REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 385 OF 2016

In the matter of Article 22 of the Constitution of the Republic of Kenya

and

In the matter of contravention of Rights and Fundamental Freedoms under Articles 19, 20, 21(1), 24, 25, 27, 28, 47 and 50 of the constitution of the Republic of Kenya

And

In the matter of The Capital Markets Act, Cap 485A

And

In the matter of Fair Administration Action Act (No. 4 of 2015)

BETWEEN

Ernst & Young LLP.....Petitioner

Versus

Capital Markets Authority.....1st Respondent

Kenya Reinsurance Corporation Ltd.....2nd Respondent

JUDGEMENT

Introduction

By a petition dated 15th September 2016, Ernst & Young LLP, a firm of auditors duly registered as a limited liability partnership[1] (hereinafter referred to as the petitioner) instituted this petition seeking several declarations/orders against the Respondents, namely, Capital Markets Authority, a statutory body[2] whose mandate is to promote, regulate and

[1] Registered under the Limited Liability Partnership Act, Cap 30A, Laws of Kenya
[2] Pursuant to section 5 of the Capital Markets Authority, Cap 485A, Laws of Kenya

facilitate the development of an orderly, fair and efficient capital market in Kenya and the Hon. Attorney General sued as the principal legal advisor to the government of Kenya.[3]

The pleadings

Briefly, the grounds in support of the petition are that that:-

i. *That the petitioner received a call from the first Respondent on 19th May 2016 asking for a meeting to clarify issues allegedly arising from audits undertaken by the petitioner Uchumi Supermarkets Limited (hereinafter referred to as Uchumi), a public listed company for the financial years ending June 2014 and 2015 respectively following a forensic audit report issued by KPMG, a firm of auditors. The petitioner agreed to meet the first Respondent at their offices on 26th May 2016 and requested for a copy of the forensic audit report by KMPG;*

ii. ***That*** *on 19th May 2016, the first Respondent sent to the petitioner extracts of the KPMG report as well as a list of issues for discussion at the said meeting but the items for discussion were not only for the above period, but extended to the period as at 2013 as well as the provision of an Accounts Report dated 8th October 2014 by the applicant and which was used in the Information Memorandum dated 7th November 2014 for a rights issue by Uchumi. Also on 20th May 2016, 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. On 26th May 2016 the first Respondent promised to share minutes of that days discussion.*

iii. ***That*** *on 31st May 2016 the first Respondent requested the petitioners to share with it the presentation made to the Board at Uchumi dated 4th September 2014 and also sent a further list of issues for clarification. On 2nd June 2016, the petitioner sought for more time up to 15th June 2016 to enable it respond to the requests/issues referred to above, and indeed did respond on 14th June 2016 and the response was acknowledged on 15th June 2016 with a promise to revert but the next communication was a notice to show cause issued on 2nd August 2016 and on 31st August 2016, the first Respondent raised some allegations and sought a response on or before 14th September 2016.*

iv. ***That*** *the petitioner avers 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 said notice to show cause*

[3] Pursuant to Article 156 (4) of the constitution of Kenya, 2010.

nor was it heard nor has it been invited for further clarification as promised above nor was it ever informed that it was under inquiry or investigations, that there was no fair hearing nor was it supplied with investigations, and by asking the petitioner to mitigate, the first Respondent had presupposed that the petitioner is culpable without a hearing, hence a breach of the Rules of natural justice, nor has the accuser been disclosed, that the procedure adopted does 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.[4]

On 30th September 2016, the Second Respondent filed grounds of opposition stating *inter alia* that the petition does not disclose any constitutional violations, that the first Respondent was acting within the provisions of Capital Markets Authority Act[5] (hereinafter referred to as the act) and that the petitioner has not demonstrated that the first Respondent acted in contravention of the law.

