Weru & 2 others v Capital Markets Authority; Dande & 2 others (Interested Parties) (Commercial Petition E010 of 2021 & E011 of 2022 (Consolidated)) [2024] KEHC 11870 (KLR) (Commercial and Tax) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL PETITION E010 OF 2021 & E011 OF 2022 (CONSOLIDATED)

MN MWANGI, J

SEPTEMBER 26, 2024

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 19, 20, 21, 22(1), 23, 25, 27, 28, 40, 47, 48, 50(1) & (2), 73, 75, 258(1) & (2), & 259(1) OF THE CONSTITUTION OF KENYA;

-AND-

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

-AND-

IN THE MATTER OF: ALLEGED VIOLATION OF THE CAPITAL MARKETS (COLLECTIVE INVESTMENT SCHEMES) REGULATIONS 2001;

-AND-

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

BETWEEN

GRACE WAMBUI WERU ..... 1ST PETITIONER

CYTONN ASSETS MANAGEMENT LIMITED ..... 2ND PETITIONER

AND

CAPITAL MARKETS AUTHORITY ..... RESPONDENT

AND

EDWIN H DANDE ..... INTERESTED PARTY

AS CONSOLIDATED WITH

COMMERCIAL PETITION E011 OF 2022

BETWEEN

EDWIN HAROLD DAYAN DANDE ..... PETITIONER

AND

CAPITAL MARKETS AUTHORITY ..... RESPONDENT

AND

CYTONN ASSETS MANAGEMENT LIMITED ..... INTERESTED PARTY

CYTONN INVESTMENTS MANAGEMENT PLC ..... INTERESTED PARTY

CMA lacks the authority to direct a company (fund manager under its jurisdiction) to change its corporate name and to suspend onboarding of new clients

The petitions arose after the Capital Markets Authority (CMA) issued directives requiring Cytonn Asset Managers Limited to change its corporate name and suspend onboarding of new clients. The High Court found that the CMA acted ultra vires in issuing the directives and held that they violated the petitioners' constitutional rights under articles 27, 28, 40, 47, and 50. The court further determined that the CMA lacked statutory authority to compel a company name change or suspend fund operations. Consequently, it declared the directives unlawful, quashed them and awarded costs to the petitioners.

Reported by John Ribia

Jurisdiction *– jurisdiction of the Capital Markets Authority - jurisdiction of tribunals to interpret statute – jurisdiction of the Capital Markets Tribunal to interpret the Capital Markets Act – interpretation of other statutes – interpretation of the Constitution – scope – interpretation of statutes that were not the Parent Act of a Tribunal - whether the Capital Markets Tribunal had jurisdiction to interpret statues other than the Capital Markets Act and its subsidiary legislation - Companies Act (Cap 486) sections 58 and 60; Capital Markets Act (Cap 485A) section 11(1)(d), 11(3)(cc) (ii) and 11(3)(w); Collective Investment Schemes (CIS) Regulations, (Cap 485A sub leg)regulations 90 and 99(1).*

Capital Markets Law *– Capital Markets Authority – powers – power to direct a licensed fund to change its name – powers of the Capital Markets Authority vis-à-vis powers of the Registrar of Companies - whether the Capital Markets Authority had the power to direct a company/licensed fund manager change of name of a collective investment scheme or such function that was a preserve of the Company and the Registrar of Companies - Capital Markets Act (Cap 485A) section 11(1)(d), 11(3)(cc) (ii) and 11(3)(w); Collective Investment Schemes (CIS) Regulations, (Cap 485A sub leg)regulations 90 and 99(1); Companies Act (Cap 486) sections 58 and 60.*

Statues *– interpretation of statues – interpretation of section 11(3)(cc)(ii) of the Capital Markets Act – powers of the Capital Markets Authority - whether the Capital Markets Authority had power under section 11(3)(cc) (ii) of the Capital Markets Act to suspend a licensed fund manager from onboarding new clients and collecting funds from existing clients.*

Constitutional Law *– fundamental rights and freedoms - right to equality and freedom from discrimination - the right to human dignity - right to property - right to fair administrative action; right to fair hearing - whether the Capital Markets Authority directive requiring Cytonn Asset Managers Limited to change its corporate name and suspend onboarding of new clients was a violation of the above rights and freedoms – Constitution of Kenya articles 27, 28, 40, 47 and 50.*

Brief facts

The petitions arose from directives issued by the Capital Markets Authority (CMA) to Cytonn Asset Managers Limited (CAML), a licensed fund manager, through letters dated June 22, 2021 and August 6, 2021. The CMA instructed CAML to rename its investment products and to change the company's name to distinguish regulated products from unregulated ones allegedly offered by other Cytonn entities. The petitioners, including CAML and its officer Grace Weru, contended that the directives were issued without legal authority and caused disruption to their business.

Following the directives, CAML's board resolved to rename its unit trust funds under the "CyAfrica" brand but declined to change the company's name, citing lack of legal basis and insufficient time. Efforts to convene a meeting with CMA were unsuccessful, culminating in CMA issuing a further directive on 6th August 2021 suspending onboarding of new clients and collection of funds from existing clients.

The petitioners argued that the name change was solely within the mandate of CAML's shareholders and that the suspension directive undermined investor confidence. They maintained that the CMA's actions were unreasonable, disruptive, and unsupported by law, prompting them to file constitutional petitions challenging the legality of the directives and the impact on their rights and business operations.

Issues

i. Whether the Capital Markets Tribunal had jurisdiction to interpret statutes other than the Capital Markets Act and its subsidiary legislation.

ii. Whether the Capital Markets Tribunal had jurisdiction to interpret the Constitution.

iii. Whether the Capital Markets Authority had the power to direct a company/licensed fund manager change of name of a collective investment scheme or such function that was a preserve of the Company and the Registrar of Companies.

iv. Whether the Capital Markets Authority had power under section 11(3)(cc)(ii) of the Capital Markets Act to suspend a licensed fund manager from onboarding new clients and collecting funds from existing clients.

v. Whether the Capital Markets Authority directive requiring Cytonn Asset Managers Limited to change its corporate name and suspend onboarding of new clients was a violation of:

    1. the right to equality and freedom from discrimination;
    2. the right to human dignity;
    3. the right to property;
    4. the Right to fair administrative action; and
    5. the right to fair hearing.

