgotten that the stay orders were discretionary and their scope and purpose was limited. The purpose of a stay order in judicial review proceedings was to prevent the decision maker from continuing with the decision making process if the decision had not been made or to suspend the validity and implementation of the decision that had been made and it was not limited to judicial or

quasi-iudicial proceedings as it encompassed the administrative decision making process being undertaken by a public body such as a local authority minister and the implementation of the decision of such a body If it had been halted.

3. The essential effect of a stay of proceedings was to suspend them. What that meant in practice would depend on the context and the stage that had been reached in the proceedings. If the inferior court or administrative body had not yet made a final decision, then the effect of the stay would be to prevent the taking of the steps that were required for the decision to be made. If a final decision had been made, but it had not been implemented, then the effect of the stay would be to prevent its implementation. In each of those situations, so long as the stay remained in force, no further steps could be taken in the proceedings, and any decision taken would cease to have effect: it was suspended for the time being.
4. The third situation, occurred where the decision had not only been made, but it had been carried out in full. At first sight, it seemed nonsensical to speak of making an order that such a decision should be suspended. How could one say of a decision that had been fully implemented that it should cease to have effect? Once the decision had been implemented, it was a past event, and it was impossible to suspend a piece of history. At first sight, that argument seemed irresistible, though it was wrong. It overlooked the fact that a successful judicial review challenge did in a very real sense rewrite history. It was, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order should temporarily cease to have effect, with the same result for the time being as would be the permanent outcome if it was ultimately held to be unlawful and was quashed. The Court had jurisdiction to stay the decision of a tribunal which was subject to a judicial review challenge, even where the decision had been fully implemented. But the jurisdiction should be exercised sparingly, and where it was exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay.
5. Where the action or decision was yet to be implemented, a stay order could normally be granted in such circumstances. Where the action or decision was implemented, then the court needed to consider the completeness or continuing nature of such implementation. If it was a continuing nature then it was still possible to suspend the implementation. However, once implementation was complete the discretion should be exercised sparingly, and even then when the court was sure that the judicial review application could be disposed of in the shortest of time possible.
6. The second factor to be taken into account in the exercise of the discretion whether or not to grant a stay of judicial review proceedings was that of public interest. Judicial Review proceedings were public law proceedings for vindication of private rights and for that reason, public interest was a relevant consideration in the granting of stay orders. Such an order could only be granted where the Applicant had made out a strong case.
7. Where there was a public interest element involved, the Court struck a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there was a strong, and not merely an arguable, case that a tribunal's decision was unlawful. The Court could refuse to order that leave granted for orders of judicial review does operate as a stay-where such a stay would violate the needs of good administration.
8. The financial penalty that was imposed by the Respondent was yet to be implemented, as there was no evidence provided of payment of the same by the Applicant. The letter dated May 21, 2018 by the Respondent to the Asset Recovery Agency in annexure 'AHA 17' to the Respondent's Replying Affidavit seeking to recover the Applicant's assets in enforcement, was only evidence that the implementation was ongoing and was not yet complete, and was therefore amenable to suspension. It was also incumbent upon the Respondent, having initiated such recovery, to inform third parties that could be affected by any stay orders granted by the Court.

9. Taking into account the amount of penalty imposed, and the irreparable prejudice and hardship the Applicant was likely to suffer in the event of enforcement of the said penalty whether in terms of payment or recovery, *vis-a-vis* the challenge on the Respondents decision to impose the said penalty, there was need to preserve the current *status qua* until the legality of the Respondent's proceedings and decision was established.
10. The prayer for stay in the Applicant's application was allowed only to the extent of the leave granted to commence judicial review proceedings to operate as stay of the payment and/or recovery of the financial penalty of Ksh 104,800,000 imposed upon the Applicant in the decision in the Notification of Enforcement Act issued by the Respondent dated April 3, 2018. The said leave would not operate as a stay of the disqualification of the Applicant imposed upon him by the Respondent.
11. On the second sanction of disqualification, that was a decision that was self-executing and on which no further positive steps needed to be taken by the Respondent in its implementation. It was therefore fully implemented, and was not of a continuing nature as no further acts needed to be taken by any of the parties as regards the implementation of the sanction, save for those proceedings.
12. Even if that Court had jurisdiction and the discretion to suspend the sanction, a number of factors militated against the exercise of that discretion. Firstly, as noted above, the discretion should be exercised sparingly where a decision had been fully implemented, and as there was a public interest element involved, only where an applicant had made out a strong case. In the present Application, leave was granted on the basis that the Applicant had an arguable case, and therefore the Applicant still needed to establish the grounds he had set out on which he challenged the Respondent's decision to disqualify him.
13. The public Interest element involved in the sanction of disqualification was that unlike the first sanction of the financial penalty that would largely impact on and prejudice the Applicant as an individual, suspending the disqualification of the Applicant would also affect other members of the public, in the event that he was allowed to continue participating in the financial and capital markets, before the propriety of the allegations made by the Respondent as regards his conduct in the said markets was determined.