In opposition to the petition, the first petitioner filed a Replying affidavit on 5th October 2016 sworn by **Abubakkar Hassan Abubakkar** in which he avers *inter alia* that:-

a) ***That*** *the first Respondent is established under section 5 (1) of the Act and its principal mandate stipulated under section 11 (1) of the act include the development in 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; 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 practical extent; The protection of investor interests; the operation of compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations;*

b) ***That*** *for the purposes of carrying out the above objectives, the act confers the first Respondent with a wide range of powers, duties and functions which include disclosure requirements and other terms and conditions on which securities may be listed or delisted, ensuring proper conduct of business, inquire 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 traded*

[4] Act No. 4 of 2015
[5] Supra

on an approved securities exchange and do all such acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under the act.

c) ***That*** *sometimes in June 2015 changes in the top management of Uchumi were reported to the first Respondent and that the changes happened against a backdrop of allegations of financial mismanagement and impropriety and that Uchumi falls under the oversight of the First Respondent and that the said changes and negative reports had the effect or potential effect of negatively affecting the performance of Uchumi shares at the securities exchange, hence it was imperative for the First Respondent to conduct the said investigation so as to secure investor interests.*

d) *Pursuant to section 11 of the act, the first Respondent commenced its independent inquiry into the affairs of Uchumi by summoning the board of Uchumi for a meeting on 25th June 2015 and during the said meeting Uchumi board revealed that it had earlier appointed KPMG to conduct forensic investigations into Uchumi's financial affairs following allegations of misrepresentation of actual value of outstanding supplies, conflict of interests, failure to effectively account for the rights issue proceedings amounting to Ksh. 895 million and failure to account for asset sale and lease back transaction amounting to Ksh. 1.1 Million and that the first Respondent requested to be supplied with the KPMG report once released, and on 18th December 2015, the first Respondent received a draft copy of the KPMG report from Uchumi with a request that that they take action against former management of Uchumi for gross misconduct which request was considered as a complaint forming the basis for investigations pursuant to section 11 (3) (h) and 13 (b) of the act.*

e) ***That*** *the inquiry was narrowed to whether the rights issues proceeds were actually used for the intended purpose, key queries raised on sale of assets, whether financial statements were free from misstatements and whether there were breaches of fiduciary duties and conflicts on interests by Uhumin board of management in the conduct of their affairs.*

f) ***That*** *since the petitioner was Uchumi's reporting accountant during the rights issue and also its external auditor for the period 2010 to 2014, the petitioner had to be involved in the Respondents investigations, hence the reason why the first Respondent contacted the petitioner and invited the petitioner for the meeting in question and provided an extract of the KPMG report which raised the issues for discussion listed in paragraph 14 of the affidavit, hence the petitioner was made aware about the inquiry and that the extracts*

were sufficient for the petitioner to respond to the queries and that there were legal restrictions on sharing the entire report and that the information sought related to the petitioners role as reporting accountants during the Rights Issue in 2014.

g) ***That*** *initial investigations revealed incidence of possible misstatements in the audited financial statements for 2010 to 2014 filed with the first Respondent and published to the investing public for purposes of making investment decision and that the petitioner audited the said statements, hence to afford the petitioner an opportunity to respondent a clear notice to show cause was issued stating the issues in question clearly.*

h) ***That*** *in particular, the show cause letter was clear that the petitioner was not subject to the initial inquiry conducted by the first Respondent and that the first Respondent was conducting an inquiry into the affairs of Uchumi and that the petitioner as the reporting accountant and external auditor was informed of the parts of the inquiry that related to the petitioners role into the affairs of Uchumi and that the petitioner played a role that required further inquiry and that the petitioner was informed of the specific allegations and the right to legal representation and that the context in which the word mitigation was used in the context of asking the petitioner to respond to the allegations, hence the petitioner was accorded the opportunity to defend itself before an objective determination is arrived at.*

i) ***That*** *the Respondent did not commission preparation of the draft KPMG report, hence it could not grant the petitioner an opportunity to be heard before it was prepared, that the petitioner had not been adjudged guilty and that the notice to show cause was meant to accord the petitioner the opportunity to be heard.*

j) ***That*** *as a matter of public interest the inquiry ought to proceed and that the first Respondent upheld the petitioners' constitutional rights and that the applicant has not met the test for granting the orders sought.*

In a further affidavit filed on 17th October 2016, Gitahi Gichahi, the executive officer of the petitioner refutes the contents of the above affidavit and avers *inter alia* that the first Respondents undertaking of being the investigator, prosecutor, Judge and hangman are in clear violation of the principles of a fair hearing and in a supplementary affidavit sworn filed on 10th November 2016 he avers *inter alia* that they were not privy to the preparation of the KPMG report nor were they involved and have reservations and complaints on its contents.

The first Respondent filed a further affidavit on 18th November 2016 in which he averred *inter alia* that it did not commission the KPMG report nor was it involved in its preparation at any stage, and that in response to complaints raised, it conducted its independent investigations which culminated in the issuance of the notice to show cause to various parties among them the petitioner.