Held

1. A Preliminary Objection ought to raise a pure point of law. It should be argued on the assumption that all the facts pleaded by the other side were correct and it could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The respondent's preliminary objection contained disputed facts that called for the High Court to interrogate the evidence adduced for it to make a determination. The grounds did not qualify as valid preliminary objections. The grounds had been overtaken by events by virtue of the High Court's orders issued on May 22, 2023 and April 17, 2024 consolidating this suit with HCCOMMPET No. 011 of 2022.
2. A question challenging a court's jurisdiction was a threshold issue that fell squarely within the confines of a preliminary objection. Sections 35 of the Capital Markets Act provided for appeals from action by the Capital Markets Authority. Section 35A provided for the establishment of the Capital Markets Tribunal which would hear appeals arising from decisions of the Capital Markets Authority and/or the Investor Compensation Fund Board.
3. From regulations 90, and 99 of the Capital Markets (Collective Investments Schemes) Regulation, 2001, the Capital Markets Tribunal did not have powers to interpret statute as that was a preserve of the

High Court, as provided for under article 165(3)(d) of the Constitution. Under section 35A(5) of the Capital Markets Act, the Capital Markets Tribunal had all the powers of the High Court. However, the said powers were limited to summoning witnesses, taking evidence upon oath or affirmation and calling for the production of books and other documents. The Capital Markets Tribunal did not have jurisdiction to interpret the Constitution and/or statutes.

4. The respondent's Preliminary Objection dated November 18, 2021 was not merited as the High Court was seized of the requisite jurisdiction.
5. The Capital Markets Authority (CMA) (the respondent) was tasked with the duty of protecting the interests of investors and in doing so, it had the power to 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 the Capital Markets Act (the Act). The respondent's reliance on the provisions of section 11(3)(W) of the Act as the basis for directing the 2nd petitioner to change its showed that there was no express provision either in the Capital Markets Act or the Capital Markets (Collective Investments Schemes) Regulation, 2001 that donated such powers to the respondent.
6. The Companies Act and regulation 90 of the Capital Markets (Collective Investments Schemes) Regulation, 2001 in essence provided that change of name of a collective investment scheme, such as the 2nd petitioner, may be approved vide an extraordinary resolution, a function that was the preserve of the Company and the Registrar of Companies as provided for under sections 58 and 60 of the Companies Act, which gave the Registrar of Companies the authority to direct a company such as the 2nd petitioner to change its name. Section 62 of the Companies Act on the other hand provided that a company was at liberty to change its name.
7. The respondent had not demonstrated to the High Court from what statute it derived the authority to direct the 2nd petitioner to change its name. In as much as the provisions of section 11(3)(W) of the Act were blanket in nature, in discharging its functions, the respondent was required to operate within the law and not usurp powers of other administrative bodies in the guise of carrying out its functions, duties and responsibilities.
8. The respondent did not have powers to direct the 2nd petitioner to change its name as the petitioner was a Company incorporated under a different statute which provided for how a company could change its name, and who had the powers to issue directions to that effect. In issuing the directive contained in the letter dated June 22, 2021, for the 2nd petitioner to change its name, the respondent acted *ultra vires* thus, the directive was an illegality.
9. The sanctions contained in the letter dated August 6, 2021 were a consequence of non-compliance with the directives issued in the letter dated June 22, 2021. The sanctions contained in the letter were not binding to the petitioners as they had no legal effect.
10. Suspension of onboarding new clients and collecting funds from existing clients by the 2nd petitioner was a preserve of the Fund Manager, thus the respondent could not rely on the provisions of sections 11(1)(d), (3)(cc)(ii), and (3)(w) of the Capital Markets Act, which did not expressly donate that power to the respondent in usurping the powers of the Fund Manager.
11. Issuance of the directives contained in the letters amounted to a violation of the petitioners' and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the Constitution.

Petition allowed.

Orders

i. *Declaration issued that the directives made by the respondent through the letters dated June 22, 2021 and August 6, 2021 to the effect that "pursuant to section 11(1)(d) read together with section 11 (3)(cc) (ii) and 11(3)(w) of the Capital Markets Act, the Authority hereby directs that Cytonn Asset Managers Limited suspends onboarding new clients and collecting funds from existing clients with immediate effect" amounted to a violation of the petitioners' and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the Constitution;*

ii. *Declaration issued that the directives made by the respondent in its letters dated June 22, 2021 and August 6, 2021 offend the provisions of regulations 90 and 99 of the Capital Markets (Collective Investments Scheme) Regulations 2001 as read with the Capital Markets Act and were ultra vires the powers of the Capital Markets Authority.*

iii. *Order issued quashing the respondent's directives as contained in its letters dated June 22, 2021 in respect to change of name of the 2nd petitioner, and August 6, 2021 addressed to Cytonn Assets Management Limited.*

iv. *Costs of the petition were to be borne by the respondent for overstepping its mandate.*

Citations

Cases

Kenya

1. *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* Application 50 of 2014; [2015] KESC 23 (KLR) - (Applied)
2. *Centre for Human Rights and Democracy & 2 others v Judges and Magistrates Vetting Board & 2 others* Constitutional Petition 11 of 2012; [2012] KEHC 5431 (KLR) - (Applied)
3. *John Musakali v Speaker County of Bungoma, County Assembly of Bungoma, Henry Nyongesa Khaemba, Moses Wabwile & Amani/Jubilee Coalition* Petition 11 of 2015; [2015] KEHC 2131 (KLR) - (Applied)
4. *Joy Brenda Masinde v Law Society of Kenya & Attorney General* Petition 54 of 2015; [2015] KEHC 507 (KLR) - (Applied)
5. *Muigai & another v Law Society of Kenya & another* Petition 286 of 2014; [2015] KEHC 6973 (KLR) - (Applied)
6. *Okoiti & 3 others v Anne Waiguru, Cabinet Secretary, Devolution and Planning & 5 others* Petition 42 & 27 of 2014 (Consolidated); [2021] KEELRC 2306 (KLR) - (Followed)
7. *Owners of the Motor Vessel "Lillian S"' v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Applied)
8. *Peter Muthoka v CMC Holdings & another* Civil Case No 154 of 2012 - (Mentioned)
9. *Republic v Public Procurement Administrative Review Board & 2 others* Judicial Review 216 of 2012; [2013] KEHC 6343 (KLR) - (Followed)
10. *Andrew Shiroko Shilenje v County Government of Kakamega & Kakamega County Public Service Board* Constitutional Petition 22 of 2014; [2015] KEHC 5907 (KLR) - (Applied)

Regional Court

Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd [1969] EA 696 - (Applied)

Statutes

Kenya

1. Capital Markets (Collective Investment Schemes) (CIS) Regulations, 2001 (sub leg) regulation 90,99(1) - (Interpreted)
2. Capital Markets Act sections 11(1)(d); 11(3)(cc)(ii); 11(3)(w); 30A; 35; 35A(16) - (Interpreted)
3. Capital Markets Regulations, 2002 (cap 485A Sub Leg) regulation 21- (Interpreted)
4. Civil Procedure Act (cap 21) section 6- (Interpreted)
5. Companies Act (cap 486) sections 58, 60- (Interpreted)
6. Constitution of Kenya articles 10, 27, 28, 40, 47, 50, 165(3)(d); 192- (Interpreted)
7. Fair Administrative Action Act (cap 7L) section 4(1) - (Interpreted)