Application partly allowed; costs to be in the cause.

Discretion of the Court to Grant Leave to Operate as Stay where a Decision has been Fully Implemented should be Exercised Sparingly

R *v* Capital Markets Authority *ex parte* Munir Sheikh Ahmed

JR Misc Application 269 of 2018

R *v* Capital Markets Authority *ex parte* Munir Sheikh Ahmed

High Court at Nairobi August 2, 2018
P Nyamweya, J

JR Misc Application 269 of 2018

Jurisdiction *– High Court – judicial review matters – where a matter was pending before an independent tribunal not properly constituted – whether the Court had the jurisdiction to entertain a matter that was pending before an independent tribunal that at the time of filing the matter before court was not properly constituted.*
Civil Practice and Procedure *– judicial review – application for leave-grant of leave to operate as stay– where a decision had been fully implemented – whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that had been fully implemented – Civil Procedure Rules, 2010 order 53 rule 1(4).*
Civil Practice and Procedure *– judicial review – application for leave – grant of leave to operate as stay – where a decision was self-executing-whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that was self-executing – Civil Procedure Rules, 2010 order 53 rule 1(4).*
Civil Practice and Procedure *– judicial review – stay of proceedings – circumstances for grant of stay-what were the circumstances where stay of proceedings could be granted by the Court in judicial review proceedings – Civil Procedure Rules, 2010 order 53 rule 1(4).*
Capital Markets Law *- sanctions-disqualification- nature of sanction of disqualification-whether disqualification can be subject of an order for stay-public interest element in sanction of disqualification.*

Brief facts
The *ex parte* Applicant brought the Application seeking amongst others; to be granted leave to apply for Judicial Review orders and the same leave to operate as a stay to stay the decision of the Respondent made by the Respondent on April 3, 2018. In the impugned decision, the Applicant was disqualified from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the Respondent for a period of 3 years and a financial penalty of Kshs 5,000,000 imposed upon him for alleged contravention of certain provision of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations 2002 and the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002.

Issues
i. Whether the Court had the jurisdiction to entertain a matter that was pending before an independent tribunal that at the time of filing the matter before court was not properly constituted.
ii. Whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that had been fully implemented.
iii. Whether leave granted to apply for Judicial Review orders to operate as stay could be granted to stay a decision that was self-executing.
iv. What were the circumstances where stay of proceedings could be granted by the Court in judicial review proceedings?
v.

Relevant Provisions of the Law
Capital Markets Act, Cap 485A Laws of Kenya

Section 11 – *Objectives of the Authority*

(1) The principal objectives of the Authority shall be
(d) the protection of investor interests;
(3) For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—
(cc) impose sanctions for breach of the provisions of this 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;
(iv) suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors;
(w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.

Section 25A – *Imposition of additional sanctions and penalties*

(1) Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities, commodities or derivatives exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)—…

Held:

1. Whereas the Court's jurisprudential policy was to encourage parties to exhaust and honour alternative forums of dispute resolution where they were provided for by statute, where such an alternative remedy was unavailable to the Applicant, the Court could exempt such an applicant and entertain the matter.
2. The decision whether or not to grant a stay pursuant to leave was an exercise of judicial discretion, and that discretion had to be exercised judiciously. The purpose of stay was to preserve the *status quo* pending the final determination of the claim for judicial review. Such a stay halted or suspended proceedings that were challenged by a claim for judicial review, and the purpose of a stay was to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a court could grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in that regard were laid down in the said decision and in various decisions by Kenyan Courts.
3. Stay of proceedings should be granted where the situation could result in a decision which ought not to have been made being concluded. In judicial review applications the Court should always ensure that the *ex parte* Applicant's application was not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order was efficacious the Court should not hesitate to grant it though it had to never be forgotten that the stay orders were discretionary and their scope and purpose was limited. The purpose of a

stay order in judicial review proceedings was to prevent the decision maker from continuing with the decision making process if the decision had not been made or to suspend the validity and implementation of the decision that had been made and it was not limited to judicial or quasi-iudicial proceedings as it encompassed the administrative decision making process being undertaken by a public body such as a local authority minister and the implementation of the decision of such a body If it had been halted.