Advocates submissions

All the counsels filed written submissions which they also highlighted in court. In their submissions filed on 20th December 2016, the petitioners advocates reiterated this court's jurisdiction to enforce fundamental rights enshrined in the Bill of Rights[6] powers to grant judicial review[7]and reiterated the right to a fair administrative action[8] and the right to be given written reasons and observe the rules of natural justice.[9]

Counsel reiterated the petitioners right to a fair administrative action,[10]and sought to distinguish the case of *Kenya National Examinations Council vs R Ex parte Kemunto Regina*[11]where the court ruled it was not possible to issue notices to several students since the present case involves only one individual. Counsel also submitted that the petitioner is entitled to a fair hearing under article 50 of the constitution[12]and that the proceedings in question are *quasi judicial* in nature hence article 50 (1) is applicable.[13] Counsel also submitted that it is evident from the show cause letter that the first Respondent intended to take enforcement action, hence the need for a hearing, and since the decision was to be made by the first Respondent, the proceedings are *quasi judicial* in nature.

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[6] Counsel cited Centre for Rights, Education and Awareness & 7 Others vs the AG {2011} eKLR at page 15, Article 165 (3) (d) (ii)
[7] Communications Commission of Kenya vs Royal media Services Limited {2014} eKLR, Rvs DPP & Another {2015}eKLR
[8] Article 47 of the Constitution
[9] Martin Nyaga Wambora vs Speaker of the Senate{2014} eKLR
[10] Multiple Hauliers East Africa Limited vs A.G & Others {2013}eKLR
[11] NBI Civ App No 127 of 2009 (Unreported)
[12] Counsel cited Judicial Service Commissio vs Mbalu Mutava {2015}eKLR at pages 22 & 23
[13] Counsel also cited Boniface Muthengi vs Headmaster, Kitui High School & Others High Court Misc App No. 45 of 2002

The petitioner insisted that failure to supply the requested report is an infringement on right to access information under article 35 (1) and also insisted that the petitioners rights to a fair administrative action were violated[14] and cited breach in the following, failure to inform the petitioner that there was an investigation against him, failure to share the minutes of the meeting and failure to report after the initial inquiry or findings and that the KPMG report was relied upon by the first Respondent and that the notice to show cause pre-determined the petitioner is culpable and that the petitioner is likely to be prejudiced hence the reliefs sought.

On 7th February 2017, the petitioner filed supplementary submissions insisting that the triple role played by the first Respondent, namely, being an investigator, prosecutor and hangman, the first Respondent cannot be impartial and cited the decision in *Alnashir Popat & 8 Others vs Capital Market Authority.*[15]

Counsel for the first Respondent in their submissions filed on 4th November 2016 cited the leading opinion of Justice Githinji in *J.S.C. vs Mbalu Mutava*[16] and argued that the right to a fair administrative action under article 47 is distinct right from the right to a fair hearing under article 50 (1). Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing applies in proceedings before a court of law or independent and impartial tribunals or bodies. In the above court of appeal decision the learned appellate judge held that the right to a fair trial did not apply to a decision made by J.S.C. A similar finding was arrived at by Majanj J in *Dry Associates Limited vs CMA & Another*[17] where the judge held that article 50 applies to a court, impartial tribunal or a body established to resolve a dispute while article 47 applies to administrative action generally. Relying on the court of appeal decision cited above, counsel submitted that article 50 has no application to the preliminary investigations conducted by the first Respondent.

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[14] Section 3 of the Fair Administrative Action Act and Odunga J in Pet No 314 of 2016
[15] HC Pet No. 245 of 2016
[16] {2015}eKLR
[17] {2012}eKLR

Counsel also submitted that administrative bodies enjoy procedural discretion provided it is substantially and procedurally fair and cited Githinji JA's decision referred to above[18] where quoting Lord Denning in *Selvajan vs Race*[19] stated that the investigating body is however, the master of its own procedure and the above referred to decisions by Majanja J. and the court of appeal decision in *Kenya National Examinations Council vs R.*[20]

Counsel also cited section 4 (6) of the Fair Administrative Action Act[21] which requires an administrator to follow procedure provided under a written law where it is provided and submitted section 28 (6) of the Capital Markets Authority Act[22] provides a procedure which was followed. Counsel also submitted that the petitioner participated in the preliminary inquiry and that the petitioner was invited and attended a meeting on 26th May 2016 even though there is no right to attend a preliminary meeting before a decision is made to show cause, and that an investigation is not a trial[23] also submitted that there was no constitutional or statutory obligation on the part of the first Respondent to invite the petitioner for a specified number of meetings and added that the core investigations was an inquiry to the affairs, accounts and records of Uchumi and in the course of the investigations, certain clarifications were deemed necessary from the petitioner and that the petitioner was only supplied with extracts of the report and that the first Respondent is aware that the full report was shared with the petitioner.