Advocates

Mr Ogada for the petitioners and interested parties

Ms Odongo for the respondent

JUDGMENT

1. HCCOMMPET No E010 of 2021 was filed vide a petition dated August 13, 2021 accompanied by a notice of motion application under certificate of urgency dated August 13, 2021. In the application, the petitioners seek the following orders-

    i. Spent;

    ii. Spent;

    iii. This honorable court be pleased and do hereby suspend the purported malicious and irregular directives contained in the letters dated June 22, 2021 and August 6, 2021 to the effect that "pursuant to section 11(1)(d) read together with section 11(3)(cc) (ii) and 11(3)(w) of the *Capital Market Act*, the Authority hereby directs that Cytonn Asset Managers Limited suspends onboarding new clients and collecting funds from existing clients with immediate effect" pending the hearing and determination of the petition;

    iv. Spent;

    v. A conservatory order do issue staying the respondent's decision suspending the onboarding new clients and collecting funds from existing clients with immediate effect pending the hearing and determination of this petition;

    vi. The costs of this application be provided for; and

    vii. Any other or further relief which this honourable court deems fit and just to grant.

2. In the petition, the petitioners seek the following orders -

    i. A declaration be and is hereby issued that the purported malicious directives issued by the respondent through the letters dated June 22, 2021and August 6, 2021 to the effect that "pursuant to section 11(1)(d) read together with section 11(3)(cc) (ii) and 11(3)(w) of the *Capital Markets Act*, the Authority hereby directs that Cytonn Asset Managers Limited suspends onboarding new clients and collecting funds from existing clients with immediate effect" constitutes a violation of the petitioner's and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the *Constitution*;

    ii. An interpretation be and is hereby made on the purport and import of regulation 90 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001* to the effect as to whether the Capital Markets Authority has the power to order, influence and force a change of name of products in the Capital Markets industry;

    iii. An interpretation be and is hereby made on the purport and import of regulation 99 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001* as to whether the Capital Markets Authority has the power to suspend onboarding new clients and collecting funds from existing clients;

    iv. A declaration be and is hereby issued that the directives dated June 22, 2021 and August 6, 2021 offend the provisions of regulations 90 and 99 of the *Capital Markets (Collective Investments Scheme) Regulations 2001* as read with the *Capital Markets Act* and are *ultra vires* the powers of the Capital Markets Authority;

v. Costs of this petition; and

vi. Any other or further relief as this honourable court may deem fit to grant.

3. In HCCOMM Petition No E010 of 2022, the petitioners' case is that Cytonn Asset Managers Limited (CAML), a licensed Fund Manager regulated by the Capital Markets Authority (CMA), manages various investment products including the Cytonn Money Market Fund, Cytonn Balanced Fund, Cytonn Equity Fund, Cytonn Africa Financial Fund, and the Cytonn High Yield Fund, collectively known as Cytonn Unit Trust Funds (CUTF). The dispute herein centers on the respondent's directives issued in letters dated June 22, 2021 and August 6, 2021, directing CAML to rename its regulated investment products, and change their names. The petitioners believe that the decision to rename their investment products should be made by the 2nd petitioner's Directors as provided for by regulation 90(2) of the *Collective Investment Schemes Regulations, 2001.*

4. The petitioners claim that renaming their products is unreasonable and malicious, is intended to disrupt their business and create market confusion. In the letter dated June 22, 2021, the respondent directed the 2nd petitioner to rename its Funds within thirty (30) days, citing section 11(3)(w) of the *Capital Markets Act* due to unspecified complaints on social media which the petitioners and the interested party had not encountered. On July 3, 2021, the 2nd petitioner's Board sought an extension from the respondent to properly address the directive and consult with stakeholders, given the significant impact on their investment products. The petitioners stated that on July 5, 2021, the 2nd petitioner's Chairman requested a thirty (30) days' extension from the respondent to address its directive due to the urgency and complexity of the matter, which request was declined vide a letter dated July 9, 2021.

5. Subsequently, the 2nd petitioner's Board met on July 14, 2021 and July 17, 2021 and decided to rename its Cytonn Unit Trust Funds products from Cytonn to CyAfrica, including changing the Cytonn High Yield Fund to the CyAfrica Alternative Investment Fund, in compliance with the respondent's directive and to avoid conflict with the respondent, a decision that was communicated to the respondent on 20th July, 2021. That the respondent approved the name change with no objection. The petitioner deposed that vide a letter dated July 23, 2021, the respondent directed the 2nd petitioner to also change its company name to CyAfrica by July 31, 2021, a deadline the petitioners deemed to be unrealistic. The said issue was referred to the 2nd petitioner's Shareholders, noting the short time frame they had to comply with the said directive. That in a meeting held on July 27, 2021, the 2nd petitioner's Shareholders unanimously decided to retain the name "Cytonn" and authorized management to seek an amicable resolution with the respondent while preserving the company's licence.

6. The petitioners argued that their decision was based on several reasons inter alia that the 2nd petitioner needed more time to understand and evaluate the rationale for the change, the time frame for the change was impractically short, and a sudden change could confuse investors and destabilize the Funds, which were already facing liquidity issues due to the COVID-19 Pandemic. The petitioners communicated their decision to the respondent vide a letter dated July 29, 2021 where they also requested for a meeting with the respondent to understand the reasoning behind the directive for a name change. On July 30, 2021, the 2nd petitioner's Chairman, Prof Daniel Mugendi, and the respondent's CEO, Mr Wycliffe Shamiah arranged for a meeting between the respondent and the 2nd petitioner's Shareholders for the week starting August 9, 2021, being a date that was arrived at Mr Shamiah's convenience as he was unavailable earlier.

7. The 2nd petitioner stated that in an unfortunate state of events, it received an email on August 4, 2021 from the respondent giving less than 24 hours' Notice for a physical meeting scheduled for

August 5, 2021, which Notice they perceived as unreasonable and done in bad faith. The petitioners contended that they struggled to coordinate attendance of the meeting due to the short timeline and the unavailability of key individuals, including a Shareholder who was on maternity leave, the Chairman who was attending a seminar, and another Shareholder with work commitments. The 2nd petitioner averred that it requested for a seven days' extension (of the notice) from the respondent on August 4, 2021 so as to secure the attendance of its Board and Shareholders. That the respondent wrote to the 2nd petitioner stating that failure to attend the meeting of August 5, 2021 was a show of high handedness and in total disregard to the well-established principle of fair administrative action. Consequently, the 2nd petitioner was directed to stop onboarding any new clients and collecting funds from existing clients with immediate effect.