4. The essential effect of a stay of proceedings was to suspend them. What that meant in practice would depend on the context and the stage that had been reached in the proceedings. If the inferior court or administrative body had not yet made a final decision, then the effect of the stay would be to prevent the taking of the steps that were required for the decision to be made. If a final decision had been made, but it had not been implemented, then the effect of the stay would be to prevent its implementation. In each of those situations, so long as the stay remained in force, no further steps could be taken in the proceedings, and any decision taken would cease to have effect: it was suspended for the time being.
5. The third situation, which occurred where the decision had not only been made, but it had been carried out in full. At first sight, it seemed nonsensical to speak of making an order that such a decision should be suspended. How could one say of a decision that had been fully implemented that it should cease to have effect? Once the decision had been implemented, it was a past event, and it was impossible to suspend a piece of history. At first sight, that argument seemed irresistible, though it was wrong. It overlooked the fact that a successful judicial review challenge did in a very real sense rewrite history. It was, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order should temporarily cease to have effect, with the same result for the time being as would be the permanent outcome if it was ultimately held to be unlawful and was quashed. The Court had jurisdiction to stay the decision of a, tribunal which was subject to a judicial review challenge, even where the decision had been fully Implemented. But the jurisdiction should be exercised sparingly, and where it was exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay.
6. Where the action or decision was yet to be implemented, a stay order could normally be granted in such circumstances. Where the action or decision was implemented, then the court needed to consider the completeness or continuing nature of such implementation. If it was a continuing nature then it was still possible to suspend the implementation. However, once implementation was complete the discretion should be exercised sparingly, and even then when the court was sure that the judicial review application could be disposed of in the shortest of time possible.
7. The second factor to be taken into account in the exercise of the discretion whether or not to grant a stay of judicial review proceedings was that of public interest. Judicial Review proceedings were public law proceedings for vindication of private rights and for that reason, public interest was a relevant consideration in the granting of stay orders. Such an order could only be granted where the Applicant had made out a strong case.
8. Where there was a public interest element involved, the Court struck a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there was a strong, and not merely an arguable, case that a tribunal's decision was unlawful. The Court could refuse to order that leave granted for orders of judicial review does operate as a stay-where such a stay would violate the needs of good administration.
9. The financial penalty that was imposed by the Respondent was yet to be implemented, as there was no evidence provided of payment of the same by the Applicant. The letter dated May 21, 2018 by the Respondent to the Asset Recovery Agency in annexure 'AHA 17' to the Respondent's Replying Affidavit seeking to recover the Applicant's assets in enforcement, was only evidence

that the implementation was ongoing and was not yet complete, and was therefore amenable to suspension. It was also incumbent upon the Respondent, having initiated such recovery, to inform third parties that could be affected by any stay orders granted by the Court.

10. Taking into account the amount of penalty imposed, and the irreparable prejudice and hardship the Applicant was likely to suffer in the event of enforcement of the said penalty whether in terms of payment or recovery, *vis-a-vis* the challenge on the Respondents decision to impose the said penalty, there was need to preserve the current *status qua* until the legality of the Respondent's proceedings and decision was established.
11. The prayer for stay in the Applicant's application was allowed only to the extent of the leave granted to commence judicial review proceedings to operate as stay of the payment and/or recovery of the financial penalty of Ksh 5,000,000 imposed upon the Applicant in the decision in the Notification of Enforcement Act issued by the Respondent dated April 3, 2018. The said leave would not operate as a stay of the disqualification of the Applicant imposed upon him by the Respondent.
12. On the second sanction of disqualification, that was a decision that was self-executing and on which no further positive steps were needed to be taken by the Respondent in its implementation. It was therefore fully implemented, and was not of a continuing nature as no further acts need to be taken by any of the parties as regards the implementation of the sanction, save for those proceedings.
13. Even if that Court had jurisdiction and the discretion to suspend the sanction, a number of factors militated against the exercise of that discretion. Firstly, as noted above, the discretion should be exercised sparingly where a decision had been fully implemented, and as there was a public interest element involved, only where an applicant had made out a strong case. In the present Application, leave was granted on the basis that the Applicant had an arguable case, and therefore the Applicant still needed to establish the grounds he had set out on which he challenged the Respondent's decision to disqualify him.
14. The public Interest element involved in the sanction of disqualification was that unlike the first sanction of the financial penalty that would largely impact on and prejudice the Applicant as an individual, suspending the disqualification of the Applicant would also affect other members of the public, in the event that he was allowed to continue participating in the financial and capital markets, before the propriety of the allegations made by the Respondent as regards his conduct in the said markets was determined.

Application partly allowed; costs to be in the cause.