Counsel also submitted that the right to information can only be enjoyed by a natural person and that the petitioner is not a natural person.[24] Counsel also submitted that the show cause letter accords to the provisions of article 47 (1) and that it is in public interest for the process in question to proceed and concluded that the petitioner has not made a case and urged the court to dismiss the case.

In their further submissions, filed on 17th February 2017, counsel for the first Respondent insisted that the first Respondent did not breach the provisions of Fair Administrative Action

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[18] Supra
[19] {1976}1ALL ER 12
[20] Supra
[21] Supra
[22] Supra
[23] See Nancy Mkhoha Baraza vs J.S.C {2012}eKLR
[24] See Majanja J in Famy Care Ltd vs Public Procurement Adm Rev. Board & Aother, Pet No 43 of 2012 & also Ngugi J in Mairobi Law Monthly vs KenyaElectricity Gen Co Ltd & 2 oTHERS {2013}eKLR

Act,[25] and cited its statutory mandate under sections 5, 11, 13B, 26 and 28 of the Capital Markets Authority Act[26] and no evidence of bias or lack of partiality has been pleaded or proven and reiterated that the decision in *Alnashir Popat & Others vs Capital Markets Authority*[27]was rendered *per incurium* and is not binding to this court because it was rendered in disregard of the binding decision rendered by the court of appeal in *Judicial Service Commission vs Gladys Boss Shollei & Another*[28] in which the court of appeal cited the Canadian Supreme court's decision in *Georges R. Brosseau vs Alberta Securities Commission*[29]which court held:-

> *"Securities commissions by their nature, undertake several different functions. The Commission's empowering legislation clearly indicates that the commission was not meant to act like a court in conducting its internal reviews and certain activities which might otherwise be considered "biased", from an integral part of its operations...A security commission's protective role, which gives it a special character, its structure and responsibilities, must be considered in assessing allegations of bias..."*

Counsel for the second Respondent adopted the submissions by counsel for the first Respondent.

Jurisdiction

On jurisdiction **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to *'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'* and the jurisdiction *'to hear any question respecting the interpretation of the Constitution.'* **Article 23** provides that; *"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."*

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Article 165 (7) provides that "For the purposes of clause (6), the High

[25] Supra
[26] Supra
[27] Supra
[28] {2014}eKLR
[29] {1989} 1 SCR 301

Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

Natural justice

Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[30]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[31] The issue that inevitably follows is whether or not the manner in which the first Respondents conducted the challenged investigations amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now 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 is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

'Natural Justice' is an expression of English common law. In *Local Government Board v. Arlidge,*[32] Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."* As early 1906, the Judicial Committee[33] observed that the principle should apply to every tribunal having authority to adjudicate upon matters involving civil consequences.

In India the principle is prevalent from the ancient times.[34] In this context, para 43 of the judgment of the Supreme Court in the case of *Mohinder Singh Gill vs. Chief Election Commissioner,*[35] may be usefully quoted:-

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[30] Article 47(1) of the Constitution of Kenya, 2010
[31] Article 47(2) of the Constitution of Kenya, 201
[32] {1915} AC 120 (138) HL
[33] {1906} AC 535 (539), Lapointe v. L'Association
[34] We find it Invoked in Kautllya's Arthashastra.
[35] AIR 1978 SC 851

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[36] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law*[37] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

Natural justice has been described as "fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair."[38]Its rules have been 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 are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."[39]

Generally, however, it is imperative that individuals who are affected by administrative decisions or decisions made by statutory bodies be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or

[36] (1980), at page 161
[37] (1977) at page 395
[38] Wiseman v. Borneman [1971] A.C. 297
[39] Kanda v. Government of the Federation of Malaya, [1962] A.C. 322, 337, as quoted by the Alberta Court of Appeal in R. v. Law Society of Alberta, (1967) 64 D.L.R. (2d) 140, 151 (Alta C.A.).

privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.[40]

I am aware that in the modern state, the decisions of statutory or administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge vs. Baldwin*[41] been alive to that fact. While the judicial character of a function may 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 makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.[42]

Procedural fairness has embedded in it the age old natural justice requirements that no man is 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.[43] Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The Petitioner argues that the first Respondent cannot be impartial because he is the investigator, prosecutor and the hangman.