8. The petitioners contended that the sanctions imposed on them by the respondent are not anchored in statute as it is not among the sanctions provided for under section 11(3)(cc)(ii) of the Act, and it amounted to violating the applicants', Shareholders', and investors' constitutional rights to fair administrative action and the principle of natural justice. The petitioners further stated that the respondent's directive to suspend onboarding new clients exceeded their authority, contradicting regulation 99(1) of the *Collective Investment Schemes (CIS) Regulations, 2001*. Additionally, they alleged that the suspension undermined investor confidence, similar to a previously stayed directive in December 2019 where the court held that issuing the directive was deemed irregular and against constitutional rights and principles of fair administrative action.

9. The petitioners asserted that the respondent's directive, led to KCB Bank Kenya Limited restricting collection accounts from receiving new funds, thus reducing the assets under management and effectively creating a hostile business environment for the Cytonn Group, with the Court occasionally providing temporary relief. They claimed that the respondent's directives issued in the letters dated June 22, 2021 and August 6, 2021 is an economic sabotage and it amounts to commission of an economic crime by the respondent. They asserted that if the orders sought are not granted there will be further economic decline and significant prejudice to the 2nd petitioner's investors, stakeholders, employees, and the public at large.

10. In opposition to the petition, the respondent filed a notice of preliminary objection dated November 18, 2021 raising the following grounds –

    i. That the entire suit filed is bad in law and fatally defective as it offends the provisions of section 35 and 35A of the *Capital Markets Act*, Cap 485A Laws of Kenya as this honourable court lacks jurisdiction to entertain hear and/or determine the issues raised in the suit;

    ii. That the entire suit is fatally defective and an abuse of the court process as it offends the provisions of section 6 of the *Civil Procedure Act*, cap 21 Laws of Kenya as the suit is sub judice as there exists a pending suit Nairobi HCCOMMPET No E313 of 2021; *Edwin HD Dande v Capital Markets Authority & 2 others* which raises substantially similar issues as the ones raised in this suit;

    iii. That the petition dated August 13, 2021 and the applications dated August 13, 2021 and November 15, 2021 are fatally defective and incurably incompetent and offend the provisions of order 7 rule 1(e) of the Civil Procedure Rules, 2010 as the plaintiff did not disclose to this Honourable Court the existence of a similar suit to wit: Nairobi HCCOMM Petition No E313 of 2021; *Edwin HD Dande v Capital Markets Authority & others*; and

    iv. That the entire suit is fatally defective as it is an abuse of the court process and meant to delay fair trial of the issues between the parties and should be dismissed with costs.

11. The respondent also filed a replying affidavit sworn on November 19, 2021 by Wyckliffe Shamiah, the respondent's Chief Executive Officer. He averred that the respondent is tasked under section 11 of the *Capital Markets Act* with the responsibility of ensuring smooth operations of the Capital Markets, to protect investors, and to impose sanctions for breach of the provisions of the *Capital Markets Act*, the regulations made thereunder, and for non-compliance with the Authority's requirements or directions. He stated that the 2nd petitioner oversees several regulated funds under the Cytonn brand, including Cytonn Money Market Fund, Cytonn Balanced Fund, Cytonn Equity Fund, Cytonn Africa Financial Services Fund, Cytonn Money Market Fund (USD), and Cytonn High Yield Fund.

12. According to the respondent, it found that Cytonn Investments Management PLC and some unregulated entities within the Cytonn Group were offering schemes and products, such as Cytonn Cash Management Solutions (CMS) and Development Real Estate Investment Trusts (D-REITs) like Project Notes that appeared to be Regulated Collective Investment Schemes. The respondent claimed that Cytonn Cash Management Solutions (CMS) operated like a collective investment scheme without registration or regulation, thereby violating laws. That Cytonn Investments, through its subsidiary Cytonn Real Estate, managed investor funds similarly to a Real Estate Investment Trust (REIT), both classified as public offers under section 30A of the Act and regulation 21 of the *Capital Markets Regulations, 2002*. The respondent deposed that despite engagements with Cytonn, the said products were not regulated, and that Cytonn High Yield Solutions (CHYS) succeeded CMS, mimicking a regulated product.

13. The respondent averred that initially, the petitioners committed to converting CHYS to a regulated Cytonn High Yield Fund (CHYF), but due to hesitation, it was decided to convert it to a Development Real Estate Investment Trust (D-REIT). He stated that the petitioners were slow in completing the D-REIT registration process, and the application was closed on November 5, 2020 due to non-responsiveness. The respondent alleged that the activities of Cytonn Cash Management Solutions, Cytonn Real Estate, and Cytonn High Yield Solutions (CHYS) violate the Capital Markets legal and regulatory framework. The respondent claimed that Cytonn Real Estate Project Notes LLP issued Project Notes, a structured debt instrument backed by real estate projects, available to the public and not limited to private offers, violating regulations. That Cytonn Investments Management PLC acted as the arranger and agent for these notes, an entity that was is not licensed by the respondent thus it was operating illegally.

14. The respondent astated that it received numerous complaints from investors about unlicensed products being offered by Cytonn entities, which were mistakenly perceived as regulated. As a result, the respondent engaged with the 2nd petitioner to change the names of their products to prevent confusion, as discussed in a meeting on January 9, 2021 but the petitioners did not comply hence continued risking investors' funds without recourse under the capital markets regulatory framework. The respondent stated that it issued a public statement on June 17, 2021 warning against investing in unregulated products from unlicensed firms so as to protect investors and clarify the situation. It was contended that to prevent future confusion, the respondent directed the renaming of products and the licensed entity in a letter dated June 22, 2021 within thirty (30) days, with an extended deadline to July 31, 2021.

15. The respondent confirmed that the 2nd petitioner renamed its products CyAfrica, but refused to change its name. It averred that the reasons for non-compliance by the 2nd petitioner were flimsy since sufficient time was given for compliance, a special general meeting could have been held since virtual meeting platforms eliminate distance barriers. The respondent asserted that after the deadline of July 31, 2021 lapsed, it requested for a meeting on August 3, 2021, which the 2nd petitioner declined. The respondent

stated that the 2nd petitioner and Cytonn Investments Management PLC's refusal to comply aimed to benefit from the confusion caused by their product naming, thus warranting the respondent to issue sanctions to the 2nd petitioner on August 6, 2021. He asserted that the respondent had acted in accordance with the law and had not discriminated against any market player. Further, that the respondent's intent has always to be to enforce legal mandates, not to act with malice or discrimination.