Financial Information does not form Part of Material Information that can Affect the Price of an Issuer's Securities Leading to Insider Trading

Republic v Terrence Davidson

Criminal Case No 1338 of 2008

Republic *v* Terrence Davidson

Chief Magistrate Court at Nairobi November 25, 2010
GC Mutembei, CM

Criminal Case No 1338 of 2008

Capital Markets Law *– insider trading and other market abuses – insider trader – who was an insider trader under the Capital Markets Act – Capital Markets Act, Cap 485A Laws of Kenya, section 2.*
Capital Markets Law *– issuer's securities – price of an issuer's securities – material information-what comprised material information that could affect the price of an issuer's securities in order to amount to insider trading under the Regulations -Capital Markets (Securities) (Public Offers, Listing And Disclosures) Regulations, 2002 (Regulations), regulation 2.*
Capital Markets Law *– issuer's securities - price of an issuer's securities – material information – financial information – whether financial information formed part of material information that could affect the price of an issuer's securities under the Regulations-Capital Markets (Securities) (Public Offers, Listing And Disclosures) Regulations, 2002 (Regulations), regulation 2.*

Brief facts

The Accused was the Chief Executive Officer and managing director of Kenya Commercial Bank (KCB) who were the bankers of Uchumi Super Markets Ltd. The Accused was also a shareholder of Uchumi and was among the top 60 shareholders.

The Accused was charged with the offence of insider trading contrary to section 32A (1)(a) read with section 32A(2) and section 34(2) of the Capital Markets Act. On the 2nd count he was charged with the offence of insider trading contrary to section 32A(1)(a) read with section 32A(a) and section 34(2) of the Capital Markets Act.

The charges against the Accused were premised on the grounds that as the CEO of KCB, he may have used his position to get price sensitive information on Uchumi which was not generally available. In his defense he submitted that he purchased the said shares with a loan from Investments and Mortgages and he needed to service the loan that was why he sold the shares and that the information memeorandum of the Right Issue had suffient information that Uchumi was insolvent. He further submittted that the finacial statement in the Right Issue unequivocallly showed insolvency of Uchumi.

Issues

i. Who was an insider trader under the Capital Markets Act?
ii. What comprised material information that could affect the price of an issuer's securities in order to amount to insider trading under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 (Regulations)?
iii. Whether financial information formed part of material information that could affect the price of an issuer's securities under the Regulations.

Relevant Provisions of the Law
Capital Markets Act, Cap 485A Laws of Kenya
Section 2 – *Interpretation*

> *"insider" means any person who is or was connected with a company, or is deemed to have been connected with a company and who is reasonably expected to have access, by virtue of such connection, to unpublished information which, if made generally available, would be likely to materially affect the price or value of the securities of the company, or who has*

received or has had access to such unpublished information;

Section 33(1) – *Insider trading prohibited*

(1) A person who is, or at any time in the preceding six months has been, connected with a body corporate shall not deal in any securities of that body corporate if by reason of his being, or having been, connected with that body corporate he is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of those securities.

Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002

Material information

Means any information that may affect the price of an issuer's securities or influence investment decisions and includes information on—

(a) a merger, acquisition or joint venture;
(b) a block split or stock dividend;
(c) earnings and dividends of an unusual nature;
(d) the acquisition or loss of a significant contract;
(e) a significant new product or discovery;
(f) a change in control or significant change in management;
(g) a call of securities for redemption;
(h) the public or private sale of a significant amount of additional securities;
(i) the purchase or sale of a significant asset;
(j) a significant labour dispute;
(k) a significant law suit against the issuer;
(l) establishment of a programme to make purchases of the issuer's own shares;
(m) a tender offer for another issuer's securities;
(n) significant alteration of the memorandum and articles of association of the issuer; or
(o) any other peculiar circumstances that may prevail with respect to the issuer or the relevant industry;

Held:

1. From the above statutory definitions, financial information was not included in the list of material information that could affect the price of an issuer's securities.
2. The information availed to KCB regarding Uchumi was financial in nature and the financial improvement experienced by Uchumi immediately after the Rights Issue was what was anticipated in the Information Memorandum of the Rights Issue that had been supplied to the public.
3. The improvement of Uchumi's financial position was not price sensitive information that was likely to materially affect its share price. The fact of Uchumi's poor performance and the pulling out of its major shareholders was a matter that had been publicized in the newspapers. The Accused therefore could not be said to have exploited information for his personal advantage which he obtained in the course of his professional activities when such information was unavailable to others when he bought and sold his Uchumi shares.
4. The prosecution did not prove its case beyond reasonable doubt that the Accused exploited information not generally available to the public. The Accused was acquitted on the two main and the four alternative charges.

Application dismissed.