The question that begs for answers is whether or not during the preliminary investigations in the present case, the first Respondent was required to apply the rules of natural justice and if so, whether the manner they acted constituted a breach of the rules of natural justice. Counsel for the petitioners cited the High Court decision rendered in *Alnashir Popat & Others vs Capital Markets Authority*[44] in support of his argument. In the said decision, the High court held that "the Respondent cannot undertake impartial proceedings in regard to the bond issue as it was involved in the process of issuing and approving the bond and that additionally the unique circumstances of the case would dictate that the Respondent does not get involved in any investigatory and enforcement proceedings."

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[40] David Phillip JONES and Anne S. de VILLARS, Principles of Administrative Law (4th edition), Thomson Carswell, 2004, p. 251.

[41] {1963} 2 ALL E.R. 66, {1964} A.C.40

[42] As Sedley J. (as he then was) stated in R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery, {1994} 1 All E.R. 651 {Q.B.}, at p. 667:

[43] see Kanda *vs.* Government of Malay {1962} AC 322,337 (per Denning LJ).

[44] Supra

Counsel for the first Respondent submitted that the above decision was rendered *per incurium* and without considering court of appeal decisions on similar circumstances, and specifically referred to the court of appeal decision rendered in *Judicial Service Commission vs Gladys Boss Shollei & Another*[45] which quoted with approval the decision of the Supreme Court of Canada in the case of *George R. Brosseau vs Alberta Securities Commission.*[46] Because of its relevancy to the present case, I find it necessary to briefly recall the facts of this Canadian case.

Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into Brosseau's actions. Brosseau argued that the Commission suffered from institutional bias due to Chair's multiple functions, which allowed him to initiate investigations, prosecute people, and then act as a judge on the panel determining their case, i.e. he/she involved at both the investigatory and adjudicatory levels. The Commission disagreed – they argued that while not specifically authorized by statute, implicit authority for the investigation could be found in the general scheme of the *Securities Act*.

L'Heureux-Dubé, writing for the court, held that:-

> *" as a general principle, a person is entitled to an independent, impartial decision-maker, the nemo judex in causa sua esse principle. In general, it is not permitted for members of an adjudicatory panel to also be involved in the investigatory stages of a proceeding, as this would give rise to a reasonable apprehension of bias.*
>
> *However, statutory authorization for overlapping functions are an exception to this rule, subject to the statute being constitutional. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is 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 is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test.*
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> *Applying this to the case at bar, here the authorization is "implicit"; the 'Act contemplates the involvement of the Chair at several stages of the proceedings. The public interest role of the*

[45] Supra
[46] Supra

Commission could not be carried out without informal investigations/reviews of this sort. Securities acts are aimed at regulating the market and protecting the general public - this must be recognized in determining how to interpret their acts.

It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations."

The *ratio decidedi* in the above decision is that administrative decision makers are created for a variety of reasons to meet a variety of needs and in some instances, an overlap in functions (which is generally not permitted on account of bias) is a necessary element to fulfilling a decision maker's mandate. Provided that the particular decision-maker is not acting outside its statutory authority (and the governing statute is constitutional), an overlap in functions may not give rise to a reasonable apprehension of bias.

Also cited by counsel for the first Respondent is the court of appeal decisions in *Judicial Service Commission vs Mbalu Mutava*[47] referred to earlier and Judicial *Service Commission vs Gladys Boss Shollei & Another*[48]where the court of appeal held that article 50 (1) of the constitution relates to proceedings in courts and other judicial tribunals.