16. In a rejoinder, the petitioners filed a supplementary affidavit sworn on March 21, 2022 by Grace Wambui Weru, the 1st petitioner and the 2nd petitioner's Principal Officer. She contended that this court is being called upon to restrain the respondent so that the Capital Markets can grow for the benefit of Kenyans. She argued that knowingly or unknowingly, the respondent has set up several impediments to Capital Markets development, and that the onslaught on the 2nd petitioner and any of its related business is just one of the many high hand tools its deploys to fight growth in Capital Markets to the benefit of the banking sector and a few vested interests that have appointed management of the respondent in a manner shrouded with opaqueness and secrecy. They contended that the respondent has stifled the growth of the Capital Markets by inter alia fighting private offers, defaming anyone who is advancing private offers as engaging in illegal activities, issuance of arbitrary and conflicting directives, and misinterpreting the applicable laws and regulations,

17. The petitioners stated that Cytonn Real Estate does not manage investor funds, as it is a development manager that deals with construction such as digging trenches and laying foundations. They further stated that they never resolved to convert Cytonn Real Estate Project Notes LLP to a Development Real Estate Investment Trust as alleged by the respondent. They argued that Cytonn Investment Management PLC was interested in a D-REIT but the process stopped when the intended Trustee tried to tie their services with a banking deposit, thus they backed out. Ms. Weru averred that the alleged numerous complaints from investors were only seven (7) out of a total investor base of 35,000 clients under the various Cytonn clients, which complaints were only received after the respondent put out a public statement in June 2021 soliciting for complaints. That the said seven (7) complaints came after March 2020 when the Board of Investors invoked the force majeure clause halting withdrawals from the Cytonn High Yield Solutions following the effects of the Covid-19 Pandemic.

18. She stated that in any event, this court has on several occasions ruled that disputes in the Cytonn High Yield Solutions are to be resolved in arbitration. Further, that the respondent had not disclosed to this Court any of the alleged numerous complaints. The petitioners averred that even if there was confusion in the market, a fact which she denied, the respondent ought to have invited the 2nd petitioner and put forth some suggestions to resolve the alleged confusion. She claimed that the contention of confusion was irrational, and was against the principles of Fair Administrative Action to order a change of name to be effected within a month on account of confusion, yet other financial services companies have taken over 23 (twenty three) months to achieve the same. The petitioners gave an example of Britam Money Market Fund which is regulated by the respondent, and Britam Wealth Management LLP, a private offer not regulated by the respondent, and questioned why the respondent had not directed Britam Money Market Fund to change its name on account of confusion.

19. They claimed that issuing a directive to the 2nd petitioner to change its name was *ultra vires* and amounts to usurping the powers of the 2nd petitioner's Board of Directors, who have the powers to effect any changes in the incorporation instruments as provided for under regulation 90(2) of the Collective Investment Scheme Regulations 2001.

20. HCCOMMPET No 011 of 2022 on the other hand was filed vide a petition dated August 9, 2021 accompanied by a notice of motion application under certificate of urgency dated August 9, 2021. In the application, the petitioner seeks the following orders –

i. Spent;

ii. Spent;

iii. Spent;

iv. That pending the hearing and determination of the petition herein, the directives contained in the respondent's letters of June 22, 2021 and August 6, 2021 addressed to Cytonn Assets Management Limited be stayed; and

v. That the costs of and occasioned by this application be provided for.

21. In the petition, the petitioner by the name Edwin Harold Dayan Dande seeks the following orders –

i. A declaration that the respondent infringed on the petitioner's right to fair administrative action by issuing the directives contained in its letters of June 22, 2021 and August 6, 2021 addressed to Cytonn Assets Management Limited;

ii. A declaration that the respondent breached articles 10 and 47 of the *Constitution of Kenya*, 2010 as well as section 4(1) of the *Fair Administrative Action Act*;

iii. A declaration that the actions of the respondent were in violation of article 10 of the *Constitution* specifically the values of good governance, transparency and accountability;

iv. An order quashing the respondent's directives as contained in its letters of June 22, 2021 and August 6, 2021 addressed to Cytonn Assets Management Limited;

v. Such other and/or further relief as this honourable court may deem fit to grant; and

vi. An order that the costs of and occasioned by this petition be borne by the respondent.

22. Upon perusal of the affidavit in support of the petition filed in HCCOMMPET No 011 of 2022, it is evident that the petitioner's case therein is similar to the petitioner's case in HCCOMMPET No E010 of 2021 which revolves around the issuance of the letters dated June 22, 2021 and August 6, 2021 addressed to Cytonn Assets Management Limited, the legality of the said letters and the process leading to the issuance of the said letters. For this reason, I shall not rehash the same.

23. On May 22, 2023, the court made an order for consolidation of HCCOMMPET No. E010 of 2021 with HCCOMMPET No 011 of 2022, with HCCOMMPET No. E010 of 2021 being the lead file.

24. The petitions herein were canvassed by way of written submissions which were highlighted on April 17, 2024. The petitioners' & interested parties' submissions were filed by the law firm of Prof. Tom Ojienda & Associates on March 23, 2022, whereas the respondent's submissions were filed on January 25, 2024 by the law firm of Robson Harris Advocates LLP.

25. Mr. Ogada, learned counsel for the petitioners & interested parties referred to the provisions of regulation 90 of the Capital Markets (Collective Skills Regulation) and the *Capital Markets Act* and submitted that the decision to change a name lies with the 2nd petitioner's Directors, and that the respondent can only propose a name to the said Directors who will convene a meeting and resolve if a name change is necessary. He further submitted that his clients wrote to the respondent stating that their Unit Trust Fund products which include Cytonn Money Market Fund, Cytonn Balanced Fund, Cytonn Equity Fund, Cytonn Africa Financial Fund, and Cytonn High Yield Fund would be killed if they implemented the respondent's directives which were otherwise ultra vires. Counsel stated that in a Money Market Fund, clients invest money which is in turn re-invested elsewhere and as such, when

the respondent directed the Trust Funds not to onboard new clients, it was a directive that was not anchored on law.

26. He cited regulation 99 of the Capital Markets Collective Investments Scheme Regulations (hereinafter referred to as the CIS regulations) as read with section 11(3)(c) of the *Capital Markets Authority Act* which deals with the sanctions the respondent can give, and stated that the sanction given to the 2nd petitioner vide the letter dated August 6, 2021 stopping the Trust Funds from onboarding new clients was illegal, as it is only the Fund Manager and Trustees that have the power to issue such directives. He further stated that the International Organisation of Securities Commission Guidelines frown upon the granting of sanctions such as the ones given to the 2nd petitioner by the respondent. Counsel asserted that the respective directives issued in the letters dated June 22, 2021 and August 6, 2021 infringed on the petitioner's rights in articles 27, 28, 40, 47 & 50 of the *Constitution of Kenya*, 2010, on the right to be heard.

27. Ms. Odongo, learned counsel for the respondent, submitted that the directives issued to the 2nd petitioner vide the letters dated June 22, 2021 and August 6, 2021 were that it should change its name to distinguish the products that were regulated from unregulated products since reports had been made to the respondent that consumers were unable to differentiate between the regulated products from the unregulated ones. She further submitted that the petitioners had proposed new names but they failed to propose a Fund Manager for the 2nd petitioner for reasons that its Shareholders had refused to pass a resolution. Counsel relied on the case of *Githu Muigai & another v Law Society of Kenya & another* [2015] eKLR, cited by the court in *Joy Brenda Masinde v Law Society of Kenya & another* [2015] eKLR, and argued that the respondent acted within its proper authority when it issued the directives vide its letters dated June 22, 2021 and August 6, 2021.

28. Counsel cited the provisions of section 11(3) of the *Capital Markets Act* and asserted that the said section is not conclusive on the express action or sanctions that may be imposed by the respondent since the operative words 'may include' indicate a variable endless but analogous list of sanctions that may be imposed by the respondent provided that they are justifiable and not capricious, and they are analogous to the ones listed, with the sole aim of achieving the respondent's objectives, which include protection of the interests of investors and the general public at large. To buttress the above submissions, Ms Odongo cited the case of *Peter Muthoka v CMC Holdings & another* HCCC No 154 of 2012, and the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2019] eKLR, where the Court addressed the doctrine of *ultra vires*.

29. Ms Odongo argued that allowing the petitioners and the interested party to operate as they please will continue to expose investors to further loss of their monies. She submitted that in issuing the impugned directives, the respondent acted within the confines of the provisions of article 47 of the *Constitution* of Kenya, 2010 and section 4 of the *Fair Administrative Action Act*. Counsel further submitted that the 2nd petitioner and its affiliated companies two of which have been placed under liquidation by the court (differently constituted), have been unable to pay back investors. She cited the case of *Andrew Shiroko Shilenje v County Government of Kakamega & another* [2015] eKLR, and argued that the petitioners and the interested party have failed to demonstrate the right(s) that stand infringed or threatened and/or any prejudice that they stand to suffer in the event the orders sought are not granted.

30. In a rejoinder, Mr Ogada submitted that the respondent has no role to play in unregulated products. He further submitted that changing the 2nd petitioner's name will bring confusion, and that there is only one product by Cytonn that is under liquidation.

Analysis and Determination.

31. I have carefully considered the petitions and applications filed herein, the affidavits in support thereof, the replying affidavit by the respondent, and the written submissions by counsel for the parties in support of their respective positions as well as the authorities relied on. The issues that arise for determination are –

    i. Whether the respondent's preliminary objection should be sustained;

    ii. Whether the respondent acted ultra vires in issuing the directives contained in the letters dated June 22, 2021 and August 6, 2021; and

    iii. Whether the petitioners are entitled to the orders sought.

Whether the respondent's preliminary objection should be sustained.

32. The locus classicus on preliminary objections is the case of *Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd* [1969] EA 696. At page 700 thereof, the court defined what a preliminary objection is, and discussed how it applies. The Supreme Court of Kenya also weighed in on the same issue in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated thus -

> .... Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.

33. Further, in *John Musakali v Speaker County of Bungoma & 4 others* [2015] eKLR the validity of a preliminary objection was considered in the following manner -

> ... The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law...

34. From the above decisions, it is apparent that a preliminary objection ought to raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Upon perusal of the respondent's preliminary objection dated November 18, 2021, I note that grounds 2, 3 & 4 contain disputed facts that call for this court to interrogate the evidence adduced for it to make a determination, thus the said grounds do not qualify as valid preliminary objections. Nevertheless, the said grounds have since been overtaken by events by virtue of this court's orders issued on May 22, 2023 and April 17, 2024 consolidating this suit with HCCOMMPET No 011 of 2022.

35. The first ground of the aforesaid preliminary objection on the other hand challenges this court's jurisdiction to determine this matter. A question challenging a court's jurisdiction is a threshold issue that falls squarely within the confines of a preliminary objection. I will therefore proceed to determine the said issue.

36. In the case of the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, it was held was held as follows-

> ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings

pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

37. The respondent claims that this petition is fatally defective as it offends the provisions of sections 35 & 35A of the *Capital Markets Act*. Section 35 provides for appeals from action by the Capital Markets Authority, it states that-

    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 –

        a. refusing to grant a licence;

        b. imposing limitations or restrictions on a licence;

        c. suspending or revoking a licence;

        c. refusing to approve a public offer of securities;

        d. refusing to admit a security to the official list of a securities exchange;

        e. suspending trading of a security on a securities exchange; or

        f. requiring the removal of a security from the official list of a securities exchange;

        g. refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces, 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...

38. Section 35A on the other hand provides for the establishment of the Capital Markets Tribunal which shall hear appeals arising from decisions of the Capital Markets Authority and/or the Investor Compensation Fund Board. Section 35A(16) provides for the orders that the said Tribunal has the power to make, they include –

    a. confirm, set aside or vary the order or decision in question;

    b. exercise any of the powers which could have been exercised by the Authority or any of its committees in the proceedings in connection with which the appeal is brought; or

    c. make such other order, including an order, for costs, as it may deem just.

39. The prayers by the petitioners in this petition have been reproduced in this ruling, and it is evident that other than challenging the powers of the respondent to issue the directives and/or sanctions issued in its letters dated June 22, 2021 and August 6, 2021, the petitioners also seek this court to interpret regulations 90 & 99 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001*. From the said provisions, it is clear that the Capital Markets Tribunal does not have powers to interpret statute as that is a preserve of the High Court, as provided for under article 165(3)(d) of the *Constitution of Kenya, 2010* which provides that -

    Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of -

    i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of laws under article 191.

40. It can be argued that under section 35A(5) of the *Capital Markets Act*, that the Capital Markets Tribunal has all the powers of the High Court. However the said sub-section provides that the said powers are limited to summoning witnesses, taking evidence upon oath or affirmation and calling for the production of books and other documents. This means that the Capital Markets Tribunal does not have jurisdiction to interpret the *Constitution* of Kenya and/or statutes. In the case of the *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* [2014] eKLR, the Supreme Court of Kenya held that -

> The ultimate power of interpretation of the *Constitution*, or the statutes, rests with the court. The courts, therefore, will always jealously guard their jurisdiction, and save it from being inappropriately curtailed...