Determining a similar case, the Supreme Court of Philippines[49] observed that it should be underscored that the conduct of a preliminary investigation, like the present case, is only for the determination of probable cause. A preliminary investigation is not a part of the trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence. Thus, the rights of a respondent in a preliminary investigation are limited to those granted by procedural law.[50]

Supreme Court of Philippines defined a preliminary investigation as:-

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[47] Supra

[48] {2014}eKLR, Per Kiage JA

[49]The Supreme Court of Philiphines in the case of Senator Jinggoy Ejercito Estrada, vs. Office of the Ombudsman, Field Investigation Office, Office of the Ombudsman, National Bureau of Investigation and ATTY. Levito D. Baligod, G.R. Nos. 212140-41, January 21, 2015

[50] Ibid

"A preliminary investigation is defined as an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well founded belief that a crime or misconduct cognizable by the law has been committed and that the respondent is probably guilty thereof, and should be held for trial. The quantum of evidence now required in preliminary investigation is such evidence sufficient to "engender a well founded belief" as to the fact of the commission of a crime or misconduct and the respondent's probable guilt thereof. A preliminary investigation is not the occasion for the full and exhaustive display of the parties' evidence; it is for the presentation of such evidence only as may engender a well-grounded belief that an offense has been committed and that the accused is probably guilty thereof."

The key decisions on the subject cited by counsel for the petitioner, namely *Alnashir Popat & 8 Others*[51] *vs The Capital Markets Authority and Centre for Rights, Education and Awareness & Others vs The A.G*[52] were rendered by the High Court. While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R.* v. *Nor. Elec. Co.*,[53] McRuer C.J.H.C. stated:-

".....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary... ". (Emphasis added).

It is also clear that this court can depart from a decision of the court of appeal, if there is a strong reason to do so. The phrase *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*."

Talking about consideration of a statute and authority or authorities that ought to have been followed, and bearing in mind the court of appeal decisions cited by counsel for the first

[51] Supra
[52] Supra
[53] Ibid

Respondent, are binding to this court, I think it is important to bear in mind that Article **259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.[54] The Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights etc.[55]

I can say without fear of contradiction that judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is 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, or the right to natural justice under Article 50.

The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.[56] A close examination of decided cases including the cases cited by the parties herein will evidently review this two-tracked system whereby the courts heavily relied on the common law in either allowing or disallowing judicial review orders. My strong view is judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making

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[54] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[55] Article 10 (1) (a)-(e)

[56] Professor James Thuo Gathii's has posed the warning in *"The Incomplete Transformation of Judicial Review"* quoted in "The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would be Decided Differently Today" http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/

process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny.

The Supreme Court of Kenya recognized that the power of any judicial review is now found in the constitution in the case of *C.C.K. vs Royal Media Services Ltd*[57] where it painted the clearest picture of the evolved nature of judicial review in Kenya. In that case, the Supreme Court held that the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in *Marbury v Madison*[58] The Court cited Articles 23(3)(d) and 165(3)(d)) of the constitution.

In the same *C.C.K. Case,* Rawal DCJ (as she then was) wrote a concurring opinion at paragraphs 403-404 chiefly to illuminate the entrenchment of a duty to act fairly in Article 47 of the Constitution. She notes, "Although this doctrine (*of legitimate expectation*) emanates from common law, the Constitution has entrenched the right of fair administrative action under Article 47 of the Constitution." I stand guided by the Supreme Court decision on this issue.

Comparative jurisprudence

The concept of judicial review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it has been held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*[59] that "[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

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[57] {2014}eKLR
[58] 5 U.S. 137 (1803).
[59] 2000 (2) SA 674 (CC) at 33,

Expanded scope of judicial review

As can be seen, 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, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. An order of judicial review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). I strongly hold the view that court decisions should show strands of the recognition of the Constitution as the basis of judicial review.

In the case of *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex-Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK)*[60] the Court held that the applicant who described itself as a welfare society registered under section 10 of the *Societies Act*[61] with membership throughout the Republic of Kenya had, under the Constitution, locus to institute judicial review proceedings if the Respondents' actions or inactions had adversely affected them or were likely to adversely affect them. The court however reverted to the old argument that private bodies are not amenable to judicial review, without inquiring whether the Respondent carried out a "quasi-judicial function" capable of adversely affecting the rights of the applicant. The applicant was denied judicial review on that basis, *per incuriam*.