41. Having found that the Capital Markets Tribunal does not have the jurisdiction to interpret the *Constitution* of Kenya and/or statutes and noting that the prayers sought by the petitioners include interpretation of Regulations 90 & 99 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001*, this court assumes jurisdiction to determine the petitioners' challenge of the powers of the respondent to issue the directives and/or sanctions issued in its letters dated June 22, 2021 and August 6, 2021.

42. In the premise, it is my finding that the respondent's preliminary objection dated November 18, 2021 is not merited as this court is seized of requisite the jurisdiction.

Whether the respondent acted ultra vires in issuing the directives contained in the letters dated June 22, 2021 and August 6, 2021.

43. The 2nd petitioner was incorporated under the *Companies Act* on August 22, 2016 and was issued with a certificate of incorporation by the Registrar of Companies. On March 22, 2018, it was licensed by the respondent to carry on the business of a Fund Manager and since then, it has been managing various investment products including the Cytonn Money Market Fund, Cytonn Balanced Fund, Cytonn Equity Fund, Cytonn Africa Financial Fund, and Cytonn High Yield Fund, collectively known as Cytonn Unit Trust Funds (CUTF). Vide a letter dated June 22, 2021, the respondent directed the 2nd petitioner pursuant to the provisions of section 11(1) & (3)(W) of the *Capital Markets Act* to change its name and rename its registered CIS funds within thirty (30) days from the date of the said letter so as to distinguish them from the larger Cytonn group and distinguish the regulated products from the unregulated ones.

44. In the said letter the respondent contended that it had received several concerns from investors and the public on the confusion brought about by the naming of the 2nd petitioner's financial products and services, thus investors and the public were unable to distinguish licensed and regulated products from those that are not. From the evidence adduced and pleadings filed, it is evident that the 2nd petitioner partly complied with the directive by removing the name Cytonn from its registered Cytonn Unit Trust Funds and replacing it with CyAfrica. That decision was communicated to the respondent vide

a letter dated July 20, 2021. In a letter dated July 23, 2021, the respondent informed the 2nd petitioner that it had no objection to the adoption of the name CyAfrica and proceeded to direct it to fully comply with the directives issued in the letter dated June 22, 2021 requiring it to change its name, not later that July 31, 2021.

45. Upon receipt of the said letter, the 2nd petitioner in a letter addressed to its Shareholders dated July 26, 2021, indicated that a change of name could only be effected through a special resolution of the Shareholders except as otherwise provided under the *Companies Act* and forwarded the matter of renaming of the 2nd petitioner for consideration in a meeting by its Shareholders. Subsequently, the 2nd petitioner's Shareholders held a meeting on 26th and July 27, 2021 but failed to pass a resolution to change the 2nd petitioner's name on grounds that a hurried name change would destabilize the regulated funds. The said decision was communicated to the respondent vide a letter dated July 29, 2021. It is not disputed that on July 30, 2021, the 2nd petitioner's Chairman held a meeting with the respondent's Chairman who agreed to meet with the 2nd petitioner's Shareholders in the 2nd week after that meeting, to discuss the issue of the name change.

46. In an email sent on August 4, 2021, the respondent forwarded to the 2nd petitioner a letter dated August 3, 2021 inviting the 2nd petitioner's Board of Directors and Shareholders for a meeting at its offices on August 5, 2021 in view of their request made on August 2, 2021. The 2nd petitioner responded in an email sent on the same day requesting for seven (7) days to consult its members and get back for the physical meeting requested since it had been difficult to secure attendance of most of its Shareholders and Board of Directors due to the short notice of the meeting. The interested party herein also did an email to the respondent dated August 5, 2021 reiterating the contents of the 2nd petitioner's email sent on August 4, 2021.

47. In a letter dated August 6, 2021, the respondent wrote to the 2nd petitioner stating that they failed to attend the meeting of August 5, 2021. In citing the provisions of section 11(1)(d),(3)(cc)(ii),(3)(w) of the *Capital Markets Act*, the respondent directed the 2nd petitioner to stop onboarding any new clients and collecting funds from existing clients with immediate effect for a period of three (3) months or until compliance with the directive of June 22, 2021.

48. The petitioners relied on the provisions of the *Companies Act*, regulations 90 & 99 of the Capital Markets (Collective Investments Schemes) Regulation, 2001 and asserted that the respondent has no powers donated to it either by the *Companies Act*, the *Capital Markets Authority Act* and/or the *Capital Markets (Collective Investments Schemes) Regulation, 2001* to direct the 2nd petitioner to change its name, thus the directives issued by the respondent to the petitioners vide their letters dated June 22, 2021 and August 6, 2021 were *ultra vires*.

49. In the case of *Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others* [2021] eKLR, the court considered the doctrine of ultra vires and held as follows-

> An act of *ultra vires* is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of law or its principles renders the decision made laced with illegality.

50. In issuing the 2nd petitioner with the directive to change its name, the respondent cited complaints from investors and the public on the confusion brought about by the naming of the 2nd petitioner's financial products and services, thus investors and the public were unable to distinguish licensed and regulated products from those that are not. Upon perusal of annexure AHA-6 of the respondent's replying affidavit, I note that it contains some of the complaints received by the respondent, which complaints

informed its letter dated June 22, 2021. Upon perusal of the said complaints, it is evident that none of them speaks of confusion and/or inability to distinguish licensed and regulated products from those that are not. To the contrary, the said complaints are on failure by some of the Trusts managed by the 2nd petitioner to pay interest and/or the investment amount to its investors

51. The respondent further relied on the provisions of 11(1) & (3)(W) of the *Capital Markets Act*, which states as follows -

> 1. The principal objectives of the Authority shall be –
>
> 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 securities commodities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives 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 facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed 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.
>
> 2. ...
>
> 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-
>
> 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.

52. From the above provisions, it is evident that the respondent is tasked with the duty of protecting the interests of investors and in doing so, it has the power to 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 the *Capital Markets Act*. The respondent's reliance on the provisions of section 11(3)(W) as the basis for directing the 2nd petitioner to change its name leaves no doubt in the mind of this court that there is no express provision either in the *Capital Markets Act* or the *Capital Markets (Collective Investments Schemes) Regulation, 2001* that donates such powers to the respondent.

53. It is the respondent's contention that a change of its name can only be possible through a special resolution of the 2nd petitioner's Shareholders as provided under the *Companies Act* and/or as provided for under regulation 90 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001* which states as follows–

> 1. The incorporation documents of a collective investment scheme may be amended by an extraordinary resolution subject to sub-regulation (2).