Also, Odunga J recently recognized that "Judicial review is a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision in *Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited.*[62] Our 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 this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

This canon of holistic interpretation was repeated in *Judges and Magistrates Vetting Board vs Centre for Human Rights and Democracy*[63] where it was held that "...the Constitution should

[60] {2014}eKLR
[61] Cap 108, Laws of Kenya
[62] {2015} eKLR
[63] {2014}eKLR

be interpreted in a holistic manner; that the country's history has to be taken into consideration; and that a *stereotyped recourse* to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution"[64]

At the same time, Kwasi Prempeh in *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*[65] has noted that the application of the common law's doctrinal traditions, philosophic underpinnings, and styles of reasoning and interpretation as the default rules and norms for framing and analyzing of even *constitutional questions*. The common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the *transformative* vision reflected in modern bills of rights. Much of the problem, he notes, stems from the basic constitutional and jurisprudential paradigm upon which English common law is built, namely Austinian positivism and Diceyian parliamentary sovereignty, notions which are incompatible with the *transformative* ideals of the Constitution of Kenya, 2010.

Thus, Judges cannot afford to routinely cite common-law cases to deny or grant judicial review on the basis of the public-private dichotomy. Moreover, the incompatibility of the common law with *transformative constitutional-ism* has also been the concern of Davis and Klare in *Transformative Constitutionalism and the Common and Customary Law*[66] where they express the apprehension that, the inbred formalism of the legal culture and the absence of a well-developed tradition of critical jurisprudence may stultify efforts to renovate the legal infrastructure in the way envisaged by the Constitution.

Under the Constitution of Kenya, 2010 judicial review orders, in my view, are applicable against any private person, body or authority who exercises a judicial or quasi-judicial functions by which a right or fundamental freedom of a person has been or is 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." Presently, Article 165(6) gives 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.

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[64] at 206
[65] Vol. 80:1 Tulane Law Review 2006 at pp 72
[66] {2010} 26 SAJHR at 405

Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is 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 are now regulated by the Constitution.

Applying the law to the facts of this case

Applying the constitutional principles reiterated above, I find no difficulty in holding that a body performing investigative duties as in the present case is bound to adhere to the constitutional prescriptions of according the person affected a process that is procedurally fair and just as clearly provided in our transformative constitution.

Section 13B grants the first Respondent the authority to investigate. Section 26 (8) of the act provides that:-

> *8) The Authority shall, in shall cases where the Authority takes action under section 25 and 26, give the person affected by such notice an opportunity to be heard.*

The above section, that is section 26 (8) which guarantees the opportunity to be heard was clearly quoted in the notice to show cause dated 31st August 2016. In fact 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 14th September 2016 to respond but instead of responding on 15th September 2016 he filed this petition. I find that the petitioner moved to court "too early' to stop the process and as at the time of filing this 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 has the petitioner proved infringement of any fundamental rights or threat to the infringement to warrant this courts intervention.

I also find that that the first Respondents functions were authorized by the relevant statute and that the statute authorizes overlapping functions. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is 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 is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias has been sufficiently demonstrated.

The petitioner fears that the first Respondent is the investigator, prosecutor and hangman. Hence, the reasonable apprehension of bias test is the key test. Reasonable apprehension of bias is a legal standard for disqualifying judges and administrative decision-makers for bias. Bias of the decision-maker can be real or merely perceived. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.[67] A reasonable apprehension of bias may 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. In my opinion the simple question which requires an answer in each case is this: Is there 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?

It should be noted that the act ought to be read as a whole. Section 11A of the act provides for delegation of functions. It provides that the Authority may delegate any of its functions under the act to a committee of the Board, a recognized self regulatory organization or an authorized person. It follows that if there is likelihood of bias or where circumstances and prudence so permit, the authority may delegate its duties as provided under this section. The fear of the first Respondent being the investigator, prosecutor and hangman may be real, but the process was as the initial stage and in view of the foregoing section, it cannot be said with certainty that the first Respondent was going to perform the said roles. Further, there is nothing preventing a person under investigation to ask for this section to be invoked.

As stated above, I find that the petitioner moved to court rather too early acting on apprehension, but as at that point in time, I find that the steps already taken by the first Respondent are in conformity with the law and no breach of a fundamental right or threat had

[67]The test was first stated in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at page 394

taken place or has been sufficiently proved. However, for avoidance of doubt, I declare that the first petitioner in the performance of its functions under the provisions of the Act is 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 is required to adhere to the principles of natural justice and comply with the provisions of Articles 50 (1) and 47 of the constitution including providing the person under investigation in advance with any adverse evidence that may be used against him/her.

In conclusion I decline to grant any of the reliefs sought in the petition. Each party shall bear its costs for this petition.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this 7th day of March 2017

John M. Mativo

Judge