2. An amendment to the incorporation documents may be made by resolution of the directors if-

   a. the instrument of incorporation provides for amendment to be made in such manner; and

   b. the amendment is required solely-

      i. to implement any change in the law, including a change brought by an amendment of these Regulations; or

      ii. as a direct consequence of any such change; or

      iii. to change the name of the collective investment scheme; or

      iv. to remove from the incorporation documents obsolete provisions; or

      v. to make any other change to the instrument of incorporation which the board of directors consider does not involve any holder or potential holder in any material prejudice, and

   c. it would not introduce or affect any provision relating to the descriptions of the transferable securities in which the collective investment scheme portfolio may be invested unless it is required solely to reflect the introduction of a new sub-fund.

54. My understanding of the above regulations is that a change of name of a collective investment scheme, such as the 2nd petitioner herein, may be approved vide an extraordinary resolution, a function that is the preserve of the Company and the Registrar of Companies as provided for under sections 58 and 60 of the *Companies Act*, which gives the Registrar of Companies the authority to direct a company such as the 2nd petitioner to change its name. In addition, section 62 of the *Companies Act* on the other hand provides that a company is at liberty to change its name. It states thus-

> A company may change its name -
>
> a. by special resolution or as may be provided for by the articles of the company;
>
> b. by resolution of the directors acting in accordance with a direction by the Registrar under section 60;
>
> c. on the restoration of the company to the Register in accordance with Part XXXIII; or
>
> d. in any other circumstance prescribed by the regulations for the purpose of this subsection.

55. Based on the foregoing provisions of the law, it is my finding that the respondent has not demonstrated to this court from what statute it derived the authority to direct the 2nd petitioner to change its name. In as much as the provisions of section 11 (3) (W) are blanket in nature, in discharging its functions, the respondent is still required to operate within the law and not usurp powers of other administrative bodies in the guise of carrying out its functions, duties and responsibilities.

56. This court finds that the respondent does not have powers to direct the 2nd petitioner to change its name, as the petitioner is a Company incorporated under a different statute which provides for how a company can change its name, and who has the powers to issue directions to that effect.

57. I therefore find that in issuing the directive contained in the letter dated June 22, 2021, for the 2nd petitioner to change its name, the respondent acted *ultra vires* thus the said directive was an illegality.

58. The sanctions contained in the letter dated August 6, 2021 are a consequence of non-compliance with the directives issued in the letter dated June 22, 2021. Having found that the respondent had no power and/or right to issue the directive contained therein, this court finds that the sanctions contained in the letter dated August 6, 2021 are not binding to the petitioners as they have no legal effect.

Whether the petitioners are entitled to the orders sought.

59. The petitioners seek various orders in this petition, thus I will address each of them independently. The respondent seeks an order declaring that the directives dated June 22, 2021 and August 6, 2021 offend the provisions of regulations 90 and 99 of the *Capital Markets (Collective Investments Scheme) Regulations*, 2001, as read with the *Capital Markets Act* and are *ultra vires* the powers of the Capital Markets Authority.

60. Earlier on in this ruling, this court found that the respondent had no powers to direct the 2nd petitioner to change its name thus the directives issued in the letter dated June 22, 2021 were *ultra vires* the powers of the respondent. In the letter dated August 6, 2021, the court found that the sanctions therein were as a result of non-compliance with the letter dated June 22, 2021, therefore, since the letter dated June 22, 2021 was issued *ultra vires* the powers of the respondent, the 2nd petitioner had no obligation to comply with the said letter as relates to the directive to change its name, hence there can be no consequence for non-compliance. As a result, the sanctions contained in the letter dated August 6, 2021 cannot stand and are not binding to the 2nd petitioner.

61. The petitioners also sought an order declaring that the directives contained in the letters dated June 2, 2021 and August 6, 2021 in relation to the suspension of onboarding new clients and collecting funds from existing clients by the respondent, constitutes a violation of the petitioners' and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the *Constitution*. In its letter dated August 6, 2021, the respondent relied on the provisions of sections 11(1)(d),(3)(cc)(ii) & (3)(w) of the *Capital Markets Act*. Section (3)(cc)(ii) provides that the respondent may-

> 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. ...
>
> 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.....

62. Sections 11(1)(d) & (3)(w) of the *Capital Markets Act* have been reproduced in this ruling, and what is evident from the said provisions is that none of them expressly provides for stoppage of onboarding new clients and non-collection of funds from existing clients by the 2nd petitioner. To the contrary regulation 99 of the *Capital Markets (Collective Investments Schemes) Regulation, 2001* states that -

> The fund manager may, at any time, with prior agreement of the trustee or directors as the case may and be, or shall without delay, if the trustee or board of or dealings directors, as the case may be, so require, suspend the in issue, cancellation, sale and redemption of shares (referred to in this Regulation as 'dealings in shares') if the fund manager, or the trustee or board of directors as the case may be, are of the opinion that due to exceptional

circumstances there is good and sufficient reason to do so having regard to the interests of holders.

63. From the above provisions it is my finding that suspension of onboarding new clients and collecting funds from existing clients by the 2nd petitioner is a preserve of the Fund Manager, thus the respondent cannot rely on the provisions of sections 11(1)(d),(3)(cc)(ii), & (3)(w) of the *Capital Markets Act*, which do not expressly donate this power to the respondent in usurping the powers of the Fund Manager.

64. In the circumstances, issuance of the directives contained in the letters dated June 22, 2021 and August 6, 2021 amounted to a violation of the petitioners' and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the *Constitution*.

65. An interpretation of regulations 90 and 99 of the *Capital Markets (Collective Investments Schemes) Regulation*, 2001 can be found at paragraphs *54*, *62* & 63 of this judgment.

66. In the end, I find that the consolidated petition herein is merited. As a result, I make the following orders –

    i. A declaration is hereby issued that the directives made by the respondent through the letters dated June 22, 2021 and August 6, 2021 to the effect that "pursuant to section 11(1)(d) read together with section 11(3)(cc)(ii) and 11(3)(w) of the *Capital Markets Act*, the Authority hereby directs that Cytonn Asset Managers Limited suspends onboarding new clients and collecting funds from existing clients with immediate effect" amounts to a violation of the petitioners' and other stakeholders' rights under articles 27, 28, 40, 47 and 50 of the *Constitution*;

    ii. A declaration is hereby issued that the directives made by the respondent in its letters dated June 22, 2021 and August 6, 2021 offend the provisions of regulations 90 and 99 of the Capital Markets (Collective Investments Scheme) Regulations 2001 as read with the *Capital Markets Act* and are *ultra vires* the powers of the Capital Markets Authority;

    iii. An order is hereby issued quashing the respondent's directives as contained in its letters dated June 22, 2021in respect to change of name of the 2nd petitioner, and August 6, 2021 addressed to Cytonn Assets Management Limited; and

    iv. Costs of this petition shall be borne by the respondent for overstepping its mandate.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ogada for the petitioners and interested parties

Ms Odongo for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.